EELC

EUROPEAN EMPLOYMENT LAW CASES

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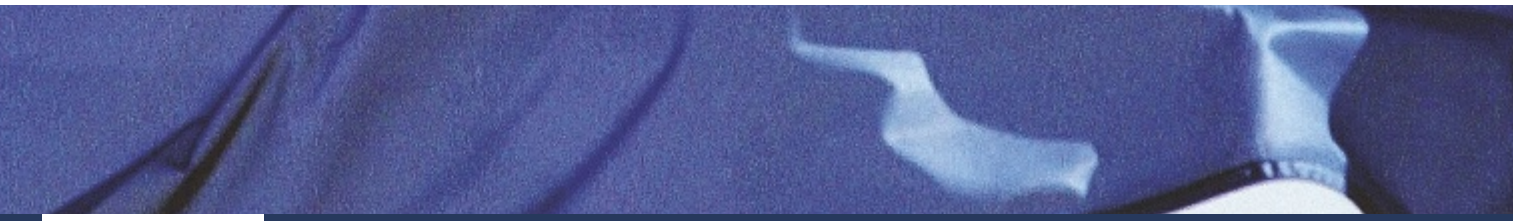
UK: proximity to retirement not same as age

Denmark: fertility treatment not same as pregnancy

Germany: voluntary redundancy scheme may exclude older staff

Netherlands: employer may level down discriminatory benefits

Finland: need to restructure may be determined at group level



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Introduction

Case report 61 deals with an interesting judgment by the highest German labour court, the BAG. The judgment addresses a question that is vexed in many European countries and, indeed, outside Europe as well: may a redundancy compensation plan, often referred to as "social plan", distinguish between young and older redundant employees? May it, for example, provide for early retirement for employees aged 60 and over while offering younger employees a one-off payment? Or, as in the BAG case, may a social plan offer favourable conditions for resignation to employees born in or after 1952 and not to their older colleagues? The BAG found such a distinction not to constitute age discrimination and to be objectively justified.

Case report 64 describes an Irish judgment in which retirement at age 65 was held to be an implied term of employment. Judgments such as these add fuel to the debate on mandatory retirement.

Case report 66 demonstrates that cynicism can pay off. A Dutch collective agreement entitled employees over a certain age to extra days of paid annual leave. Inspired by recent opinions of the Equal Treatment Commission, the employer argued that it would be discriminating on the grounds of age if it complied with the collective agreement, and refused to grant the extra leave. The court condoned this "levelling down".

These are just three of the ten discrimination case reports in this issue of EELC. Along with several major ECJ judgments also reported in this issue, they bear testimony to the importance of discrimination law in Europe. The next issue of EELC will be reporting more cases on this subject.

December 2010

Peter Vas Nunes, Editor

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2010/56

Claim for invalid dismissal crosses over to transferee

COUNTRY CZECH REPUBLIC

CONTRIBUTOR ROMANA KALETOVA

Summary
The rights and obligations of an employee who was dismissed invalidly prior to a transfer of undertaking cross over to the transferee. In this particular case, however, they remain with the transferor on account of a judicial error.

Facts
This case consists of five judgments. The facts are simple: Employer A terminated the employment of an employee for cause, with immediate effect. It did so by means of a letter dated 16 November, which the employee received on 21 November. Meanwhile, Employer A sold its business to Employer B with effect from 18 November. On 20 December, the employee sued Employer A.

Judgments
Lower Court I: Employer A argued that, as there had been a transfer of undertaking, the employee sued the wrong employer. In response, the employee got Employer B involved in the proceedings. From then on, there were two defendants, Employer A and Employer B. The court found (i) that the termination was invalid and (ii) that the agreement to sell the business had been antedated and was therefore invalid. As a consequence, the employee had remained in the employment of Employer A.

Court of Appeal I: The Court of Appeal affirmed the Lower Court's judgment, though for different reasons. It agreed that the termination for cause was invalid, but in contrast to the Lower Court, it found that there had been a transfer of undertaking on 18 November. However, as this transfer occurred two days after the termination but over a month before the court proceedings were initiated, Employer A's rights and obligations vis-a-vis the employee had not transferred to Employer B. In other words, there had been a transfer of undertaking but the employee's rights did not follow the business. Thus, the employee had a claim against Employer A.

Lower Court II: it now having been established that the dismissal was invalid and that therefore the employee's employment continued, the employee initiated a second action against Employer A, seeking compensation for invalid dismissal for the period from 21 November. The Lower Court denied the claim, arguing that, as there had been a transfer of undertaking (see Court of Appeal I), the employee had no claim against Employer A (i.e. he should have sued Employer B). In other words, the Lower Court agreed with the Court of Appeal's assessment that there had been a transfer of undertaking, but disagreed with its view that despite this transfer the employee's rights had not transferred.

Court of Appeal II: the Court of Appeal overturned the Lower Court's judgment, basically repeating what it had said before. This time, it awarded the employee's claim for compensation and ordered Employer A to pay him compensation for invalid dismissal for the period from 21 November.

Supreme Court: Employer A appealed to the Supreme Court (*"extraordinary"* appeal), arguing that where there is a transfer of undertaking, all rights and obligations transfer from the transferor (Employer A) to the transferee (Employer B), including salary claims based on invalid pre-transfer dismissal. The Supreme Court accepted this argument. Even when it is unclear at the time of the transfer whether or not an employment contract has been validly terminated, the (disputed) claim for salary (as it were, a potential claim) goes across to the transferee. Therefore, the employee should have sued Employer B rather than Employer A and the Court of Appeal was mistaken in holding that despite the transfer of undertaking, the employee's rights and obligations, including his claim, had not transferred to Employer B. However, given that there had been a final and conclusive judgment declaring the invalidity of the termination against Employer A, the doctrine of *res iudicata* stands in the way of a court order against Employer B. Accordingly, the Supreme Court upheld the Court of Appeal's judgment even though it was based on incorrect reasoning.

Commentary
Even though the Supreme Court did not have to consider the transfer of undertaking since it had to respect the doctrine of *res iudicata,* the Supreme Court gave in its reasons an explanation of what rights must be transferred within the transfer of undertaking, and in which cases. It stated that all rights and obligations between the transferor and the employee pass to the transferee, including a claim for compensation resulting from an invalid dismissal.

In the end, the employee was awarded his claim (albeit against the wrong party) after five court proceedings.

Comments from other jurisdictions
The Netherlands (Peter Vas Nunes): it is undisputed in The Netherlands that a transfer of undertaking causes more or less all rights and obligations to cross over to the transferee. This includes pending court cases, claims that have not yet been brought to court, for example a claim for unfair dismissal, and even potential future liability, for example in connection with asbestos. In the same way, a claim by the employer against the employee, for example on account of overpayment, theft or illegal competition, also crosses over to the transferee. An employee who was given notice before the transfer with effect from a later date transfers into the employment of the transferee in "noticed" status.

United Kingdom (Richard Lister): The principle of "automatic transfer" under the UK's Transfer of Undertakings (Protection of Employment) Regulations 2006 (known as "TUPE") applies to employees who were employed "immediately before the transfer"; and
employees who *would* have been so employed if they had not been dismissed because of the transfer or a reason connected with the transfer, which is not an "economic, technical or organisational reason entailing changes in the workforce".
The above position is set out in regulation 4(3) of TUPE, which codified the ruling of the House of Lords in *Litster v Forth Dry Dock & Engineering Co Ltd [1990] 1 AC 54.* The upshot is that employees who are unfairly dismissed by the transferor before the transfer are treated as if they were employed up to the point of transfer. Accordingly, the liability for their dismissals will automatically pass over to the transferee. However, this does not apply to pre-transfer dismissals that are entirely

unconnected to the transfer, or connected to the transfer but for an "economic, technical or organisational" reason. In that scenario, the employees are not be deemed to be employed immediately before the transfer and liability for their dismissals remains with the transferor.

Subject: transfer of undertakings
Parties: B.B. (employee) – v – J.K. (transferor) and P.N. (transferee)
Court: Nejvyšši soud České republiky (Supreme Court of the Czech Republic)
Date: 24 February 2010
Case number: 21 Cdo 4780/2008
Hardcopy publication: not available
Internet publication: http://www.nsoud.cz

2010/57

Prohibition against visibly wearing Christian cross is indirect religious discrimination, but justified

COUNTRY THE NETHERLANDS

CONTRIBUTOR PETER VAS NUNES, BARENTSKRANS, THE HAGUE

Summary
A prohibition on a tram driver from wearing a necklace with a Christian cross visibly over his uniform constitutes indirect discrimination on the basis of belief but, unlike a prohibition on wearing a headscarf, is objectively justified.

Facts
A is a Coptic Christian. He originated from Egypt, where the Coptic minority is persecuted by the Muslim majority. He moved to The Netherlands and obtained Dutch nationality in 1984. In 1998 he got a job as a tram driver with the Amsterdam municipal transportation company GVB. This company had for decennia been a department of the municipality, but in 2007 it was privatised, which meant that it would henceforth have to compete with other transportation companies for route concessions and would need to become more customer-oriented. For the first ten years of his employment with GVB, A had always worn a necklace with a gold cross, five centimetres in length, over his shirt. In December 2008, GVB introduced a new line of corporate clothing. In an all-staff memo management wrote, "As of Sunday 14 December 2008 all uniformed employees shall wear the new uniform. The reason for a uniform is to make you recognisable to our customers and to project a professional image. For this reason it is important that you wear the uniform in the correct manner [...] Clothing that does not form part of the uniform is not to be worn visibly [...] Jewellery is to be modest in size and colour".
On 16 January 2009 A was reprimanded for wearing his necklace with cross over his uniform. He refused to remove it or to wear it beneath his uniform, arguing that it was his right to express his religious conviction and that wearing a visible cross was his way of doing so. When A continued to refuse to do as he was told, he was suspended. GVB suggested to him that the matter could be discussed with a representative of the Coptic Church. GVB also informed A that he was free to wear a bracelet or a ring with a cross on it and that GVB was willing to give him a loan so he could purchase such a bracelet or ring immediately. This solution was not satisfactory to A, who insisted on wearing a cross – visibly – over his heart. He found it unfair that female Muslim employees were permitted to wear a headscarf. GVB countered that the headscarf was part of the GVB uniform, having been designed in the GVB colours and bearing the GVB logo.
Meanwhile, GVB issued a notice to its staff, stating, "[...] Necklaces may be worn, but only under a shirt or blouse. Brooches (e.g. on a shawl) are not permitted. GVB lapel pins are allowed".
When it proved impossible to find a resolution to the issue, A called in sick with stress-related symptoms. He was given psychological counselling at GVB's expense. Eventually, A agreed, reluctantly and under protest, to wear his necklace beneath his uniform, but he sought the help of a lawyer, who sent GVB a letter demanding that his client be allowed to wear a cross visibly. GVB refused and was taken to court. The court of first instance turned down A's application, arguing that, as GVB made no distinction between necklaces with and without a religious connotation, there was no discrimination, either direct or indirect. It was not reasonable of A, so the court added, to expect GVB to make an exception for him. The fact that female Muslim employees were provided with a headscarf as part of their uniform did not constitute discrimination.
A appealed, arguing *inter alia* that the court of first instance had failed to take account of freedom of religion as guaranteed by the Dutch constitution, several international instruments such as Article 18 of the United Nations' Universal Declaration of Human Rights, Article 9 ECHR and the Dutch Equal Treatment Act. This religious freedom, so A alleged, meant that he should have the right to profess his religious convictions openly, as instructed by Luke Chapter 9, verse 26: *"For whosoever shall be ashamed of me and my words, of him shall the Son of man be ashamed"*. Not taking this right into consideration meant that Christians such as A suffered indirect discrimination, so he claimed.

Judgment
The Court of Appeal agreed that there was indirect discrimination. The conviction that Christians have a duty to testify publicly to their conviction, for example by wearing a visible cross, was not merely A's individual belief but a belief held by many Christians. Therefore a prohibition on wearing a visible cross discriminates indirectly against (certain groups of) Christians. The question is therefore whether this discrimination is objectively justified. The Court of Appeal answered this question affirmatively, reasoning as follows:
- GVB's clothing instructions aim to contribute to an improved level of service to the public, which became more urgent when GVB was privatised; this aim is legitimate, meets a real need, is serious and is free from discriminatory intent;
- the prohibition of visible jewellery and brooches is an effective means to achieve this legitimate aim, as it frees uniforms from "personal elements", which – in conjunction with the other clothing instructions – contributes to the desired corporate, uniform and professional appearance of GBV staff;
- it is not possible to achieve this aim in any other, less discriminatory manner, and the prohibition is proportionate;
- as for headscarves, unlike jewellery and brooches, scarves do not detract from the corporate or professional identity, or the uniform impression given by the staff, as the headscarves are worn in the GVB colours and carry the GVB logo.

Commentary
Although I cannot find fault with this judgment, which resembles that of the Court of Appeal (England and Wales) in the *Eweida – v – British Airways* case (EELC 2010/43), I find it hard not to sympathise with A's point of view, not only in view of the ongoing persecution of the Copts in Egypt - which was not relevant in this case – but also because I can't help wondering whether the "no jewellery" policy was really aimed solely at enhancing tram drivers' professional appearance. Was there perhaps (also) a hidden agenda aimed at avoiding religious strife in the workplace (which would have made the clothing rules directly discriminatory), or perhaps even at appeasing certain employees and/or passengers?
Article 9 ECHR guarantees the right to freedom of religion, which right includes freedom "to manifest [one's] religion". Although the Dutch Equal Treatment Act merely protects the freedom of religion as such, it is construed broadly and includes the freedom to act according to one's beliefs. For example, the Equal Treatment Commission has held that refusing to promote a sales clerk to assistant store manager because

of his dreadlocks was unlawful because dreadlocks are an expression of Rastafarian belief. Likewise there have been many cases where an instruction to remove a headscarf was held to be unlawful. A converted Sikh had the right, so a court held, to come to work in a tunic, with a turban and carrying a dagger. In all these and many other cases the contention that certain behaviour is a religious requirement, or at least something closely associated with religion, was an element in the facts that the court had to assess. However, it is settled case law in The Netherlands, and presumably elsewhere as well, that a judge should never render, or need to render, a theological opinion. Whether or not a certain religion or belief prescribes certain behaviour – in this case, whether a (Coptic) Christian really is required to propagate his faith – is not for a court to decide, except perhaps in extreme cases (such as in a 1982 case where a man justified dumping rubbish into a canal by claiming that he was a Hindu and that his belief required him to throw ritual offerings into the water).

In order for an aim to be legitimate it must meet a **real** need. How real was the GVB's need for uniformity and professionalism? The courts have a wide measure of discretion in assessing this. Does this mean that a court can decide that, for example, that it is legal to forbid a tram driver from working in a face-covering hijab, despite the fact that many Muslims believe that a woman must wear a hijab while outside her home? Or should the GVB provide a uniform including a hijab (in corporate colours and with GVB logo)?

Comments from other jurisdictions

United Kingdom (Bethan Carney): As mentioned above, this case is very similar to the UK Court of Appeal case of *Eweida v British Airways plc* [2010] IRLR 322. Ms Eweida was a devout Christian who wanted to wear a visible cross as an expression of her faith. British Airways' dress code prohibited employees from wearing visible jewellery unless it was a 'mandatory' religious requirement. Ms Eweida accepted that wearing a cross was not a mandatory requirement of her religion but a personal choice. The Court of Appeal had to consider whether or not Ms Eweida was subject to indirect religious discrimination.

The Court concluded that there was no religious discrimination. Indeed, unlike the Dutch court, it did not even find that the dress code put some Christians at a disadvantage, which meant there was no need for a finding to be made on the question of justification. The Court of Appeal took this view because there was no evidence put before it that anyone other than Ms Eweida was or would be disadvantaged by the policy and for a claim of indirect discrimination to succeed there must be a "group disadvantage". However, the Court did go on to hold that it would have found justification in any event, on the basis that BA's policy was a proportionate means of achieving a legitimate aim.

Subject: religious discrimination
Parties: A (appellant) – v – *GVB Exploitatie B.V. (respondent)*
Court: Amsterdam Court of Appeal (*Gerechtshof Amsterdam)*
Date: 15 June 2010
Case number: 200.054.861/01 SKG
Internet publication: www.rechtspraak.nl, LJN BM7410

2010/58

Discrimination on grounds of perceived disability not outlawed

COUNTRY UNITED KINGDOM (ENGLAND AND WALES)

CONTRIBUTOR ALEXANDRA MIZZI, LEWIS SILKIN, LONDON

Summary

Under current UK law, a claim for disability discrimination can only be brought by a person who has a disability or is associated with a disabled person, not a person who is wrongly perceived as having a disability. This will change when the relevant provisions of the Equality Act 2010 come into force.

Background

There are three categories of unlawful disability discrimination under the Disability Discrimination Act 1995 ("DDA"). These are, in outline:

- 'direct' discrimination – less favourable treatment "on the ground of the disabled person's disability";
- 'disability-related' discrimination – less favourable treatment "for a reason which relates to the disabled person's disability" (which cannot be shown to be justified); and
- a failure to comply with the duty under the DDA to make reasonable adjustments for disabled persons.

The decision of the House of Lords (which, at the time, was the UK's highest court) in *London Borough of Lewisham – v – Malcolm* [2008] IRLR 700 made it more difficult for claimants to bring claims of "disability-related" discrimination. *Malcolm* was a non-employment case in which the claimant, who was schizophrenic, had been evicted by the local authority as a result of having sublet his council-owned flat. Mr Malcolm claimed that this amounted to disability-related discrimination, contending that he should be compared with a non-disabled person who had not sublet the flat. His argument was that he would not have sublet his flat if he had not been suffering from schizophrenia. The House of Lords, however, adopted a narrow interpretation requiring an employee to show that he or she was treated less favourably than a non-disabled employee who behaved in the same way would have been treated. As a result, Mr Malcolm could not establish that he had been treated less favourably than the relevant comparator – so the local authority was not obliged to establish that its actions were justified.

The approach in *Malcolm* has been applied in employment cases and has made it difficult, for example, to bring claims challenging dismissal for sickness absence. In order to avoid this difficulty, claimants are increasingly relying on the third category under the DDA, asserting that the employer has failed to make reasonable adjustments which would have enabled them to remain in employment.

Facts

Mr Aitken was a police constable who had previously been diagnosed with obsessive compulsive disorder ("OCD"). At an office Christmas party in late 2005, he behaved aggressively and bizarrely towards his colleagues. The incident was investigated and it was ultimately concluded, with medical advice, that he posed no danger to his colleagues or to the public. However, he had difficulty controlling his behaviour at times.

Mr Aitken took extensive sick leave. On the irregular days on which he attended work, he was not permitted to have contact with the public,

on the basis of medical advice given to the employer. He was retired on medical grounds in mid-2007. He brought a claim for unfair dismissal and disability discrimination. An Employment Tribunal dismissed his claims for direct disability discrimination, disability-related discrimination and failure to make reasonable adjustments and he appealed to the Employment Appeal Tribunal ("EAT").

The EAT's Judgment

One of Mr Aitken's main arguments was that he had been treated less favourably because of an (inaccurate) perception that he had a dangerous mental illness. Although medical advice had confirmed that he posed no danger to the public, he alleged that he had been treated as if he did. The EAT noted that the tribunal at first instance had made a clear and unchallenged finding of fact that he had been treated as he had because of how his behaviour had appeared to others, rather than any stereotypes about mental illness.

In any case, the EAT concluded that he had been treated *more* favourably than a person who was not suspected of having a mental illness would have been treated: a non-disabled employee would probably have been dismissed immediately. The EAT also noted that the language of the DDA did not extend to discrimination on the basis of a perceived disability; it only covered discrimination against employees who were *actually* disabled.

Another of Mr Aitken's arguments, in relation to his claim of disability-related discrimination, was that he should be compared to someone who had not behaved at the party in the way he had done. However, applying the *Malcolm* ruling, the EAT held that the correct comparator was an employee who had behaved in the same way but was not disabled.

In relation to the claim of failure to make reasonable adjustments, the EAT confirmed the tribunal's decision that the employer was entitled to take into account the need for a police officer not to appear to present a risk to the public, even if he did not in fact pose a risk.

Commentary

The *Malcolm* decision has created significant difficulties for claimants alleging disability-related discrimination. The effect of the House of Lords' approach to comparators is to reduce the distinction between "direct" and "disability-related" discrimination to vanishing point. The Equality Act 2010, which consolidates and harmonises existing UK discrimination law but has yet to be brought into force, contains measures to remedy this problem. It introduces a new category of *indirect* disability discrimination, in line with other strands of discrimination law. If a disabled employee can show that he or she is placed at a disadvantage by a provision, criterion or practice, the employer must show that its provision, criterion or practice is justified to avoid a finding of unlawful indirect discrimination.

In addition, the Equality Act creates a new category of "discrimination arising from disability" which will replace "disability-related" discrimination. This is, however, fairly close conceptually to indirect discrimination and the overlap between the new categories is likely to give rise to confusion. The relevant provisions of the Equality Act came into force on 1 October 2010**.**

The Equality Act will expressly allow claims to be brought on the basis of perceived disability, which Mr Aitken was unable to do under the DDA. Another recent case, *J v DLA Piper* (15 June 2010, UKEAT/0263/09) has also confirmed that the current legislation does not cover claims based on perceived disability. It is interesting that in both cases the EAT declined to adopt a purposive approach to interpreting the legislation. This contrasts with the very creative approach in *EBR Attridge Law LLP –v- Coleman (No.2)* [2010] IRLR 10 (see *EELC* 2010/9, Issue 1, March 2010), where the EAT determined that a individual could bring a claim under the DDA for discrimination on the grounds of their association with a disabled person, despite the clear drafting of the statute. It remains to be seen whether this signals a retreat from the EAT's recent phase of judicial activism or simply a pause for thought pending the Equality Act entering into force.

Comments from other jurisdictions

The Netherlands (Peter Vas Nunes): The Dutch Disability Discrimination Act, which came into force in 2003 as a partial transposition of Directive 2000/78/EC, has from the outset outlawed discrimination on the basis of disability, whether real or perceived. A perceived disability covers both (i) the situation where the employer and/or the employee mistakenly believe(s) there to be a "handicap" in the meaning of the Act, i.e. an impairment which has a substantial and long-term adverse effect on the person's ability to perform his work (e.g. the employee has a HIV infection, which in itself does not qualify as a "handicap") and (ii) the situation where the employee and/or the employer mistakenly believe a real impairment to have a long-term adverse effect (e.g. the employee has suffered a stroke, which need not necessarily cause long-term impairment). A recent example where a court dealt with a case of perceived disability concerned an employee who was hired on 7 January with effect from 1 March 2010. On the evening of 7 January, just hours after the parties had signed the employment contract, the employee had a heart attack. He did not mention this to his employer. However, in a telephone conversation with his employer on 18 February, he mentioned that he would be unable to come to work on 1 March because he was having heart problems. He was fired on account of his medical condition, which – so the employer wrote – would make it impossible for the employer to purchase sickness/disability insurance (that would cover loss resulting from his absence from work) for the first five years. The legal issue was whether the dismissal was for reason of a "disability". Although Dutch law does not define this concept, it is generally held to mean a permanent or long-term inability to do one's job. A heart attack need not cause permanent or long-term disability. In fact, many employees who have suffered a heart attack are fully fit for their job. Therefore, had the Disability Discrimination Act outlawed only real disability, the plaintiff might have lost the case. However, the fact that the employer mentioned uninsurability for a period of five years indicated that it believed – rightly or mistakenly – that the disability would (or might) last a long time. Hence, the employee was deemed to have been dismissed on account of a perceived disability and his claim was upheld. In an earlier judgment, in 2007, an employer was ordered to reinstate someone it had dismissed before his first day at work on the grounds that he would be unable to drive a car for at least six months following the first day of work, having had a stroke shortly after being hired. The court found that the plaintiff had a real or perceived disability, and that in both cases the dismissal was discriminatory.

Subject: Disability discrimination
Parties: Aitken – v – Commissioner of Police of the Metropolis
Court: Employment Appeal Tribunal
Date: 21 June 2010
Case number: UKEAT/0226/09
Hardcopy publication: Not available yet
Internet publication:
www.bailii.org/uk/cases/UKEAT/2010/0226_09_2106.html

2010/59

Degree requirement was not indirect age discrimination

COUNTRY UNITED KINGDOM (ENGLAND AND WALES)

CONTRIBUTOR TOM HEYS, LEWIS SILKIN, LONDON

Summary

An employer required an employee to possess a law degree in order to progress to the highest threshold of a career structure. The Court of Appeal ruled that this did not put those who were too close to retirement to obtain a degree at a "particular disadvantage" for the purposes of an indirect age discrimination claim under UK legislation.

Facts

Mr Homer worked as a police officer for 30 years before working as a legal adviser for the Police National Legal Database ("PNLD"), a department of West Yorkshire Police.

At the time of his appointment, the requirement to work as a legal adviser with PNLD was either the possession of a law degree, the possession of the equivalent of a law degree, or, if neither of those applied, exceptional experience/skills in criminal law, combined with a lesser qualification in law. Mr Homer did not have a law degree and so qualified by the third route.

PNLD carried out a review of the legal adviser role as they wished to increase retention. A new career structure was implemented, with graded pay subject to three thresholds. Mr Homer, who was by now aged 61, successfully applied to be treated as having fulfilled the first two and then applied to qualify at the third level. A law degree was a mandatory requirement to qualify for the third threshold so, despite fulfilling all other criteria, Mr Homer's application was unsuccessful.

Mr Homer submitted a claim to the Employment Tribunal for indirect age discrimination under the Employment Equality (Age) Regulations 2006, which implement the Framework Directive 2000/78/EC. He argued that people of his age group (60-65) would not have time to complete a degree course before reaching the age at which they would be required to retire, and so would not be able to enjoy the enhanced remuneration and status that qualification to the third threshold would bring.

The Employment Tribunal ruled in Mr Homer's favour, finding that he and others in his age group were effectively prevented from achieving the third threshold prior to the normal retirement age of 65. This was a "particular disadvantage" as compared with those in the age group 30-59. The Tribunal went on to conclude that the requirement was not objectively justified as a proportionate means of achieving the legitimate aim of recruitment and retention of good quality staff. The employer appealed to the Employment Appeal Tribunal ("EAT").

The Employment Appeal Tribunal's decision

The EAT allowed the employer's appeal, ruling that there was no basis for concluding that there was any particular disadvantage which affected persons falling within the age bracket of 60-65. The disadvantage affected everyone in the same way and the requirement of a degree was not something required only of those over a certain age. The fact that Mr Homer would not have chance to enjoy the benefits of enhanced pay and status was by reason of his working life being limited, which was "simply a consequence of age, not age discrimination".

The EAT then considered whether, if indirect age discrimination had been established, the Employment Tribunal's finding on objective justification should stand. Despite having some criticisms of the Employment Tribunal's reasoning on this issue, the EAT upheld its conclusion.

Mr Homer therefore appealed to the Court of the Appeal, submitting that there was no legal error in the Employment Tribunal's approach to the issue of "particular disadvantage". The employer cross-appealed the EAT's decision in relation to justification.

The Court of Appeal's decision

The Court of Appeal identified the question before it as being: did the introduction and application of the law degree provision put Mr Homer and others in his age group at a particular disadvantage? The employer argued that it did not because it was not Mr Homer's age but proximity to retirement that stood in the way of him achieving the third threshold. The Court of Appeal accepted this submission in relation to lack of opportunity to benefit from increased remuneration and also, after some initial doubts, in the context of loss of status. Whatever Mr Homer's age when the degree requirement was introduced, he would have failed to enjoy the higher status until he obtained the degree. The fact that he did not have time to enjoy the status between graduation and retirement was no different from the fact that he would have no opportunity to enjoy the enhanced remuneration.

The Court concluded that the EAT's judgment was correct. The disadvantage suffered by Mr Homer's age group – i.e. inability to obtain a law degree before retirement – resulted from their impending withdrawal from the workforce rather than age. The same result would follow for employees in the younger age group who also stopped working before obtaining a degree. Accordingly, Mr Homer had failed to show a disadvantage amounting to indirect age discrimination.

Because of this conclusion, the Court of Appeal did not need to give detailed consideration of the employer's cross-appeal relating to justification and proportionality. However, the Court briefly commented that it agreed with the EAT. The employer's policy was not proportionate as the same improvement in recruitment and retention could have been achieved with a relaxation of the degree requirement for Mr Homer's age group. Nonetheless, the appeal failed at the first hurdle.

Commentary

The Court of Appeal placed considerable emphasis on Mr Homer's retirement at 65 and the fact that the disadvantage resulted from that rather than the requirement to have a degree. The distinction between age and proximity to retirement may at first sight seem a fairly arbitrary one, since the two are undeniably connected. However, on a considered analysis, this is probably correct. Someone leaving the workplace because of a mid-life career change, or because of starting a family, would similarly not have time to complete a degree so as to be able to benefit from enhanced pay and status.

The UK currently operates a mandatory retirement system, under which employees can be forced by their employer to retire at 65. However, the UK's new coalition government has announced plans to phase out this regime. In the absence of a set retirement age, Mr Homer would probably have met even greater difficulty in pursuing his claim. He would not have had to stop working at 65 and so potentially could have completed his degree and worked for as long as his health and motivation would allow, enjoying the enhanced remuneration and status he desired. In those circumstances, the Court of Appeal's comment that "any disadvantage can properly be described as the consequence of age [...] not the consequence of age discrimination" would be even more persuasive.

Although Mr Homer lost, the Court of Appeal and EAT judgments both depended on the particular way in which he put his claim. His case was essentially that members of his age group would not have time to complete a degree before retirement. At no stage did Mr Homer advance the argument that requiring a degree *in itself* amounted to indirect age discrimination – on the ground that the growth in higher education has resulted in a significantly larger proportion of younger than older workers being in possession of a degree. Had the case been put in this way, Mr Homer could have adduced statistical evidence to back it up and may ultimately have been more successful.

In light of this, employers should be wary of rigid requirements that applicants must have a degree. In many situations, where such a requirement is considered desirable, the employer would be well advised to adopt a flexible approach. For example, a high level of experience may be an acceptable substitute.

Comments from other jurisdictions

Austria (Martin E. Risak): The arguments raised in relation to the legal situation in England and The Netherlands (see below) are interesting and it is quite surprising to me that – to my knowledge – they have never been raised in Austria. In the state sector, especially, a lot of emphasis is put on formal secondary and tertiary education for acquiring senior positions. I assume that there is not only a gender but also an age difference between employees with and without (in particular) degree level education and it would therefore be very interesting to know how an Austrian court would decide this question.

The Netherlands (Peter Vas Nunes): A point of interest in the case reported above concerns the requirement that the plaintiff hold a law degree in order to be promoted to a higher pay level. Such requirements can be discriminatory. An example is the *Gerrits – v – Zorggroep* case, on which the Dutch Supreme Court ruled in 1997. A female employee in a nursing home was denied promotion to a management level because she lacked a certain certificate. One of her colleagues, a man, did get the promotion, because he had the certificate. The female employee challenged the denial of promotion all the way up to the Supreme Court. She was successful because the employees with the certificate were mainly men whereas those without the certificate were all women. This had to do with the fact that in the post WW II period it was uncommon for girls to attend the sort of colleges where one could obtain the certificate in question. Hence, the plaintiff was indirectly discriminated against on the basis of her gender. The question was whether this was objectively justified. The aim of the certificate requirement was to make sure that managers have a certain minimum level of higher education. This is a legitimate aim. Was requiring managers to have the certificate an effective means to achieve this aim? The court gave the employer the benefit of the doubt. Was the requirement necessary to achieve that aim? No, because it is perfectly possible for someone lacking higher education to be a good manager and, conversely, not all holders of the certificate are necessarily good managers. Transposing this Dutch judgment to the case of the West Yorkshire Police employee reported above, one could perhaps make the case that older employees in the police force are less likely to have a law degree than their younger colleagues and that therefore Mr Homer was indirectly discriminated against on account of his age.

Subject: Age discrimination
Parties: Homer – v – Chief Constable of West Yorkshire Police
Court: Court of Appeal (England and Wales)
Date: 27 April 2010
Case number: [2010] EWCA Civ 419
Hardcopy publication: [2010] IRLR 619
Internet publication: www.bailii.org

2010/60

Dismissal following notice that employee was undergoing fertility treatment not presumptively discriminatory

COUNTRY DENMARK

CONTRIBUTOR MARIANN NORRBOM, NORRBOM VINDING, COPENHAGEN

Summary

It was up to a female sign language interpreter undergoing fertility treatment to show facts that raised a presumption of discrimination when she lost her job in a round of redundancies.

Facts

A provincial centre for deaf people experienced a loss in business when a competitor set up close by. When the competitor then merged with another business in Copenhagen, the crisis became acute and the centre had to reduce the number of sign language interpreters from 28 to 17. Six of the 28 interpreters were covered by special rules protecting them against dismissal. The issue was how to select for redundancy the remaining 22 interpreters, of whom five would have to be dismissed. The employer decided to select the five employees on the basis of a number of defined criteria.

A female interpreter did not score high enough and was dismissed. In her opinion, she had been picked out because she had told her employer two months earlier that she was undergoing fertility treatment. She felt discriminated against and therefore brought a claim against her employer. The judgment does not reveal whether she was pregnant at the time of the dismissal. Under Danish law this was not a relevant question, because in 2003 the Supreme Court held that the prohibition of dismissal on the ground of pregnancy applies equally to dismissal on the ground that an employee is undergoing fertility treatment.[1]

Judgment

The parties agreed that job cuts had been necessary. Against this background, the Court held that the fact that the interpreter had told her employer about the fertility treatment did not in itself shift the burden of proof onto the employer, in which case the latter would have had to prove non-discrimination. In addition, the Court held on the evidence of the witnesses and the general information about the selection method that the interpreter had failed to provide the necessary proof of discrimination. Accordingly, the Court ruled in favour of the employer.

Commentary

This case was adjudicated solely on the basis of domestic Danish law, namely the Act on Equal Treatment of Men and Women, without reference to European legislation. Although Article 9 of the Act does not prohibit termination during pregnancy or maternity leave, it does prohibit termination on the grounds of such leave. This prohibition carries two elements in it that are linked, both in Danish and in EU law. One element, as provided in Directive 92/85, is that pregnant women, women who have recently given birth and their newborn babies deserve extra protection against occupational health and safety hazards. Article 10 of Directive 92/85 does this by outlawing the dismissal of pregnant workers except "in exceptional cases" and, in the event such an exceptional case arises, by requiring the employer to "cite duly substantiated grounds [...] in writing". In Denmark, this means that in the event of termination during either pregnancy or maternity leave, the employer must prove that it was absolutely necessary to dismiss the pregnant employee instead of another employee.[2]

The other element, as provided in Directive 2006/54, is that women should not be treated less favourably on the ground of their sex. Both elements come together in Article 2(2)(c) of this directive, which defines "discrimination" as including "less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Directive 92/85/EC". Directive 2006/54 includes a provision reversing the burden of proof in the event of a presumption of discrimination.

In most cases, it makes no difference to a female employee whether she claims under the rules protecting pregnancy etc. or whether she claims under the sex discrimination rules. This case, however, illustrates that there can be a difference. Had the plaintiff been pregnant at the time she was dismissed, her employer would have had to prove that it was absolutely necessary to dismiss her rather than another employee.[3] As the plaintiff was not pregnant, she needed to rely on the sex discrimination rules, which required her to make a *prima facie* case that the decision to select her for redundancy was linked to her having undergone fertility treatment.

Comments from other jurisdictions

Austria (Martin E. Risak): The Austrian courts have decided a similar case (Supreme Court 16. 6. 2008, 8 Ob A 27/08s): a (female) employee was dismissed. At the date on which she was given notice of her dismissal, her ova had been fertilised in vitro, but not yet transferred back to her uterus. The employee claimed that she was pregnant at this time and therefore under the protection of the Austrian Act on the Protection of Mothers (*Mutterschutzgesetz*), which allows termination only with the consent of the Employment Court and only if evidence is provided by the employer that termination was absolutely necessary. The Austrian Supreme Court referred the case for a preliminary ruling to the ECJ, which stated in C-506/06 (*Mayr*) that the prohibition of dismissal of pregnant workers as provided in Article 10(1) of Directive 89/391/EEC must be interpreted as not extending to a female worker who is undergoing in vitro fertilisation treatment but where the fertilised ova have not yet been transferred into her uterus. The ECJ also pointed out that such a termination might be in breach of the principle of equal treatment for men and women inasmuch as it is established that the dismissal is essentially based on the fact that a woman has undergone fertility treatment. The Austrian Supreme Court took up these arguments and confirmed the validity of the dismissal as the employee neither raised the issue of discrimination nor furnished *prima facie* evidence for it as provided in the Equal Treatment Act (*Gleichbehandlungsgesetz*). The legal situation therefore seems to be very similar to the Danish one reported above.

Ireland (Georgina Kabemba): In Ireland the case may have been decided differently. Pregnant employees are treated in the same manner as all other employees for selection for redundancy. However, if an employee is on maternity leave (protective leave) and is provisionally selected for redundancy, notice cannot generally be issued to her until she returns from maternity leave.
In addition, whilst dismissal on the grounds of pregnancy is prohibited under the Unfair Dismissals Acts, 1977 – 2007, there is no statutory protection for an employee undergoing fertility treatment. However, the Employment Equality Acts 1998-2004, could be called upon to claim a discriminatory dismissal based on gender for example. Whilst a dismissal case concerning IVF treatment has yet to be adjudicated in Ireland, the European Court of Justice case of *Mayr v Bäckerei und Konditorei Gerhard Flöckner OGH C-506/06 (2008)* and the recent UK Employment Appeals Tribunal decision in *Sahota v Home Office and Pipkin* ET/1101513/08 will no doubt hold a persuasive position in the event that such a case arises in Ireland.

Spain (Ana Campos): In Spain, terminations during pregnancy and maternity leave are considered null and void unless the reasons for termination are justified. In other words, it is not possible to terminate an employee in such cases for unfair reasons, and this would give rise to a severance compensation. This rule was introduced in the Spanish Workers' Statute when transposing Directive 92/85/EC.

In this case, the crisis of the company due to the existence of a competitor made the job cuts necessary, so there were objective reasons that would have made the termination fair.

However, in this case, the employee was neither pregnant nor on maternity leave, so the above would not apply. However, regardless of there being reasons for the job cuts, the general sex discrimination prohibition set forth in our Constitution and laws forbids discrimination based on gender, and, as a consequence, if an employee manages to provide the court with sufficient *prima facie* indications of discrimination (for example, if the employer knew the employee was undergoing fertility treatment and that made the employer decide the termination), that will shift the burden of the proof to the employer, who will have to prove that the termination was unrelated to the employee's gender. In this case, it is possible that a Spanish court would have ruled also in favour of the employer, as it was proved that the employee had failed to comply with the defined criteria set forth by the company to choose the employees that would remain in employment. So the ruling in Spain would have been very similar to the one in Denmark.

United Kingdom (Bethan Carney): It appears that the legislation in the UK dealing with the burden of proof in discrimination cases works in a similar way to that in Denmark. Normally it is for the claimant to prove his or her case. However, in some circumstances, the burden of proof shifts to the respondent. If facts are put before the tribunal from which it could, in the absence of any other explanation, conclude that discrimination had occurred, the burden of proof moves from the claimant to the respondent, who must prove that it did not discriminate. A major change in UK discrimination law occurred very recently when new consolidating legislation, the Equality Act 2010, came into force on 1 October 2010. This Act brings the different strands of discrimination law (sex, race, disability, age, sexual orientation etc) into one place. All the previous case law on the burden of proof provisions was made under the old legislation, but commentators believe that the definition has not significantly changed so it will continue to be relevant.

(Footnotes)

1 The Supreme Court case concerned a woman who was undergoing fertility treatment at the time of termination. Accordingly, the Court did not decide on how to apply the rules in cases where employees have in the past undergone or will in the future undergo fertility treatment.
2 Section 16(4) of the Danish Act on Equal Treatment of Men and Women etc.
3 She referred to section 9 of the Danish Act on Equal Treatment of Men and Women etc. Had she been pregnant, she would have referred to the same section.

Subject: Discrimination on the ground of fertility treatment
Parties: A – v – a centre for deaf people
Court: The Court in Glostrup
Date: 6 April 2010
Case number: BS-10G-1427/2008
Hard Copy publication: Not available
Internet publication: Please contact info@norrbomvinding.com

2010/61

Employer may exclude older employees from voluntary exit arrangement

COUNTRY GERMANY

CONTRIBUTOR PAUL SCHREINER, LUTHER RECHTSANWALTGESELLSCHAFT, ESSEN

Summary
The exemption of older employees from a general offer to conclude attractive severance agreements is compatible with the German General Anti-Discrimination Act (*Allgemeines Gleichbehandlungsgesetz, "AGG"*).

Facts
A company introduced a voluntary redundancy scheme under which employees born in or after 1952 could resign – with the company's consent – on favourable financial terms. As at 1 July 2007, a total of 5,937 employees had made use of the scheme. Of these 5,937 employees 24 were born before 1952. Whether or not the 24 agreements concluded with these older employees were on the same terms as those offered to the younger employees was in dispute.

An employee born in 1949 applied for resignation on the terms of the redundancy scheme. When his request was turned down, he took his employer to court, claiming that the redundancy scheme and the refusal to let him make use of it were discriminatory on the ground of age.

The plaintiff's claim was turned down by the local labour court, by the appellate court and, finally, by the Federal Labour Court (*Bundesarbeitsgericht*, "BAG").

Judgment
The BAG began by stating that age is a linear attribute, in the sense that every employee has a certain age that is subject to constant change. This is in contrast to the other strands of discrimination, which prohibit distinguishing between people on the basis of attributes that are, as a rule, immutable. Therefore, a distinction based on age can only constitute discrimination if it negatively affects an entire age group. This was not the case in the redundancy scheme at issue, given that Directive 2000/78 and the German non-discrimination law implementing it (the AGG) aim to protect employees against termination of their employment, not to give them a right to benefit from an incentive to resign. The BAG referred to the following recital clauses in the Directive: s6 ("[...] the economic integration of elderly [...] people"), s8 ("[...] to pay particular attention to supporting older workers, in order to increase their participation in the labour force") and s25 ("[...] It is therefore essential to distinguish between differences in treatment which are justified, in particular by legitimate employment policy, labour market and vocational training objectives, and discrimination, which must be prohibited"). In summary, the BAG found that the scheme did not constitute discrimination.

Alternatively, the BAG held that the redundancy scheme was objectively justified by a legitimate aim and that excluding older employees from the scheme was a proportionate means to achieve that aim.

Commentary
The BAG based its decision on the need to protect elderly workers, which is a plausible argument against discrimination such as what occurred in this case.

As regards the potential justification according to s10 AGG in case of discrimination, the decision is rather short and not very convincing, since the criteria for a justification are not assessed carefully. Nevertheless, the BAG gives some interesting statements regarding the prohibition of age discrimination:

Firstly, it clarifies that there can be no age discrimination unless a certain age group is treated less favourably than another. This is part of the definition and not only part of a potential justification. In other words, treating an individual differently on the basis of age does not in itself constitute age discrimination. This of course is in line with the underlying directive.

Secondly, the BAG wasted no time in illustrating why there was no age discrimination, although older employees did not even have the choice to apply for an attractive termination package. One could very well have argued that the denial of the mere choice itself is discriminatory. From my perspective the BAG did not illustrate this question further since there was no obligation for either side to conclude termination agreements. Therefore, the scheme itself merely constituted a formal guideline for the severance payments. Besides, older employees were also offered the conclusion of termination agreements or partial retirement. In the end, it seems the BAG probably had the impression that an acceptable solution had been found for every employee who wanted to leave the company. In this respect the situation was comparable to a "normal" redundancy scheme, given that social plans may also operate differentiation amongst employees with regard to their age as long as there is sufficient reason for it. For example it is not considered discriminatory if older employees are offered lower redundancy payments if they will be retiring in the foreseeable future.

The total redundancy package in the situation at hand – redundancy payments for termination of younger employees, lower redundancy payments for termination of older employees and partial retirement – seems, when taken as a whole, not to be discriminatory, even if it meant that the older employees could not resign under the same conditions as the younger employees.

Comments from other jurisdictions

Austria (Martin E. Risak): The commentary raises the question of the possible justification for differentiation in social plans based on age. It assumes that offering older employees lower redundancy payments than their younger counterparts because they will be retiring in the near future would not be considered discriminatory. I am not too sure that this is the case, as it seems to differ from the reasoning in the ECJ's decision in the *Hlozek* case (C-19/02). The court stated that EU law on the equal treatment of men and women did not preclude the application of a social plan providing for a difference in the treatment of male and female workers in terms of the age at which they are entitled to a bridging allowance, since, under the national statutory scheme governing early retirement pensions, they are in different situation with regard to the factors relevant to the grant of that allowance. More important for the question at hand is that the ECJ also accepted the fact that workers approaching statutory retirement age constitute a category different from that of other workers as regards the likelihood of their (not) finding other employment. The ECJ also argued that that assessment explained why the social plan provided for a difference in treatment, for the purposes of the grant of the bridging allowance, based directly on the age of the workers at the time of their dismissal. Considering this decision, I am not too sure whether lower redundancy payments for older employees who have not yet reached the statutory retirement age would not be considered to be age-discrimination.

France (Claire Toumieux and Aude Pellegrin): It is undisputed in France that older employees may not be excluded from a voluntary redundancy scheme solely on account of their age. Indeed, a social plan may reserve the benefit of some measures to certain categories only if all the employees of the company are placed in an identical situation concerning the said benefit (French Supreme Court, 12 July 2010, n°09-15.182). In that case, the French Supreme Court held that the social plan could not exclude employees from the benefit of a voluntary scheme solely because they belonged to another establishment of the French company, as such a measure violated the equality of treatment principle. The company may only reserve the benefit of voluntary exit arrangements to certain categories of employees if the difference of treatment rests upon objective and relevant criteria, the relevance of which are evaluated on a case by case basis for the benefit at stake. At a time where the protection of senior employment is in hot debate, an age criterion may not be viewed as a valid one by which to exclude older employees from a voluntary redundancy scheme.

Spain (Ana Campos): In Spain also, discrimination based on age is forbidden. In consequence, it is not possible to establish a compulsory retirement age in collective bargaining agreements unless other requirements, such as employment policies, including a commitment to replace retired employees, are met.

This case is noteworthy because, as the BAG states, all legislation and policies prohibiting discrimination based on age aim to protect older employees from being excluded from the job market, and in this case, the employee finds his age does not permit him to terminate employment under privileged conditions. Nevertheless, considering that the employee could have terminated the employment under different conditions, including partial retirement, it is probable a Spanish court would rule in the same way as the German court, because the redundancy scheme taken as a whole, was not discriminatory.

United Kingdom (Richard Lister): There have been several cases in which employers' contractual redundancy pay schemes have been challenged under the UK's age discrimination legislation (now contained in the Equality Act 2010). There is a specific exemption for severance schemes that are similar to the UK statutory redundancy payment scheme. However, many employers' schemes fall outside this exemption and are unlawful unless they can be objectively justified as a proportionate means of achieving a legitimate aim.
The courts have identified various potential legitimate aims in this context, including: encouraging and rewarding loyalty; cushioning older workers against labour-market disadvantage; maintaining good employee relations and a contented workforce; and encouraging voluntary redundancies and career progression for more junior staff. Importantly, another legitimate aim can be to prevent employees receiving a "windfall". On this basis, employers have successfully justified provisions in contractual schemes under which redundancy payments were either capped or "tapered" downwards for older employees approaching retirement age (*Loxley v BAE Systems Land Systems (Munitions & Ordnance) Ltd* [2008] IRLR 853; *Kraft Foods UK Ltd v Hastie*, EAT0024/10, unreported).

Subject: age discrimination
Parties: unknown
Counsel: unknown
Court: Federal Labour Court *(Bundesarbeitsgericht)*
Date: 25 February 2010
Case Number: BAG 6 AZR 911/08
Hardcopy publication: NZA 2010, 561t
Internet publication:
www.bundesarbeitsgericht.de, Entscheidungen, case number

2010/62

New challenge to German time-bar rule limiting discrimination claims

COUNTRY GERMANY

CONTRIBUTOR PAUL SCHREINER, LUTHER RECHTSANWALTGESELLSCHAFT, ESSEN

Summary
German law requires discrimination claims to be notified to the employer in writing within two months of the date the employee becomes aware of the discrimination. Last year the Federal Labour Court found this requirement to be compatible with European law and did not find it necessary to refer questions to the ECJ (see EELC 2010/45). Now a lower court has decided to ask the ECJ whether the German time-bar rule is compatible with (1) primary EU law and (2) Directive 2000/78.

Facts

In November 2007 the plaintiff, at that time aged 41, applied for a job with the defendant as a call centre agent. She applied after having read a job advert that included the following statement, "are you aged between 18 and 35, proficient in the German language and looking for a full-time job? Then you are the person we need." The defendant had published similar adverts in 2007 and 2008, each time seeking applicants aged between 18 and either 30 (2007) or 35 (2008). The plaintiff's application was rejected on 19 November 2007. The defendant hired two younger women instead.

Feeling discriminated against on account of her age, the plaintiff brought an action on 29 January 2008, claiming compensation for the costs of the application and the cost of the legal proceedings and lawyers' fees (Schadenersatz) as well as for emotional damage (Entschädigung) pursuant to the General Equal Treatment Act (Allgemeines Gleichbehandlungsgesetz, "AGG"). She argued that she was better qualified for the job than the employees who had been hired. She also pointed out that Article 7 AGG prohibits age-specific job adverts, and that therefore there was a presumption of age discrimination.

The employer based its defence on Article 15(4) AGG. This provision requires discrimination claims in employment to be notified to the employer in writing within two months (or more or less, if so provided in a collective agreement) in order not to be time-barred. The Code of Civil Procedure also provides that, in the event the employer fails to respond or to offer adequate compensation, the employee has three months from the date of said written notification to bring legal proceedings.

The court of first instance (Arbeitsgericht Hamburg) dismissed the claim on the ground that the plaintiff's job application had been rejected on 19 November 2007 and that she had not notified the defendant of her claim until 29 January 2008, which was more than two months later, and that her claim was therefore time-barred pursuant to Article 15(4) AGG. The court rejected the plaintiff's argument that Article 15(4) AGG is incompatible with Directive 2000/78, arguing that, even if this were the case (which the court left unanswered), a directive lacks direct horizontal effect.

Judgment national court

On appeal the appellate court (Landesarbeitsgericht Hamburg) found that the Directive does indeed lack direct horizontal effect. However, this leaves open the possibility that a provision of national law is ineffective if it is incompatible with primary EU law, for example with the principle of effective legal protection or the principle of non-regression. Since 1 December 2009 (Lisbon Treaty), the principle of effective legal protection is enshrined in Article 19 (second paragraph) TEU: "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law". The ECJ has repeatedly interpreted this principle as prohibiting national rules that make it impossible or inordinately difficult for a person whose rights, conferred on him by EU law, have been violated, to bring a claim. An aspect of this prohibition is that it must not be more difficult to bring such a claim than it is to bring an equivalent claim (equivalency principle). The principle of non-regression holds that Member States must refrain from reducing existing levels of protection.

For this reason the court referred the following question to the ECJ[1]: "Does national legislation under which a time-limit of two months from receipt of a rejection of a job application [...] apply (in the absence of provisions in a collective agreement) to the bringing in writing of a claim for damages and or compensation based on discrimination in primary recruitment infringe law of the European Community (safeguarding effective legal protection) and/or the Community law prohibition of age discrimination [.....] if three-year limitation periods apply to equivalent claims under national law, and/or the 'prohibition of regression' (reduction of protection) under Article 8 of Directive 2000/78/EC, if a previous national provision provided for a longer limitation period for discrimination on the grounds of sex?"

ECJ's decision

The ECJ held that it was up to the national court to establish whether the national law constitutes an effective remedy to sufficiently ensure effective legal protection in the fields covered by EU law. Effective legal protection does not necessarily mean that only the most advantageous regulation of the national law must be applied. Since there are no specific regulations in Germany regarding a claim for age discrimination, the national court needs to verify that the applied provision is equal to comparable time-limits in German law. In principle the implementation of a time-limit to lodge a claim is also possible in laws which transpose EU directives, so long as they do not make it impossible or inordinately difficult for a person to make use of the rights resulting from the Directive.

As regards the alleged violation of the prohibition of regression, the ECJ held that no violation occurred, since the older period did not constitute part of the general protection level in relation to discrimination for reasons of sex contained in Article 8 of the Directive.

Commentary

The most interesting aspect of this decision is its clear contrast to that of the German Federal Labour Court (Bundesarbeitsgericht, "BAG") of 24 September 2009, reported in the August 2010 issue of EELC (2010/45). In that case, which concerned the time-bar rule referred to above, the BAG noted that Article 7(3) of Directive 2000/43 (which is identical to Article 9(3) of Directive 2000/78) allows Member States to adopt "national rules relating to time limits for bringing actions as regards the principle of equality of treatment". Applying the doctrine of effective remedy, the BAG held that the two month time-bar provided in Article 15(4) AGG does not deny employees an effective remedy and that this period is not shorter than similar time-bar periods under German employment law. The BAG found this to be so evident that it saw no need to refer questions to the ECJ. At the time the judgment reported above was delivered (June 2009) the BAG had yet to deliver its judgment. Nonetheless, it is noteworthy that a lower court is asking the ECJ a question that a higher court had found unnecessary to refer to the ECJ.

In accordance with the ECJ's ruling, the BAG is competent to rule on the question of whether or not the German time-limit rule is valid. Therefore, one may wonder whether the decision of the BAG can be upheld, considering the argumentation of the Landesarbeitsgericht Hamburg.

From my perspective the two month time-bar should be considered to be in line with the Directive. Preclusion periods are not in general forbidden by Directive 2000/78. Article 9 III of the Directive, which does allow periods within which claims can be made, but on the other hand requires that it remains possible to refer to European Community law and that this is not excessively complicated to do.

Therefore in the situation at hand the question that needs to be asked is whether the two month time-bar genuinely undermines the guarantee of effective legal protection. For this purpose, section 15 paragraph 4 it is necessary to compare other regulations that restrict preclusion periods in German law.

On the one hand, one needs to look at the rulings of the BAG in 2007, which consider a two month period within which to lodge a claim in an

employment contract to be too short to be valid. In the reasoning of the decision the BAG referred to various legal provisions, all of which refer to such periods and finally deduced that the three month period within which a claim must be lodged is adequate for contractual (and only contractual!) entitlements.
Today, in German Law a special provision has been enacted that applies to all claims made under the AGG. For this reason, the comparison in the older decision is no longer current and does not provide useful guidance in relation to the case at hand.
If one compares the two month period to other such periods provided in German employment law, it becomes apparent that many of the grace periods offered in employment law are significantly shorter than standard periods of limitation.
Section 4 of the Employment Protection Act (*Kündigungsschutzgesetz, "KSchG"*) and s17 ss1 of the Part-time and Limitation Act (*Teilzeit- und Befristungsgesetz, "TzBfG"*) both provide a three week limitation period after which a notice of termination or the termination of employment due to the expiration of the agreed time limit can no longer be challenged.
Many collective bargaining agreements provide limitations that are shorter than the statute of limitation for making claims resulting from them – and this even goes for the remuneration regulated in the collective bargaining agreement.
Further, the older decision (BAG 2007) refers to a now-defunct national provision regarding claims for damages resulting from sex discrimination (this has now been replaced by the AGG). This rule foresaw a spectrum of limitation periods: if an applicable collective bargaining agreement or the prospective employment agreement set a grace period of two months, this period also applied to entitlements arising from any pre-contractual discrimination (i.e. where the application was turned down in violation of the anti-discrimination principles). If no such period was set, a minimum period of two months for bringing a claim applied. Therefore, it appears that a two month grace period was considered valid in principle at that point in time and a violation of the principle of non-regression can hardly be found.
Admittedly, there are a large number of other legal provisions in German law that refer to a longer period: pre-contractual breaches of duty, for example, regularly prescribe a limitation period of three years. Entitlements from s15 I, II AGG are subject to stricter rules, although the reason of the claim is comparable. If one takes a look at the intention of Section 4 of the Employment Protection Act (*Kündigungsschutzgesetz, "KSchG"*) and s17 ss1 of the Part-time and Limitation Act (*Teilzeit- und Befristungsgesetz, "TzBfG"*), their intention seems to be the same as for the two month limitation period in question in this article: employment law often requires that both parties to a contract learn fast about claims that are being made or unilateral decisions, or even contractual clauses that are being considered invalid. The intention in relation to these employment law provisions is obviously the same as in the case at hand, i.e. there are good reasons for the rather short period. The main reason is that an employer needs to collect and keep all applications (not only the successful ones) to ensure he can provide adequate proof if an applicant claims to have been discriminated against. If an applicant can show some evidence that there could have been discrimination, the employer bears the burden of proof that no discrimination occurred, which regularly requires it to explain who the other applicants were. Keeping all application documents for the usual three year period would almost be impossible for larger companies. Therefore, it seems to me that the national provisions described above are a more adequate basis for a comparison.
However, from my point of view all European principles regarding the effectiveness of a national implementing provision are based on a comparison with comparable provisions in that country. If one compares the two month rule to other regulations, one will see, that, particularly in the employment legislation, even shorter periods are common.

Comments from other jurisdictions
Austria (Martin E. Risak): The Austrian legal situation is quite similar to the German one though some differences exist. According to the provisions of the General Civil Code (*Allgemeines Bürgerliches Gesetzbuch*, s1486) employees' claims to remuneration become time-barred after three years from the date they fall due. The same period applies to claims for compensation for damages, which become time-barred three years from the date on which the claimant becomes aware of the damage and the identity of the injuring party.

The Act on Equal Treatment (*Gleichbehandlungsgesetz*) provides for shorter though not uniform preclusion periods: claims for damages resulting from discrimination during the hiring or the promotion process have to be made within six months with the Employment Court. Claims for damages resulting from (sexual) harassment have to be made within one year. The general three-year period of limitation is applicable only to claims based on wage discrimination.

The EJC decision *Bulicke* therefore is of interest for Austria too. At first glance, the provisions on shorter time-limits in the Austrian Equal Treatment Act seem to concur with European law, as they are comparable to other shorter cut-off periods in Austrian Employment Law (for instance, claims subsequent to premature withdrawal or summary dismissal must be made within six months). It also seems to me that the prohibition of non-regression does not apply, as the Equal Treatment Act introduced a new basis for employee claims that did not exist before and therefore were not covered by the general cut-off period.

United Kingdom (Richard Lister): Up until April 2009, discrimination complainants in the UK were required to send a written statement of their grievance to their employer in accordance with a statutory grievance procedure. A complaint to an employment tribunal was inadmissible unless the employee had first complied with this requirement. This legislation, introduced in 2004, was widely regarded as counterproductive and unworkable and was repealed last year.
The position now is that discrimination claims must be presented to an employment tribunal within three months of the act complained of and there is no requirement to notify the employer beforehand. A tribunal has discretion to hear a claim presented outside the three-month period if it considers it "just and equitable" to do so. It is extremely unlikely that the current time-limit regime in the UK could be legitimately challenged as being incompatible with EU law.

(Footnote)
1 OJ 10 October 2009 C 244/2.

Subject: Age discrimination, principles of effective legal protection and non-regression
Parties: Susanne Bulicke - v - Deutsche Büro Service GmbH
Court: *Landesarbeitsgericht Hamburg*
Date: 3 June 2009
Case number: 5 Sa 3/09
Hardcopy publication: not available
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2010/63

Dismissal for poor productivity does not constitute age discrimination unless discriminatory intent is proved

COUNTRY LUXEMBOURG

CONTRIBUTOR MICHEL MOLITOR, MOLITOR AVOCATS, LUXEMBOURG

Summary
In Luxembourg, poor productivity can be used to select the employee(s) to be made redundant for business reasons, even though it leads in fact to the dismissal of older or sick employee(s). If the dismissal occurred before Luxembourg transposed Directive 2000/78, it can still be incompatible with the "principle of non-discrimination", but in that case the employee must prove discriminatory intent.

Facts
The plaintiff was a 48 year old seamstress. She was employed by a manufacturer of industrial bags. In 2006, by which time she had been employed for over 13 years, she was dismissed, with six months notice. She asked to be given the reasons for her dismissal. The employer replied that she was being dismissed for business reasons, the manufacture of industrial bags having become a loss-making activity. The employer added that it had selected the plaintiff for dismissal because her productivity was 20% below that of the other seamstresses. The plaintiff took her employer to court, claiming that the business argument was no more than a pretext (the employer was alleged to have hired two new seamstresses in the summer of 2007 to fulfil pending orders), that her lower productivity had to do with sick leave and medical problems, and that the decision to select her rather than any of her colleagues for dismissal was unfair and discriminatory. These circumstances made her dismissal unfair (*abusif*), she alleged, for which reason she claimed, *inter alia,* € 25,000 for material loss and € 10,000 for non-pecuniary harm.

Judgment
The court accepted that the plaintiff had been dismissed for business (economic) reasons. This was a relevant finding, because in 2007 the Luxembourg Superior Court confirmed a decision of 1999 to the effect that an employer that reduces staffing for sound business reasons is free to select the employees to be made redundant. The only defence such an employee has is either that the business reason is a pretext or that the employer has abused his right of dismissal. Given this discretionary freedom, there was no need for the court to investigate the employee's productivity or her sick leave or to compare them to those of the other seamstresses. There was no evidence that the employer had hired replacements for the plaintiff or that its decision to downsize staff was a pretext to get rid of the plaintiff, neither was there evidence that the employer had abused its right, given that it had demonstrated the plaintiff's lower productivity and that the plaintiff had not been able to prove that she had informed the employer of her alleged medical condition.

As already noted, one of the plaintiff's complaints was that selecting employees for redundancy on the basis of productivity constitutes indirect discrimination on the grounds of age, and that a Luxembourg law of 28 November 2006 implementing Directive 2000/78 forbids age discrimination. The court noted that this Luxembourg law did not come into force until two months after the plaintiff's dismissal. However, the court held that the dismissal could still be incompatible with the "principle of non-discrimination". In the case at hand, though, there was no such incompatibility. Referring to two French Court of Appeal judgments, one dating back to 1991 and the other to 2007, the court found that applying productivity as a criterion can, but does not necessarily, disadvantage older or unhealthy employees. The mere possibility of a disadvantage is insufficient to create indirect discrimination; the employee needs to prove discriminatory intent. As the plaintiff was not able to establish discriminatory intent, the court rejected her claim and her dismissal was held not to be *abusif*.

Commentary
The present case illustrates two developments in Luxembourg labour law: one relating to the justification of economic redundancy and the other to anti-discrimination.
As regards the justification of economic redundancy, the Labour Court accepted, in the present matter, that economic reasons for the dismissal had been provided, since the employer could point to objective facts demonstrating that the company was loss-making and that there was therefore a need to re-organise the company. Consequently, the Court applied, in line with certain case-law from the last decade, a judicial self-restraint, in refusing to review the employer's exercise of its discretion to select employees for redundancy.
Formerly, in Luxembourg case-law, the employer had to justify its choice to dismiss one employee rather than another in the case of economic redundancy. The choice of the employee to be dismissed could be justified by professional capacity, length of service, social and family situation, as well as productivity. Since 1999, in the words of Luxembourg case law, the employer is *"free to choose the dismissed person, unless the latter can prove to be the victim of any abuse of right or that the redundancy was only a pretext"*. Thus, the burden of proof is on the employee. In our case, the plaintiff lost her case because she failed on this point, even though she alleged that the employer had engaged two persons during the summer of 2007.
This new position of the Luxembourg courts does not seem very compliant with the legal obligation of the employer to give the precise reasons for the dismissal according to Article L.124-5(2) of the Labour Code. In fact, in the present case, the Court acknowledged the plaintiff's lack of productivity, which stands clearly in contradiction of the court's refusal to review the choice of employee to be made redundant.
This aspect takes on an even greater importance in the context of the prohibition of discrimination. On one hand, this decision shows the positive influence of European law on Luxembourg law, since the Court did not hesitate to refer to the principle of non-discrimination, in spite of the lack of applicability of Article L.251-1 of the Labour Code prohibiting discrimination, which was only introduced in Luxembourg by the above-mentioned law of 28 November 2006 and was not in force at the time the dismissal occurred. On the other hand, to require from the employee proof of discriminatory intent by the employer does not comply with the latest developments in anti-discrimination law, in particular, in relation to indirect discrimination. In fact, it is now well established that in order for circumstances to qualify as indirect discrimination, the employee must provide *prima facie* evidence that a category of employees is more affected by a measure than other categories. In such a case the burden of proof that there has been no breach of the principle of equal treatment lies with the employer.

Hopefully, the Labour Court will limit the evidentiary requirement of discriminatory intent to the time before the entry into force of the law of 28 November 2006.

Comments from other jurisdictions

Austria (Martin E. Risak): This case illustrates very well that aside from the protection against discrimination based on the discriminatory grounds provided for in EU law, the general provisions on protection against dismissal differ very much within the Member-States of the EU. Reducing staff for sound business reasons is seen as good cause for a dismissal under the Austrian system of protection against dismissal – but the statute provides also that the employer's decision as to which employees to select may be contested in court if the works council has protested against the dismissal. In such a case, the court tests whether the employer has taken the social situation of the dismissed employee sufficiently into account and in the context of that test, the employer may argue that some employees are not comparable, as they have different levels of productivity. However, a difference in productivity will only be relevant if it is significantly below average (though it is not clear if this is the average employee irrespective of age or the average employee within the age group of the employee who was dismissed).
Even so, I think that the protection against age-discrimination may add an additional layer of complexity since, as in the case reported here, the employee may also claim that a decision based on productivity constitutes an indirect age-discrimination. This would only be true if the below-average-productivity (inasmuch as considered relevant by the courts) refers to the average employee irrespective of his age as explained above (an approach I very much doubt a court would follow as it would open up arguments about indirect age-discrimination). Under the Austrian Equal Treatment Act (*Gleichbehandlungsgesetz*) the employee would not have to establish discriminatory intent by the employer but would be required to furnish *prima facie* evidence.

Germany (Paul Schreiner): In Germany, in the situation at hand, the *"Kündigungsschutzgesetz"* (Unfair Dismissal Protection Act) would probably apply, assuming that more than ten employees were employed in the company. The Unfair Dismissal Protection Act allows for the termination of employment only if the employer shows a valid reason (which can in principle be related to the conduct of the employee, to personal or to operational factors). If the employer can show such a valid reason, it must then choose amongst comparable employees, those whose employment should be terminated. To make that decision, the employer must follow the rules of social selection laid down in the Unfair Dismissal Protection Act. Age is one of the criteria for that decision, but productivity is not. Therefore, if the employer claims operational reasons for the dismissal, he must to choose amongst the employees, which of them deserves the least protection for social reasons. In general, age is seen as a criterion that shows that an employee is particularly worthy of protection. Therefore, a justification of the termination in Germany would most probably have failed, since the employee in question was apparently one of the older employees.
Nevertheless, it is also possible in Germany to terminate a person's employment for not being productive. This requires evidence that the employee works less than he could, which is apparently not the case here. If an employee is less productive due to illness or multiple illnesses, this can also constitute a valid reason for a termination if the employer is over-burdened by paying salary, whilst not receiving adequate benefit from the work of the employee.
In summary, the requirements in German law for a termination owing to underperformance are generally very high. The discussion as to whether or not low performance is just a pretext for discrimination based on age is therefore not one that occurs with any frequency.

Ireland (Georgina Kabemba): In Ireland lack of productivity would normally be dealt with as a performance issue. Lack of productivity would not, of itself, be seen as a fair reason for selection for redundancy. There are many employers who would argue that a company should have the right to select the best employees in a redundancy exercise, particularly in the current economic climate. However, an employment tribunal in Ireland expects to see objective criteria, insofar as possible, for differentiating between employees in a redundancy selection process, for example skills, qualifications, training, experience, future business needs, etc.
Furthermore, it should be noted that in Ireland, under the Unfair Dismissals Acts 1977- 2007, dismissal of an employee, outside of the redundancy context, must not be deemed unfair where the dismissal results "wholly or mainly" from lack of capability or competence of the employee in performing his or her job, and provided fair procedures are followed.
Finally, an additional avenue of redress in Ireland for the employee may have been to take an action for disability discrimination before an Equality Tribunal under the Employment Equality Acts 1998 and 2004. This would be a more common route in Ireland where an employee has been dismissed following various sickness absences.

United Kingdom (Hannah Vertigen): In the UK, a dismissal on the basis of productivity – in circumstances where lower productivity is connected to an individual's age, sick leave and medical problems – would be potentially indirectly discriminatory on the basis of both age and disability. As such, it would not be for the employee to prove discriminatory intent, as in this case, but for the employer to show that the choice of productivity as a criterion was justified a proportionate means of achieving a legitimate aim.

Subject: age discrimination
Parties: Ms X - v - SOLEM S.A.
Court: *Tribunal du Travail de Luxembourg*
Date: 15 February 2010
Case number: 646/2010

2010/64

Dismissal at age 65 implied term of employment and not in breach of Directive 2000/78

COUNTRY REPUBLIC OF IRELAND

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Summary

An employee brought judicial review[1] proceedings of a decision by her employer, the Health Service Executive (HSE), to terminate her employment upon her reaching the retirement age of 65. Although the employee was never furnished with a contract of employment, the

Court held that a mandatory retirement age of 65 was an implied term of her contract of employment, and that the employer's decision to terminate the employee's employment on her reaching the age of 65 was lawful.

Facts

The Applicant, Ms McCarthy, commenced employment as a senior radiographer in Orthodontic Services in St. James' Hospital, Dublin in June 2002. Initially employed on a part-time basis, Ms McCarthy also practised as a barrister at the Irish Bar. Following the enactment of the Health Act 2004 Ms McCarthy was transferred to and became an employee of the Health Service Executive (HSE) as a temporary part-time officer. Ms McCarthy left the Bar in 2004 and in 2005 her hours of work were increased to full-time at the hospital.

Section 19 of the Health Act 1970, which applied when Ms McCarthy commenced her employment, provided for a mandatory maximum retirement age of 65 for permanent officers of Health Boards. The Applicant was not furnished with a contract of employment on commencing work in 2002, despite requesting one.

In April 2009, the Applicant sought clarification from her manager in Orthodontic Services, as to whether she was obliged to retire on reaching the age of 65 in October 2009. Her manager assured the Applicant she would "do [her] best" to keep the Applicant in employment. As a result Ms McCarthy believed that it would be very likely that she would be able to continue to work, particularly as she had worked with others whom she knew to be over 65 years of age.

In August 2009, Ms McCarthy received a letter from the Assistant National Director of the HSE, stating that she was due to retire on 28 October 2009. Subsequent to enquires made to her manager, the Applicant was informed that owing to budgetary constraints, there was no possibility of remaining in the employment of the HSE after reaching the age of 65. In October, Ms McCarthy's contract was terminated. She applied to the High Court to restrain the HSE from terminating her employment and sought an Order quashing the decision to terminate.

The Applicant submitted she had a legitimate expectation that this retirement age would not apply to her circumstances. She contended that, as she did not hold a permanent position, section 19 of the Health Act 1970 did not apply to her. Furthermore, new entrants to the public service after April 2004 were not subject to the mandatory retirement age of 65[2]. Ms McCarthy contended that this further supported her stance that the retirement age did not apply to her as a non-permanent officer. Ms McCarthy also claimed that she had worked with other radiographers whom she knew to be over the age of 65. Ms McCarthy strongly maintained that she was never aware of, nor could have been deemed to have been aware of, the mandatory age of retirement applying to her until she was told in August 2009, as she had never received a written contract.

Ms McCarthy further relied upon the prohibition on age discrimination contained in Council Directive 2000/78[3] and argued that the HSE had failed to justify the alleged discrimination by reference to legitimate social policy objectives. The Applicant cited the judgment of the ECJ in the Age Concern case[4] of March 2009, in which it was stated that the option to derogate operates *"only in respect of measures justified by legitimate social policy objectives"* and that there exists a *"high standard of proof [to show that] the legitimacy of the aim relied on [is suitable] justification"*. The Applicant's legal team submitted that these criteria had not been fulfilled, nor had the standard of proof been discharged by the HSE.

The HSE acknowledged that no written contract had ever been furnished to the Applicant, but stated that contracts furnished to other employees in a similar position to Ms McCarthy, who also commenced work in 2002, provided for a retirement age of 65. The HSE submitted that, although the Applicant was not furnished with a written contract of employment, an oral agreement existed between the parties which contained an implied contractual term that the retirement age of 65 was applicable to Ms McCarthy's position. It was contended that such a term could be implied as a matter of fact and/or on the basis of custom and practice. Furthermore, the Respondent's superannuation scheme of which Ms McCarthy was a member, referred to a normal age of retirement of 65. It was submitted that it would have been obvious to an "officious bystander"[5] that such a retirement age was applicable to Ms McCarthy.

In response to the claim that a legitimate expectation was created by the assurance of the manager of Orthodontic Services to "do [her] best", the Respondent cl aimed that no factual evidence supported that such a representation had been made, and furthermore, the manager was not the relevant decision maker in this regard.

The HSE rejected the contention that Directive 2000/78 had been infringed and referred the Court to the case of *Palacios de la Villa v Cortefiel Servicios*[6] in which the ECJ dealt specifically with the legality of terminating employment at 65. The ECJ held that it is *"not unreasonable for the authorities of a Member State to take a view that a measure... may be appropriate and necessary in order to achieve a legitimate aim in the context of national employment policy"*.

Judgment

The High Court ruled that the mandatory retirement age of 65 could be viewed as having been implied into Ms McCarthy's conditions of employment. Taking into account that Ms McCarthy was legally qualified, the court refused to accept that she was unaware of the retirement age applicable to her position in the public service. The Court deemed the Applicant to have been "on notice" of the implied term by virtue of the broad awareness of the retirement age amongst most working adults, and, furthermore, due to the reference to the retirement age and the cut off for contributions at age 65, as contained in the HSE's superannuation scheme.

The Court did not believe any legitimate expectation arose in this case, as her manager was not in a position to make a representation which could give rise to a legitimate expectation, and there was no evidence that any representation was in fact made.

In ruling that Council Directive 2000/78 had not been breached, the Court endorsed the decision of the ECJ in *Palacios de la Villa*, which held that a law providing for a retirement age of 65 could not be seen as discriminatory or unreasonable in its effect, and further noted the universal existence of such laws across Europe. The Court deemed Ms McCarthy's termination of employment *"lawful by reason of her having reached the retirement age relevant to her"* and refused to grant the reliefs sought.

Commentary

A mandatory retirement age in Ireland has not been established by law, but the majority of employment contracts, including those in the public service, specify a compulsory retirement age of 65. Some occupations, including the police, doctors (general practitioners) and the judiciary have statutory mandatory retirement ages. Generally, in the absence of legislation, it is often the employer's pension scheme that dictates the retirement age for its members. An additional factor, which has been influential in affecting the setting of retirement ages by employers, is the state pension scheme, which is applicable from age 65 onwards. The Employment Equality Acts 1998 – 2007, while prohibiting discrimination on the age ground, allow Irish employers to set different retirement ages for employees or different classes or

types of employees in an organisation. Section 34(4) of the Act provides that "it shall not constitute discrimination on the age ground to fix different ages for the retirement (whether voluntarily or compulsorily) of employees or any class or description of employees".
Note that the 1998 statutory provisions pre-date the Directive and we cannot gleam any insights as to the reasoning for inclusion of section 34(4) in the Employment Equality Bill 1996. However, some legal commentators in Ireland today would argue that the age-related derogations of section 34(4) are not only compatible with the Directive but are in fact allowed for under Article 6(1). This is why the only amendment to be made to section 34 of the 1998 Act by the Employment Equality Act 2004, clearly post-Directive, was only concerned with fixing ages in relation to occupational benefits schemes. Section 34(4) remained unaltered. It could be argued that these derogations outlined in Article 6(1) of the Directive, and by extension section 34(4) of the 1998 Act, have since been supported by the ECJ's decision in *Palacios de la villa* in 2007.
However, this must be balanced with the opinion of other Irish commentators who believe that section 34(4) is incompatible with the Directive. Judgments in cases such as *Age Concern* England (C388/07) and *Rosenbladt v Ollerking Gebaudereinigungs mbH* (C45/09) before the ECJ, and *Seldon v Clarkson Wright & Jakes* [2009] IRLR 267 before the English Court of Appeal indicate that a compulsory retirement age will only be upheld where it is as a result of national measures or it has not been unilaterally imposed by an employer (e.g. negotiated by the unions or by an individual with equal bargaining power such as a partner in a firm). The ECJ has stated in each of its judgments that compulsory retirement of workers is discriminatory on grounds of age and must be justified. On this basis, it could be argued that Section 34(4) of the Employment Equality Act 1998 seems to allow automatic compulsory retirement and, is therefore incompatible with the Directive.

The current approach to retirement age in Ireland is somewhat confusing. On the one hand, there has been a call to reduce unemployment for younger employees in certain professions, such as teaching, by ensuring that employees leave at normal retirement age. Such was the approach in *Palacios de la Villa,* where the ECJ held that Spain's compulsory retirement age of 65 was justified in allowing employers to compel staff to retire at that age, as it helped to reduce unemployment and stabilise the Spanish workforce. On the other hand, there have been calls to increase the State pension age, to reduce pressure on the public finances and to increase economic productivity. The National Pensions Framework[7] was published by the Department of Social Protection in March 2010. One of the Framework's recommendations is an increase in the State pension age from 65 to 66 in 2014, increasing to 67 by 2021 and 68 by 2028.
This case is an illustration of differing approaches and contradictions to retirement ages within Irish public bodies. On the one hand, the legislature has introduced laws to remove retirement age[8] for public servants who commence their employment from April 2004. On the other hand, a public institution will insist that public servants who have commenced employment prior to 2004, are terminated. This is done by relying on an implied contractual term and the terms of a superannuation scheme, this being the case even when it is alleged that some other radiographers aged over 65 have remained employed. What is a mandatory retirement age for one radiographer is not for another.
Contrasts in approach to retirement age are illustrated further when one compares a recent case before the Employment Appeals Tribunal (EAT). In *Smith v Provincial Security Services Limited*[9] the Claimant worked as a security guard with the Respondent company. He moved to the Company within the group through a series of transfers. He was dismissed when it was discovered that he was over 65. Despite having signed a contract containing a mandatory retirement clause, the Claimant was of the belief that there was no retirement age specified in his contract. The EAT determined that he was justified in thinking that he was not contractually bound to retire at the age of 65 when he had been allowed to continue with one group company until the age of 69 and continued after transferring to the Respondent until the age of 72. The EAT found that the Claimant was unfairly dismissed and deemed that the most appropriate remedy was to reinstate the Claimant to his position.
Whilst Palacios de la Villa and *Age Concern* have provided some clarity/ guidance in this area, there is still a level of uncertainty in Ireland as to what constitutes "appropriate and necessary" when it comes to individual cases. The National Pensions Framework has highlighted that Ireland will almost certainly be entering a transitionary period as regards entitlement to the state pension, which will become more out of line with compulsory retirement ages fixed by employers. This will only heighten the potential for legal challenges against employers on grounds of age discrimination, or for unfair dismissal arising from the discrepancy between state, contractual and superannuation retirement ages, in both the public and private sectors alike.

Comments from other jurisdictions

Austria (Martin E. Risak): Austrian employment contracts normally do not include clauses which terminate the contract automatically when the employee reaches the statutory retirement age. However, one comes across them sometimes, especially in cases involving subsidiaries of German companies, as in Germany, these clauses are quite common. The EJC decisions on *Palacios de la Villa* and *Age Concern* have introduced this concept to employers and there are moves by some to have them included in standard contracts. This is understandable, because under Austrian employment law a termination with notice can be contested in court if the employee is employed in an organisation employing more than four employees and if the termination impairs the employee's substantive interests. The Supreme Court has established that if an employee can claim the maximum statutory pension, his substantive interests are not impaired – it therefore is not so much the age of the employee that is taken into consideration but rather his other sources of income, of which pension is one. It can be therefore quite hard to dismiss an employee who has reached the age of 65, especially if he or she has had a scattered employment history and is unable to claim a high pension.
The said recent ECJ decisions have therefore given some Austrian employers ideas about how they can get rid of employees of a certain age by including age clauses in their employment contracts – but, as the Dutch commentator points out below, the legal situation is not as clear-cut as it might seem at first glance.

France (Claire Toumieux and Aude Pellegrin): By law in France, employment agreements must not contain any implied terms which force employees to retire upon reaching the retirement age. Any contractual or conventional provision which provides for the automatic termination of an employment agreement by virtue of the age of the employee or the fact that he or she may benefit from an old age pension scheme is void by virtue of Article L.1237-4 of the French Labour Code. Under French employment law, even though an employee may start receiving old-age pension, usually at age 65, the employer may only propose retirement to the employee and the employee is entitled to refuse until he or she turns 70.

Germany (Dr. Gerald Peter Müller): Under the rules of German employment law, an implied contractual term to terminate an employment relationship at the age of 65 years would not be enforceable. The applicable statute (*Teilzeit- und Befristungsgesetz, "TzBfG"*) requires that any stipulation limiting the duration of an employment relationship must be in writing and (with limited exceptions) supported by a material reason.

Employment contracts in Germany usually include an explicit term that the employment will come to an end when the employee reaches the retirement age (65 years now, but this is being incrementally extended to 67 years). Furthermore, applicable CLAs do typically include such a clause. As to the material reason, the German constitutional court (*"Bundesverfassungsgericht"*) ruled in 2007 that a retirement clause can be valid if it allows the employee to reach a sufficient level of economic security. It is accepted that participating in the statutory pension scheme itself will satisfy this requirement. This being said, it must be noted that German courts only apply a general test as to whether the "economic security" criterion can be satisfied. Therefore, it is not necessary to actually prove that an adequate pension claim can be built up within the employment and this would in fact be impossible to do without hindsight. This – in my view – makes sense as long as the retirement clause is agreed upon in the employee's younger years – thus allowing for a sufficient build-up of pension entitlement, or at least allowing the opportunity to do so. After all, it is still a matter of consensus in Germany that the statutory pension scheme will be sufficient to provide for the needs of a retired employee. However, whether these assumptions remain valid in future will no doubt become a matter of debate, given the recent demographic changes in the German workforce. In addition, for employees who are already close to the retirement age, the question of whether the test of economic security should really be concrete and tangible instead of merely abstract – and therefore include any pension entitlements already accrued – is also likely to be explored.

As in The Netherlands (see below), German colloquial language usually uses only one expression to indicate that a persion is ending active employment and starting to receive a state pension – *"in Rente gehen"* – "to go on pension". The idea is that the ending of the employment and the beginning of receiving a pension coincide. However, this simply reflects the usual pattern that has existed until recently. Although it has always seemed to be common sense to assume that after working for many years, German employees are able to live on their pension, this appears to be fading away. Without launching into the details of the German pensions system, it is certainly the case that the idea that the active work force pays the pensions of retirees (the so-called "contract between the generations" – *"Generationenvertrag"*, as opposed to a funded pension system) becomes more and more problematic, owing to the gradual reduction in the number of active workers as compared to the number of retirees. It is probably not too pessimistic to say that in the not-too-distant future, the number of post-retirement-age employees who would either like to or have no choice but to work beyond that age, will increase. At the same time, and also as a result of the changes in demographics in Germany, employers will feel a growing urge to retain highly qualified employees in their workforce because fresh recruits with sufficient training will be ever harder to find. The fact that such an employee is also receiving pension benefits will become less important. In sum, it appears to me that changes in working life will reflect on the expressions used and "going on pension" may soon only mean the ending of active work life but not necessarily the starting of receiving pension benefits, or the other way around.

The Netherlands (Peter Vas Nunes): a 2009 judgment by a court of first instance (*Ktr. Delft* 23 April 2009) confirmed what most lawyers already held to be the case, namely that employment contracts cannot be deemed to contain an implied term that they terminate at age 65 or on retirement.

The English language distinguishes between "retirement" and "pension". The Dutch language does not. We say "to go on pension" (*met pensioen gaan*), which can mean either or both of two things. It can signify that a person's employment contract is coming to an end in connection with age. It can also mean that a person will start receiving old-age pension payments. Usually, someone who says he is "going on pension" means both: he will cease working for a living and, simultaneously, he will start receiving benefits. Increasingly, however, these situations need not coincide. It is perfectly possible for someone to stop working before his retirement benefits kick in. Alternatively, there is nothing to prevent a person from continuing to work for the same employer and collecting pension benefits at the same time, in which case he receives two monthly checks. The reason I mention this is that Article 6 of Directive 2000/78/EC has two sections. The first allows objectively justified differences of treatment on grounds of age (which includes dismissal), whereas the second section allows – *inter alia* – "the fixing [...] of different ages for employees" for occupational social security schemes (which includes pension schemes), even where such fixing of different ages is not objectively justified. Section 34(4) of the Irish Employment Equality Acts 1998-2007 appears to be incompatible with the Directive inasmuch as it allows employers "to fix different ages for the retirement (whether voluntarily or compulsorily) of employees" My view is that that this provision seems to be lumping sections 1 and 2 of Article 6 of the Directive together and allowing termination on the sole ground of age regardless of justification.The Dutch Age Discrimination Act includes a provision which allows employers to terminate employment contracts at age 65 without requiring justification. There is considerable debate in The Netherlands as to whether this provision is euro-proof. Most authors believe it is, arguing that the ECJ gave its blessing in *Palacios* and, again, in *Age Concern*. Personally, I am not convinced that this is the case, particularly as the government in its explanatory memorandum to Parliament at the time the Bill was introduced, reasoned that an exception to the prohibition of age discrimination was necessary to allow forced retirement, not (as was the case in *Palacios* and, to a lesser extent, in *Age Concern*) in order to combat youthful unemployment, but merely to avoid employers having to give a reason for dismissing staff at age 65. As the Irish correspondent explained above, it is not clear why the Irish legislator adopted said Section 34(4). Depending on that reason, I would argue that Section 34(4) may not be compatible with Directive 2000/78 or, more precisely, with the general principle of non-discrimination based on age as codified by Directive 2000/78.

United Kingdom (Richard Lister): Events in relation to mandatory retirement in the UK have been moving rapidly since the High Court's ruling in the *Age Concern* case in September 2009 (see *EELC* 2009/46). Soon after the UK's new coalition government came to power last May, it decided to phase out the legal regime allowing employers to require employees to retire at age 65 – the so-called "default retirement age" (DRA). It has since been consulting on proposals to remove the DRA by 1 October 2011, with transitional arrangements for compulsory retirements taking effect in the preceding six months. The consultation closed on 21 October 2010 and the Government will confirm its intentions in due course.

Assuming this reform goes ahead as planned, employers wanting to retain their own retirement age will need to demonstrate that it is "objectively justified" – i.e. a proportionate means of achieving a

legitimate aim or aims. It seems probable that tribunals will require cogent empirical evidence as to both the decision to implement a retirement age and the choice of any particular age. It is likely to become more difficult in future for employers to justify an across-the-board retirement age for all grades and occupations.

[Footnotes]

1 Judicial review is a procedure in which the Irish courts can provide remedies against the abuse of executive powers by the State and public bodies. It allows the courts to supervise public authorities in the exercise of their powers.
2 Section 3.1 of the Public Services Superannuation (Miscellaneous Provisions) Act, 2004 removed the mandatory retirement age for the majority of public service positions for any new entrants to the public service from April 2004.
3 Council Directive establishing a general framework for equal treatment in employment and occupation (2000/78).
4 Case 388/07; The Incorporated Trustees of the National Council on Aging (Age Concern England) v Secretary of State for Business, Enterprise and Regulatory Reform [2009] IRLR 373 ECJ.
5 The 'officious bystander test' is used to incorporate obvious implied terms into a contract. The test is to the effect that if, while the parties were making their contract, an officious bystander were to suggest some express provision that should be included in it, they would both reply, "oh, of course." The test derives from a UK Court of Appeal case on contract law - Shirlaw v Southern Foundries [1940] AC 701.
6 Case 411/05; *Palacios de la Villa v Cortefiel Servicios SA* [2007] ECR I-8531.
7 www.pensionsgreenpaper.ie/publications_nationalframework.html.
8 Public Services Superannuation (Miscellaneous Provisions) Act, 2004.
9 Employment Appeals Tribunal MN573/09 RP586/09 UD565/09; 4 February 2010.

Subject: Mandatory Retirement Age
Parties: Aoife McCarthy (Applicant - employee) – v – Health Service Executive (Respondent – employer)
Court: The High Court
Date: 19 March 2010
Case number: [2010] IEHC 75
Hardcopy publication: Not yet available
Internet publication: www.courts.ie

2010/65

Scottish court reverses "same establishment" doctrine in respect of gender pay equality

COUNTRY UK (SCOTLAND)

CONTRIBUTOR RORY MCPHERSON, THOMPSONS SOLICITORS & SOLICITOR ADVOCATES, GLASGOW

Summary
For sex discrimination purposes, an employee can compare him or herself to all other employees within the same employer regardless whether they are in the same department.

Facts
The Equal Pay Act 1970 (EPA) gives effect in the UK to the EU principle of equal pay for equal work between men and women.

In bringing a claim under the EPA a claimant can only rely on particular comparators if certain criteria are met. For example, the comparator must be of the opposite sex and must do work of equal value in terms of the skills, demands and responsibilities involved in the jobs. One criterion that must be satisfied is that the comparator must be in the "same employment" as the claimant.

The definition of "same employment" can be found in Section 1(6) of the EPA which states that the claimant and comparator must either work in the "same establishment" or, if they work in different establishments then common terms and conditions must be observed at the different establishments either generally or for the relevant employees. The definition of "same establishment" is not further defined in the Act.

The question of whether claimants and comparators were in the "same establishment" and also in the "same employment" arose in the course of mass equal pay claims brought against various local authorities in Scotland.

In those claims there had been a large number of claimants who had been employed under terms and conditions of employment set by the APT&C collective agreement reached by the trade unions and the local authorities. These claimants were, for example, clerical officers, classroom assistants and nursery nurses. This agreement is often referred to as "the Blue Book".

The equal pay claims brought by these claimants were based on a comparison with, for example, roadworkers, gardeners, roadsweepers and refuse collectors who received bonuses that were not paid to the claimants. People employed in these jobs had their terms and conditions of employment set by the Manual Worker collective agreement which is also known as "the Green Book".

The question that arose was whether the term "establishment" in Section 1 (6) could refer to the local authority as a whole or whether it had a more restricted definition, such as a department or workplace. This was particularly significant as very few, if any, of the relevant claimants were employed in the same department or in the same

workplace as the comparators. It would then be a question of whether they worked in different establishments where common terms and conditions were observed.

In 2009, in *Dumfries & Galloway Council v North*, the Scottish Employment Appeal Tribunal (EAT) decided that, where claimants and comparators worked in different establishments, in order to go on to satisfy the second limb of the Section 1 (6) test, claimants had to show there was a realistic possibility of the comparators working in the same establishment as the claimants and on the same terms and conditions. For example, a claimant employed as a classroom assistant would need to demonstrate that a refuse collector could realistically be employed to work in a school or by the education department. It was generally felt by commentators that this set the bar very high and would make it all but impossible for the claimants to pursue their claim.

Judgment
The question of what was the "same establishment" was considered by the Scottish EAT in *City of Edinburgh Council v Wilkinson & ors*. The EAT decided that the authority as a whole was one establishment for the purposes of Section 1 (6) and so the claimants could compare themselves to the relevant comparators who were also employed by the authority. The reasoning of the EAT was that the local authority was one organisation set up to discharge various, diverse statutory functions such as the provision of education, the collection of waste, street cleaning and so on. Where the local authority employed staff to carry out these functions and discharge their statutory obligations then these staff were all employed in the same establishment even if the local authority separated its operations into various different departments.

The EAT also went on to decide that, in any event, the claimants and comparators were all employed on common terms and conditions as a result of a further collective agreement reached by the Scottish local authorities and trade unions in 1999. This agreement is known as the Single Status agreement or "Red Book".

The purpose of the Red Book was to harmonise terms and conditions for all local authority employees previously working under Green Book and Blue Book terms. The agreement stated that, from 1999, all local authority employees were employed under Red Book terms although the previous pay and grading structures under the Green and Blue Books were preserved until individual local authorities had carried out a job evaluation to place its employees on a new single pay scale.

The EAT found that this was sufficient to satisfy the requirement that all the claimants and comparators were on common terms and conditions regardless of whether they were in the same establishment.

Finally, the EAT decided that it had been wrong in the *North* case to state that claimants had to show there was a realistic possibility of the relevant comparators working in the same department or workplace.

Commentary
The EAT's judgment recognised that to take the approach urged by the local authority would make it unduly difficult for claimants to enforce the right to equal pay for equal work. It would certainly prevent claimants from pursuing claims where there was clear gender segregation within a particular workforce, where women were predominantly employed in particular jobs in a different workplace or department from male-dominated jobs.

It is worth noting that the *North* decision has been appealed to the Inner House of the Court of Session and this appeal is due to be heard later this year. It remains to be seen whether the employer in that case will continue to oppose the appeal in light of the *Wilkinson* decision or whether City of Edinburgh Council will now appeal leading to the whole matter being considered.

Comments from other jurisdictions
France (Claire Toumieux and Aude Pellegrin): French courts take a broad approach to the "equal work, equal pay" rule. In this regard, the Scottish case reflects quite well one of the principles recently adopted by French courts, i.e., that differences in remuneration may not be justified solely by the fact that employees belong to different establishments of the same company (French Supreme Court, 28 October 2009).

Subject: sex discrimination
Parties: City of Edinburgh Council - v - (1) Wilkinson and 21 others (2) MacLeod and 31 others
Counsel: Ian Truscott QC (Edinburgh), Jane NcNeill QC (Wilkinson et al), R. Allen QC (MacLeod et al)
Court: Employment Appeal Tribunal, Scotland
Date: 19 May 2010
Case Number: UKEATS/0002/09/BI
Hardcopy publication: not available
Internet publication: not available

2010/66

Employer may "level down" discriminatory benefits

COUNTRY THE NETHERLANDS

CONTRIBUTOR PETER VAS NUNES, BARENTSKRANS, THE HAGUE

Summary
An employer may refuse to apply a provision in a collective labour agreement granting employees aged 50 and over additional paid annual leave.

Facts
Five (initially six) employees sued their employer Kaba, seeking a judgment ordering Kaba to add certain numbers of "seniority days" and "Payens days" to their balance of paid annual leave. The "seniority days" were based on the applicable collective labour agreement, which provided (and currently, in 2010, still provides) that all employees are entitled to 25 days of paid leave per annum and that employees who on the first of January of any year are aged over 50, over 52, over 54, over 56 or over 58 are entitled to, respectively, 1, 2, 3, 4, and 5 additional days of leave. The "Payens days" were also additional days of paid annual leave (coming on top of the seniority days), which Kaba had agreed to grant certain of its employees, depending on a mix of seniority (five years of service or more) and age (from age 55).

On 29 December 2006 management sent all staff a memo in which it noted that the provision in respect of seniority days and Payens days ("the Provision") was incompatible with the Age Discrimination in Employment Act, which is the Dutch transposition of Directive 2000/28, inasmuch as this directive outlaws age discrimination. The memo went on to state that, given this incompatibility, the Provisions were invalid, and that therefore Kaba would no longer apply them. A number of employees protested against this unilateral reduction of their terms of employment and, when management refused to withdraw its decision, took Kaba to court. They claimed additional paid leave varying between 2 and 20 days each. The court of first instance, in a judgment delivered on 6 February 2009, turned down their claim, essentially reasoning as follows.

The Provisions undeniably distinguish between groups of employees on the basis of age. Therefore, the Provisions are in breach of the law unless they are objectively justified. There is no indication that the Provisions are an integral part of a more encompassing package of arrangements in the field of terms or conditions of employment. The Provisions appear to be unconnected to other terms of employment, standing more or less on their own. Given this fact, it is not possible to determine their aim. The only argument put forward by the plaintiffs as regards the justification of the Provisions is that it is a well-known fact that an individual's capacity to perform work diminishes with age. This is too vague a statement to justify age-discriminatory provisions such as the ones at issue. This means that – as per the Age Discrimination Act – the Provisions are null and void and therefore unenforceable. The court rejected the plaintiff's argument that a discriminatory term of employment is not null and void but merely voidable by the employee.

Judgment

The Court of Appeal began by noting that the plaintiffs' contracts lacked a "unilateral amendment clause" and that therefore, given the Dutch (case-) law on the unilateral amendment of agreements, Kaba was not entitled to change their terms of employment unfavourably in the absence of a situation where insisting on the unamended terms would be "unacceptable". Clearly, it would be unacceptable to insist on the application of provisions that are illegal. Thus, the outcome of the case depended on whether the Provisions were legal, i.e. objectively justified.

The plaintiffs argued that this was the case. Their argument rested mainly on the fact that the collective agreement that had been in force in 2007, on which their claim was based, had meanwhile been replaced by a collective agreement that included a new chapter 16 on "age awareness policy". This new chapter called on employers to adopt various "instruments" aimed at tailoring elderly employees' work to their age-related capabilities and challenges. The principal instruments were (1) annual performance reviews aimed at identifying age-related difficulties and what to do to address those difficulties, (2) job changes and job rotation, (3) changes in working times, job content, furniture, equipment, etc., (4) periodic medical examinations and (5) (re)training. The addition of this new chapter 16, so the plaintiffs contended, indicated that the Provisions, which were included in chapter 9, were part and parcel of a wider set of provisions establishing an overall "age awareness policy".

The court rejected this argument, finding that chapters 9 and 16 were not linked in any way and that therefore the Provisions could not be seen as an integral part of an overall age awareness policy. Thus, the appellate court upheld the lower court's judgment.

*[By way of explanation, the Equal Treatment Commission in March 2006 introduced the concept of age awareness policy (*leeftijds(fase)bewust personeelsbeleid*). This was done in response to concern that had arisen following a number of opinions in which the Commission had, rather dogmatically and inflexibly, held benefits awarded to elderly employees solely on the basis of their age or seniority, such as work time reduction without a corresponding drop in salary, exemption from shift duty, generous early retirement schemes and extra paid annual leave, to be in violation of the law. Since 2006, if such an age-related benefit does not stand alone but forms an integral part of a broader policy aimed at encouraging employees to continue working despite age-related physical and mental challenges and encouraging employers to retain such elderly employees, the Commission is willing to assess the legality of these benefits in the broader context of the employer's overall employment policies (including the steps taken to deter the employer from hiring exclusively younger staff).This so-called "contextual" approach has been accepted in a number of court judgments.]*

Commentary

This judgment is innovative for three reasons. This is the first time in published Dutch precedent that an employer was successful in applying the age discrimination rules to its advantage. Although Directive 2000/78 and the Dutch legislation transposing it were undoubtedly designed to operate for the benefit of employees, and were certainly not designed to be used against them, there is nothing in the text to prevent such use. On the contrary, the Dutch Age Discrimination in Employment Act provides explicitly that contractual provisions that are incompatible with the principle of non-discrimination are null and void (*nietig*). Had the Dutch legislator wished to limit this principle for the benefit of employees, it would surely have legislated that illegal contractual provisions are *voidable*, not void, as it has done in other pieces of legislation.

A second point to remark is that the appellate court is implicitly condoning "levelling down". This touches on the debate as to whether illegally favouring one group of employees over another should lead to levelling down, as the employer did in this case, or to levelling up, which in this case would have led to the younger employees receiving the same benefit as their elderly colleagues. The sex discrimination law, for example, proceeds from the principle of levelling up. A female employee who is paid less than her male colleague for work of equal value, performed under similar circumstances, can claim the balance, even retro-actively. I expect the same would apply where an employee is treated less favourably in connection with race, religion, disability, etc. Suppose, for example, that the collective agreement in the case reported above had provided that Christian employees are entitled to five more days of paid annual leave than the remaining (majority of) employees, surely the latter would be able to claim the same benefit?

My third observation is that the court could perhaps have compensated the plaintiffs for their sudden loss of a significant benefit, had they asked for such compensation (which they did not). In Dutch practice it is quite common for courts to award such compensation, often in the form of an annually diminishing sum, thereby phasing out the benefit over a period of time.

Comments from other jurisdictions

France (Claire Toumieux and Aude Pellegrin): Negotiators of collective agreements will most certainly be interested by the approach of this decision. To our knowledge no such decision exists in France. So far we have only seen employees requesting that their benefits be levelled

up. For instance, on 1 July 2009, the French Supreme Court held that a non-executive employee ("non-Cadre") was entitled to claim the extra days of annual paid leave afforded to executives (*"Cadres")* under a company wide agreement (see our article entitled "Any benefit granted to a professional category should be based on objective reasons", EELC 2010-3). The question in France today is whether "illegally" favouring one group of employees over another should lead to levelling down, as the employer did in the Dutch case, or to levelling up.

United Kingdom (Hannah Vertigen): It is likely that a court in the UK would have reached the same result as the Dutch court in this case. The award of additional holiday based on age would be directly discriminatory and, as such, only permissible if objectively justified (by showing that it is a proportionate means of achieving a legitimate aim). However, it is uncertain whether a UK court would adopt a levelling-down approach in circumstances where there was such a clear contractual right to the additional holiday.
Nonetheless, the "levelling down" aspect of this case does have parallels with recent UK cases in which it has been found not to be unlawful age discrimination to apply a cap or a tapering effect to payments made under contractual enhanced redundancy pay schemes – *Loxley v BAE Systems Land Systems (Munitions & Ordnance) Ltd* [2008] IRLR 853 and *Kraft Foods UK Ltd v Hastie*, EAT0024/10, unreported. In both cases, the purpose of applying the cap or tapering effect was to ensure that older employees did not get a large redundancy payment as well as the ability to start withdrawing pension benefits, and so receive a "windfall".

Subject: Age Discrimination
Parties: R. Baarslag and four others – v – Kaba Nederland B.V.
Counsel: A.A.M. Broos for plaintiffs, S. Kropman for defendant
Court: Appellate Court (*Gerechtshof*) of Arnhem
Date: 27 April 2010
Case number: 200.033.868
Hard Copy publication: JAR 2010/143
Internet publication: (Lower court's judgment on www.rechtspraak.nl à LJN BH2910)

2010/67

Failure to provide a "statement of employment particulars" can be costly

COUNTRY DENMARK

CONTRIBUTOR MARIANN NORRBOM, NORRBOM VINDING, COPENHAGEN

Summary
An employee was awarded 20 weeks' pay in compensation for never being issued with a statement of particulars, although she had requested one.

Facts
This case concerned a woman who, after having been employed for seven months at a café, thought that she had been promoted to manager. Previously, she had asked for a "statement of particulars". This is a statement as provided in the Statement of Employment Particulars Act, which is the Danish transposition of Directive 91/533. It obligates employers to notify their employees in writing of "the essential aspects of the contract", which include job title, position, nature of work, etc., and to inform them in writing of all changes in these essential aspects. Failure to comply with this requirement gives the employee the right to claim damages. The plaintiff in this case had never been issued with a statement of particulars, despite having asked for one. When she tripped with a glass in her hand later that year, she damaged a nerve in her hand. She went on sick leave, but she did not receive full salary during this leave, instead receiving (lesser) sickness benefits.[1] Had she been promoted to manager, she would have been able to claim sick pay as a "salaried employee", given that, under the Danish Salaried Employees Act, in the event of sickness, "salaried employees" (which basically refers to all white collar workers) are entitled to continued payment of their full salary for an indefinite period. In Danish practice, however, waiters and waitresses are usually not "salaried employees" and are therefore not eligible for sick pay.

The plaintiff sued the owner of the café for sick pay, arguing that she had been promoted to manager, producing three pay slips as evidence that she had been given a raise. The owner denied having promoted the employee, pointing out that she was still being paid by the hour, which managers are not. Therefore, she was not entitled to sick pay, so the café owner claimed.

Judgment
The Court noted that the failure to provide the employee with a statement of particulars had had tangible effects on her. Had she been issued with a statement of particulars, there would have been no doubt as to when her employment began[2], her pay, the nature of her job (including whether she held a managerial position) and her hours of work. The Court also took into account that she had asked for a statement of particulars. On these grounds, the Court held that there were aggravating circumstances and awarded her the maximum compensation available under the Danish Statement of Employment Particulars Act, which is the equivalent of 20 weeks' pay.

With regard to sick pay, the Court held on the evidence that the employee had been promoted to manager with effect from July 2008 and that she was therefore a salaried employee and thus protected by the Danish Salaried Employees Act and entitled to sick pay.

Commentary
In Denmark, Directive 91/533/EEC is often implemented through collective agreements. If an employee is not protected by a collective agreement implementing Directive 91/533, he is protected by the Danish Statement of Employment Particulars Act instead.

In this case, the employee was not protected by a collective agreement, and she was therefore protected by the Danish Statement of Employment Particulars Act. Under the Act, employees are entitled to compensation if the employer has failed to issue a statement of employment within one month of employment. In extraordinary circumstances, the compensation can amount to as much as 20 weeks' pay. Although such high awards are rare, this case shows that they do happen.

In this case, however, the award seems quite excessive based on previous case law (see EELC 2009/55), and the judgment has in fact been appealed to the High Court.

Comments from other jurisdictions
Austria (Andreas Tinhofer): In Austria, failure to provide a written statement of the relevant particulars entitles the employee to sue the employer for issuance of such a statement. In practice, written statements (or employment contracts in writing) quite often fall short of the statutory requirements. This may be due to the lack of effective and dissuasive sanctions. However, it is difficult to see how the employee could claim damages. The lack of appropriate information on the essential particulars of employment might make it more difficult for employees to enforce their rights, but in normal circumstances it is not likely to cause any real harm.

Ireland (Georgina Kabemba): In Ireland the maximum compensation that a complainant could be awarded under the Terms of Employment (Information) Act, 1994 is eight weeks' pay. The complainant may also have certain other avenues of redress in Ireland. For example, the plaintiff in the case reported above could have claimed under the Payment of Wages Act, 1991 if she had contractual entitlement to company sick pay. However, there is no automatic entitlement to sick pay from an employer in Ireland.

The Netherlands (Peter Vas Nunes): In a Dutch court, a case could perhaps be made that failure to issue an employee with a statement of employment particulars as provided in Directive 91/533, which has been transposed into domestic law in The Netherlands, can trigger a reversal of the burden of proof. In that event, the plaintiff in the case reported above could have claimed sick pay unless her employer proved that she had not been promoted to manager.

Spain (Ana Campos): In Spain, Directive 91/533 was transposed in Section 8.5 of the Workers' Statute, according to which employers are obliged to inform employees with a length of service over four weeks of the essential elements of their employment relationship, unless there is an employment contract containing all these elements. Failure to do so is an administrative labour infraction, punishable by a fine ranging from € 60 to € 625.

According to Spanish law, temporary employment contracts, part-time employment contracts and other types of contracts must always be in writing. If there is no written employment contract, then the burden of proof of working conditions shifts to the employer.

The situation examined in this case would not happen in Spain, because temporary disability pay is calculated based on contributions made to Social Security, which is calculated according to the remuneration received by the employee, regardless of job category.

United Kingdom (Richard Lister): The remedy for a failure to provide a statement of employment particulars under the equivalent UK legislation is that the employment tribunal will determine what particulars ought to have been included (s.11 of the Employment Rights Act 1996). Tribunals have no power to enforce their decision by making a monetary award. However, the position is different where an employee has made a successful claim under various tribunal jurisdictions (e.g. discrimination, unfair dismissal, redundancy pay, or breach of contract) and it transpires that the employer was also in breach of its duty to provide a full and accurate statement of employment particulars. In such circumstances, the tribunal *must* make an award of between two and four weeks' pay – in addition to whatever compensation is awarded in respect of the "main" claim – unless there are exceptional circumstances making such an award unjust or inequitable.

(Footnotes)

1 Sickness benefits are paid by the local municipality. Salaried employees are entitled to continued payment of their full salary on condition that they assign to their employer their entitlement to sickness benefits.
2 The Court found that she had been employed in November 2007 and that she had been promoted with effect from July 2008.

Subject: The Danish Statement of Employment Particulars Act, which implements Directive 91/533
Parties: The Danish Union of Commercial and Clerical Employees in Denmark acting for A versus B
Court: The Copenhagen City Court
Date: 22 April 2010
Case number: BS 9C-3356/2009
Hard Copy publication: No
Internet publication: Please contact info@norrbomvinding.com

2010/68

A group of companies that reorganise may, for redundancy selection purposes, assess the need to terminate staff at group level

COUNTRY FINLAND

CONTRIBUTOR KAJ SWANLJUNG, ROSCHIER ATTORNEYS LTD, HELSINKI

Summary
The employer was entitled to terminate the employment contract of an employee in a situation where the group was reorganised owing to its weak financial position, as the operations of the group of companies constituted a single operational and economic entity.

Facts
This case concerned a situation where the employer, Sisu Auto Huoltopalvelut Oy ("Huoltopalvelut"), a company in the group of Oy Sisu Auto Ab ("Sisu"), had terminated the employment contract of a sales representative (the "plaintiff") on financial and production-related grounds resulting from the reorganisation of operations within the Sisu group of companies (the "Sisu Group"). Following the termination of the Plaintiff's employment contract, an employee of Sisu was reassigned to Huoltopalvelut to perform the same tasks as the plaintiff. Both the plaintiff and the reassigned employee worked within the spare parts business division of the Sisu Group.
The plaintiff instituted legal proceedings against Huoltopalvelut claiming, primarily, compensation for unjustified termination of his employment contract and, alternatively, damages for breach of the employer's re-employment obligation. He argued that because another employee was reassigned to perform the same duties as he had performed before being dismissed, the amount of work had not been substantially and permanently reduced, as required in the Employment Contracts Act. Huoltopalvelut's operational results had not been negative. Termination of the plaintiff's employment had therefore been unjustified. As for the employer's re-employment obligation, the plaintiff stated that Huoltopalvelut should have first offered the available work to him instead of employing someone from another group company.
Huoltopalvelut responded by stating that it was entitled to terminate the plaintiff's employment contract in order to reorganise the Sisu Group's operations and cost structure. According to Huoltopalvelut, the Sisu Group's financial results had been negative. Another relevant circumstance was that, prior to his employment with Huoltopalvelut, the plaintiff had worked for Sisu. Huoltopalvelut argued that it was entitled to treat all employees reassigned from one company in the group to another in a similar manner. Therefore, Huoltopalvelut was not obliged to terminate the employment contract of the reassigned employee whose expertise best met its requirements.

Judgment
The Supreme Court held that the termination of the plaintiff's employment contract was not unjustified and that Huoltopalvelut had not violated its re-employment obligation. According to the Supreme Court, the assessment of grounds for terminating an employment

contract on financial and production-related grounds must be based primarily on the circumstances within the entity that is legally the employee's employer. The Supreme Court continued, however, by stating that if the group of companies' operations are not independent from each other but rather constitute one operational entity, the assessment could be made on a group level.

Taking into account, among other things, that the spare parts business division of the Sisu Group included operations and personnel from different group companies, the Supreme Court stated that the group of companies within the Sisu Group were financially and operationally dependent on each other and, thus, constituted one operational and economic entity. In addition, the co-determination negotiations that took place prior to the Sisu Group's reorganisation were carried out at group level without particular emphasis on the employees' official employer companies. Therefore, the Supreme Court held that the assessment of financial and production-related grounds for terminating the plaintiff's contract could be made on the basis of the Sisu Group's financial and production-related circumstances.

The Supreme Court concluded that because of the Sisu Group's weak financial position, the reorganisation was justified. Consequently, the amount of work had been reduced and the Sisu Group had financial and production-related grounds for redundancies. As the assessment was to be made at group level, Huoltopalvelut's profitable results were not relevant when considering the grounds for terminating the plaintiff's employment contract. The Supreme Court also stated that, because the plaintiff and the reassigned employee had been working within the same spare parts business division of the Sisu Group, the fact that the reassigned employee had been instructed to carry out the same duties as the plaintiff did not the mean that the amount of work had not been substantially and permanently reduced.

Finally, the Supreme Court assessed whether Huoltopalvelut should have given preference to the plaintiff when deciding whom to make redundant and whether Huoltopalvelut had breached its re-employment obligation. The Supreme Court concluded that, according to case law, an employer may decide which employment contracts to terminate on financial and production-related grounds, as long as the decision criteria the employer applies are neither inappropriate nor discriminatory. The employee who was reassigned to perform the same duties as the plaintiff had worked in similar tasks with the same business division of another company within the group and, therefore, the reassigned employee was in a position equivalent to the plaintiff. The Supreme Court did not find any grounds to suggest that the decision criteria had been inappropriate or discriminatory. Given that the employer had the right to reassign the employee, the Supreme Court concluded that Huoltopalvelut had breached neither its re-employment obligation nor its obligation to offer the plaintiff the position as required in the Employment Contracts Act.

Commentary

Although the case was adjudicated solely on the basis of Finnish law and no EU law was involved, the Supreme Court's judgment may be of interest to employment lawyers outside Finland because it addresses a difficult issue which I expect exists everywhere, namely whether one can look across the borders of an employer's legal entity when selecting employees for redundancy.

In its landmark decision the Supreme Court confirmed for the first time that, under certain conditions, the assessment of the reasons for terminating an employment contract on financial and production-related grounds can be made at group level. The ruling forms an exception to the main rule under Finnish law, according to which assessment must be based primarily on the situation within the "official" employer company.

Even though this assessment depends on case-specific conditions, the Supreme Court's reasoning provides some guidelines for such assessment. The judgment implies that the assessment could be made at group level, e.g., in a situation where the businesses of companies within a group have been organised so that the group is financially and operationally interdependent and forms one operational and economic entity. Further, prior co-determination negotiations carried out at group level can be seen as one indicator favouring a group-level assessment.

Comments from other jurisdictions

France (Claire Toumieux and Aude Pellegrin): In France, it has long been established that if economic dismissals are carried out as a result of a reorganisation necessary to safeguard the competitiveness of the employer and the French company belongs to a group, the assessment of the need to safeguard competitiveness will be made at group level. French courts will only consider the reorganisation to be a valid cause of dismissal if it was carried out to safeguard the group's sector of activity worldwide.

Moreover, in France as in Finland, it is undisputed that an employer may not select which employees to make redundant without applying ordered criteria, which must be neither inappropriate nor discriminatory. However, unlike the present Finnish case, the selection of employees to be dismissed may only be done at the French level. Indeed, the criteria may only be applied to the employees of the French company or of the various French establishments of the company, but not to employees of a worldwide operation.

In addition, job elimination that may justify redundancies is assessed at French company level and not at group level. Therefore, unlike the present decision, French courts, in their assessment of the validity of an economic dismissal, will verify whether a position within a French company really has been eliminated.

Germany (Dr. Gerald Peter Müller): The outcome would have been different, had the case been brought before a German employment court.

Protection against unfair dismissal in Germany is provided by the "*Kündigungsschutzgesetz*" (Unfair Dismissal Protection Act): the necessary justification for a termination of an employment contract falling within the Act's scope requires a "fair reason". One of the reasons that can justify a layoff is a dismissal for urgent business reasons, i.e. a reduction in demand for manpower which may, for example, derive from restructuring measures. In such cases, the employer has to prove that for business reasons the employee in question can neither be sustained in his or her current position nor could he or she be appointed to another position. The *Kündigungsschutzgesetz* primarily refers to the demand for workforce in the establishment. If there is no demand, the Act requires the employer to look for alternative positions within other establishments within the same company (i.e. the contractual employer). Furthermore, employers must abide by the rules of the so-called "social selection process" ("*Sozialauswahl*"), as follows: imagine a case where out of 10 similar positions only one position ceases to exist. According to the rules of *Sozialauswahl*, the employer cannot freely – or even just without being discriminatory or inappropriate – choose one of the employees to be made redundant. The employer must choose the employee who deserves the least level of social protection (according to his or her of age, length of service, alimony obligations and severe disability). The employer's argument that he believes one employee to be "fitter" for the job than the other would not be considered in this respect. Therefore, in the case at hand – and unless he was less worthy of social protection in the aforesaid

meaning – the plaintiff may well have kept his job.
An interesting point in the judgment of the Finnish Supreme Court is the idea of "switching" from company level to group level in order to assess the justification of the plaintiff's dismissal. A different manifestation of the same idea that under specific circumstances a group of companies may constitute a "single operational and economic entity" for the purpose of deciding the validity of a dismissal can also be found in German employment law – albeit under different prerequisites. In cases where different employers (i.e. companies – even if not part of the same group) operate commonly in the same workplace, jointly take administrative decisions and decisions on the assignment of staff, the (different) employers' common "structure" is known as "joint works" ("*Gemeinschaftsbetrieb*") and considered to be a single entity for the purposes of fulfilling the conditions of the test for validity of the dismissal. This would include, for example, lack of alternative employment for the person to be dismissed.

United Kingdom (Richard Lister): For the purposes of the statutory definition of redundancy in the UK, the "business" of an employer may be treated as one with the business of an associated employer. Two employers are "associated" if one is a company controlled by the other, or if both are companies controlled by another company. In practical terms, this means that a group of companies is entitled to select employees for redundancy regardless of whether or not there is a redundancy situation in each individual company. In other words, the group can be considered as a whole when applying a redundancy selection procedure.
The flipside of this is that, in order to establish a fair and reasonable redundancy procedure, employers generally need to show that they gave proper consideration to the availability of alternative employment for those employees selected for redundancy. In this context, it will normally be appropriate to consider potential alternative jobs not just within the particular company in which the individual was employed but also within other subsidiaries in the same group.

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Parties: An employee – v – Sisu Auto Huoltopalvelut Oy
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2010/69

When is a strike so "purely political" that a court can prohibit it?

COUNTRY THE NETHERLANDS

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Summary
A collective action, such as a strike, that aims to influence government plans, but targets others (e.g. employers) is not only subject to national law, but also to European law as applied by the national courts, which much ascertain whether the collective action is suitable for ensuring the achievement of the objective pursued and does not go beyond what is necessary to attain that objective.

Facts
On 24 March 2009 the Dutch government announced its intention to raise the age from which state old-age benefits become payable ("the retirement age") from 65 to 67. The announcement met with widespread protest. The government decided to seek the advice of the Socio-Economic Council (the "SER"). This is an advisory body consisting of equal numbers of employer representatives, employee representatives and independent experts appointed by the Crown. The SER was given until 1 October 2009 to come up with an alternative solution that would address adequately the challenge of an ageing population and the increasing cost of old-age benefits. Due to irreconcilable differences of opinion between the employer representatives and the employee representatives, the SER was unable to find an alternative to the government's plan, whereupon the SER's attempt to find such an alternative came to an end on 1 October 2009 and the government decided to proceed with its plan to raise the retirement age.

On 1 and 2 October 2009 a number of unions notified the municipal transportation companies of Amsterdam (GVB), Rotterdam (RET) and The Hague (HTM) that they would strike for the symbolic duration of 65 minutes during the morning rush hour on 7 October 2009. The purpose of the strike was to protest against the government's plan, so the unions declared. They asked the managements of GVB, RET and HTM to cooperate, but rather than accede to this request, the companies applied to the court for injunctive relief. They asked the court to order the unions to call off the strike, arguing that the strike was political and therefore not legitimate.

Dutch Law
There is no codified law in The Netherlands on collective action, such as strikes. The law is entirely judge-made. In developing their case law, the courts have relied heavily on the European Social Charter (the "ESC").[1] In 1986 the Supreme Court found that Article 6 (4) ESC (Part I) has direct (vertical and horizontal) effect and therefore forms an integral part of Dutch law. Article 6 (4) ESC provides:

"With a view to ensuring the effective exercise of the right to bargain collectively, the Parties [...] recognise the right of workers and employers to collective action in case of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into."

I have underlined the words "conflicts of interest" in order to highlight that the ESC does not bestow a right to strike in case of conflicts of right, i.e. disputes that can be adjudicated by the courts. For example, if an employer disagrees with a union on the interpretation of a provision in a collective agreement, either party can ask the court to rule on the matter, and there is therefore no right to take the law into one's own hand by striking. A demand for a pay raise, on the other hand, does not relate to a legal right or obligation, and a dispute in respect of such a demand is therefore not something that can be resolved by a court; it is a "conflict of interest" that can only be settled through negotiation.

The ESC does not give workers an unlimited right to strike in cases of a conflict of interest. Article G (Part V) provides that this right *"shall not be subject to any restrictions or limitations [...], except such as are prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals*.[2] Furthermore, *"the restrictions permitted under the Charter to the rights and obligations set forth herein shall not be applied for any purpose other than for which they have been prescribed*."

Finally, the Dutch courts have developed "last resort" (*ultimum remedium*) and "fair play" rules which provide that, even in situations where the conditions set by the ESC for legitimate collective action have been satisfied, the action can still be outlawed if it has not been preceded by sufficient attempts to resolve the dispute by other means[3] or has not been announced clearly and sufficiently in advance.

In summary, whenever a Dutch court is called upon to rule on the legality of a strike (or other collective action), it needs to establish (1) whether there is a "conflict of interest", and, if so, (2) whether there is a restriction or limitation as provided in Article G ESC, (3) whether the strike was truly called as a last resort and (4) whether the strike was announced sufficiently in advance.

Court of first instance

The plaintiffs argued, *inter alia*, that the strike was aimed, not against themselves, but against a decision by the government that they were unable to influence. A legitimate strike is a strike aimed at inducing an employer to do something it is capable of doing. Article 6 (4) ESC allows collective action in order to restore the balance of power between employers and employees, not to put the government under pressure, so the plaintiffs argue. Had the retirement age issue still been in debate in the Socio-Economic Council (SER), it is conceivable that the strike could have led to an attempt by the managements of GVB, RET and HTM to plead with the employers' representatives in the SER to yield to the demands of the employees' representatives. However, the SER had closed the debate and the government had taken a decision, so there was no longer any means of exerting influence. The court accepted this line of argument and outlawed the strike. The Court concluded that the situation did not harm the union's right to bargain collectively as protected by Article 6 (4) ESC, because they could still exercise that right effectively. The unions, complying with the court order, called off the strike, but they appealed the judgment in order to be able to determine their position in view of future collective actions.

Court of Appeal

Although GVB, RET and HTM raised the following issues: 2 (disproportionate damage to third parties' rights), 3 (last resort) and 4 (untimely notification), the focus of the debate was whether the strike was a "purely political" one and therefore not, as the expression goes, "protected by Article 6 (4) ESC". The Court of Appeal began by referencing two Supreme Court judgments.

The first of these judgments (1986) concerned a rail strike that was aimed against a decision by the government to introduce legislation curtailing certain terms of employment that had previously been included in the collective negotiation with unions. The Supreme Court ruled that strikes that are aimed against government policy whilst targeting others than the government, fall within the scope of Article 6 (4) ESC, provided they are aimed against government policy in the field of terms of employment. Strikes aimed against other types of government policy, being "purely political", fall outside the scope and are therefore, in principle, illegitimate.

The other Supreme Court judgment (1994) concerned a strike in the port of Rotterdam. It was aimed against legislative plans by the government (mainly reduction of sick pay). The strike was held to be legitimate, as these plans threatened to impact negatively on the unions' bargaining power with respect to new collective agreements. Such a "setback" in bargaining power is sufficient, so the Supreme Court held, to accept that a strike falls within the scope of Article 6 (4) ESC.

Returning to the present case, the court acknowledged that raising the retirement age is an issue Parliament needs to resolve and that it was therefore not an issue that was on the bargaining table between the employers and the unions. However, raising the retirement age will certainly influence future negotiations between companies such as GVB, RET and HTM and the unions, the existing terms of employment being predicated on a retirement age of 65. In the event the law is amended so as to raise the retirement age to 67, the unions will suffer a setback in their negotiating position. This fact constituted an argument in favour of allowing the strike. However, GVB, RET and HTM argued that "the setback argument" cannot be used unless and until the test as to whether or not a strike is aimed against something that "tends to be (or should be) the subject matter of negotiation with unions" has been passed. The court rejected this argument. Although, admittedly, the retirement age, being set by an Act of Parliament, is not a subject for negotiation with unions, it is so interwoven with items that do tend to be negotiated with unions (a rise in the retirement age inevitably influencing the unions' bargaining power with respect to related items) that it would go against the grain of Article 6 (4) ESC to deny the unions the right to strike, also taking into account the limited scope of the collective action at issue. The Court underlined the fact that Article 6 (4) ESC does not only protect the right to bargain collectively, but also safeguards the unhampered exercise of that right.

Commentary

All around Europe unions have been initiating collective actions against decisions made at municipal and/or national governmental level as well as in the private sector, regarding such matters as cost-cutting, restructuring, reforming labour market conditions, raising the national retirement age, etc.

Political strike?

Since the end of 2009 several collective actions have been battled over in the Dutch courts. The actions targeted *inter alia* a municipal public waste disposal service and private cleaning companies at Schiphol airport. The unions involved won all the cases. In each case the main question was whether the collective action should or should not be deemed to be 'political' collective action not protected by Article 6 (4) ESC.

Dutch courts are reluctant to deem a strike to be political. Interestingly, the boundaries of what constitutes a "political strike" are not clear. In its 1986 decision in the railway strike case, the Dutch Supreme Court referred to the conclusion of the European Committee on Social Rights (ECSR) that qualified political strikes "as being outside the purview of collective bargaining".[4] The Supreme Court in that case concluded that the mere fact that the collective action was aimed against the government, though (only) effecting and damaging other (third) parties, did not make it a political strike. In that particular case, the government interfered directly with employment benefits that had previously been established through collective bargaining. Given this element, it is understandable why in that particular case the collective action was protected by the ESC.

The conclusion can be drawn that since the 1986 Supreme Court decision, Dutch courts have taken a lenient approach to strikes. Whenever issues related to employment benefits are involved, directly or indirectly, collective actions are almost automatically considered to fall within the scope of the ESC, and therefore considered legal, provided the last resort test has been passed and the fair play rules have been observed (first negotiations, then, if they fail, proper and timely announcement of the specific collective action) and provided that none of the restrictions allowed by Article G ESC can be invoked. These rules are also valid in cases of secondary actions (work-to-rule, go-slow, slow-down etc.) or solidarity actions. There are only a few cases where a strike has failed to meet the test. One of those cases involved a highway blockade, which was considered not to be legitimised by the ESC because of its extreme nature.[5]

Third parties

As to the position of third parties, the Committee on Social Rights has ruled that, when assessing the legality of a strike, that damage caused to third parties and financial loss sustained by the employer can only be taken into consideration in exceptional cases, when justified by a "pressing social need".[6] The employers involved are considered to be such 'third parties' (referred to in Article G as "others"). Claims by these third parties have therefore almost always been rejected in The Netherlands in the past, except in situations where there was a high risk of disproportionate damage.[7]

Given the above, it is not surprising that the Appellate Court decision is widely supported by Dutch legal practitioners, who believe that Article 6 (4) ESC should be interpreted broadly. If it were interpreted narrowly, the right to bargain collectively – a highly regarded right – would be less effective than it is supposed to be. In this respect it is interesting to note that the Dutch courts interpret the ESC more broadly than the Committee on Social Rights itself does.[8]

Restrictions under Community law?

This broad view, combined with the "setback test", make me wonder, without necessarily wanting to question the view expressed above, whether the recent developments in European case law regarding collective actions would affect the outcome if such a collective action case were to be brought before the ECJ by the companies damaged by the collective actions.

The right to take collective action is to be exercised in accordance with European Union law, as stated explicitly in the recitals to the Charter of Fundamental Rights of the European Union.[9] One of the tasks of the Community is, after all, the promotion of "a harmonious, balanced and sustainable development of economic activities and a high level of employment and of social protection". Commercial activities should be supported by a competitive market, thus contributing to the creation of an effectively functioning internal market.[10]

Influence of Viking and Laval?

In this respect the *Viking* and *Laval* cases are worth a closer look. The ECJ held *inter alia* that, in areas where the Community does not have jurisdiction, the Member States remain, in principle, free to lay down the conditions for the existence and exercise of the rights at issue (e.g. the right to take collective action), but they must nevertheless exercise that freedom consistently with Community law.[11]

In *Viking* the ECJ held that the right to strike is subject to restrictions under European law where the effect of a strike may disproportionally impede an employer's freedom to provide services. Earlier this year, the ECJ confirmed that, although the right to strike is recognised as a fundamental right, explicitly referring to the ESC and the Charter (and which forms an integral part of the general principles of Community law, the observance of which the Court ensures), the exercise of that right may nonetheless be subject to certain restrictions.[12]

It follows from *Viking* that the non-applicability of Article 153(5) TFEU (previously 137(5) EC) to the right to strike (or to impose lock-outs) does not in itself exclude collective action from the application of Community law.[13]

In this context it can also be pointed out that in *Viking* the ECJ rejected the unions' claim that the immunity of a collective bargaining agreement from the EU's rules on competition, as ruled by the ECJ in *Albany* should be applied by analogy to the right to collective action.[14] In Albany, in brief, the ECJ ruled that agreements concluded in the context of collective negotiations pursuing social policy objectives should be regarded as falling outside the scope of Article 81(1) EC (now 101 (1) TFEU). In *Viking,* by contrast, the ECJ ruled that "it cannot be considered that it is inherent in the very exercise of trade union rights and the right to take collective action that those fundamental freedoms [i.e. the freedom of establishment and the freedom to provide services] will be prejudiced to a certain degree".[15] In other words, a collective action falls within the scope of the free movement provisions of the Treaty, which have a horizontal direct effect.

Before *Viking* it was common ground that a collective action is governed by national law and that disputes were left to Member States to resolve. This enabled national courts to apply EU law – as far as possible – consistently with national conceptions of what is or is not a proportionate collective action.

When looking at permissible restrictions that may be placed upon the right to strike, the ECJ in *Viking* seems to add one more level by introducing a new principle of proportionality bearing in mind the notion of the provisions of Community law. As regards the appropriateness of the action and whether or not it goes beyond what is necessary, *Viking* shows that the national court must take Community law into account.

In *Viking* the objective pursued by the strike was the protection of the jobs and conditions of employment of the union's members. The ECJ ruled that, even if the strike could reasonably be considered to fall within the objective of protecting workers, *"such a view would no longer be tenable if it were established that the jobs or conditions of employment at issue were not jeopardised or under serious threat."*[16] Whether or not that is the case is for the national court to decide. If so, then the

national court would have to ascertain whether the collective action initiated is suitable for ensuring the achievement of the objective pursued and does not go beyond what is necessary to attain that objective.[17] Moreover, the ECJ stated that even if it is ultimately for the national court, the Court of Justice may provide guidance, based on the file in the main proceedings and on the written and oral observations submitted to it, in order to enable the national court to determine the particular case before it.

It has become clear that the position of the unions with regard to collective actions in transnational issues has become more complicated. The *BALPA*-case provides us with a significant example. The British Airline Pilots' Association ("BALPA") was influenced by *Viking* and *Laval,* which decisions made the union decide not to follow through with a strike, stating that it would risk bankruptcy if it was required to pay the damages claimed by British Airways who argued that the strike was illegal under *Viking* and *Laval*. BALPA has expressed its concern that the application of *Viking* and *Laval* by the UK Courts will result in injunctions against collective action if a strike's impact on the employer is judicially determined 'to outweigh the benefit to workers'. In the current context of globalisation, such cases are likely to be ever-more common.

So what about national issues? Although the Dutch situation as described does not deal with a transnational situation, as was the case in *Viking* and *Laval,* where, moreover, specific European Directives were applicable (in *Viking* the Services Directive and in *Laval* the Posting Directive), in my view the outcome of these cases could also influence the way national issues need to be judged given the newly introduced proportionality test by the ECJ in stating that the right to take collective action must be exercised consistently with Community law and that the national court will need to ascertain whether the strike is suitable for ensuring the achievement of the objective pursued and does not go beyond what is necessary to attain that objective. Given the nature of the ECJ criterion, which seems to set a higher standard for justifying collective actions in general, I see no reason why the ruling should not apply at the European level in the same way as it does for transnational collective action. Here may therefore lie territory to be challenged when a suitable case arises. As to the Dutch situation, I am curious about whether the general "setback-argument" will hold when it comes to a test.

Comments from other jurisdictions

Ireland (Georgina Kabemba): In Ireland an injunction would only have been granted if it were considered that the strike was not "in contemplation or furtherance of a trade dispute", the phrase "trade dispute" being defined as meaning "any dispute between employers and workers which is connected with the employment or non-employment, or the terms or conditions of or affecting the employment, of any person". There is no requirement that the dispute be "wholly or mainly connected" with terms or conditions of or affecting employment and consequently, provided that it can be shown by the trade union that there is a *real* connection, the strike should be protected. It should be noted, however, that the European Social Charter is not regarded as forming an integral part of Irish law.

(Footnotes)

1 European Social Charter (revised, 1996), ETS (European Treaty Services) (now CETS, Council of Europe Treaties Services) No 163, available on htpp://conventions.coe.int.
2 Also known as the "proportionality" test.
3 The Supreme Court seems to have determined the *ultimum remedium* test to be an independent test in its 2000 ruling in the *Douwe Egberts* case. The theory rests on the sequence of sections 1, 2/3 and 4 of Article 6 ESC: the unions have a duty to negotiate (section 1), the government has a duty to promote mediation and arbitration (sections 2 and 3) and finally there is the conditional right to strike (section 4). The Committee on Social Rights has criticised The Netherlands for adopting this position, which would seem to outlaw so-called warning strikes, such as the one reported above (see Conclusions XVI-1 p. 444-447 and Conclusions XVII-1 dated 6 April 2004). For this reason, some authors argue that the "last resort" test is really no more than one of the elements to be taken into consideration when applying Article G.
4 European Committee on Social Rights, Conclusions I, p38 para (e) and VIII, p97.
5 Supreme Court 19 April 1991 (NJ 1991/690).
6 European Committee on Social Rights , Conclusions XIII-1, ps157-158, report for 1990-1991.
7 E.g. District Court Rotterdam 9 March 2007, LJN BA1088.
8 R.M. Beltzer and E.M. Hoogeveen, Comment on the ESH, dated 1 January 2008.
9 Charter of Fundamental Right of the European Union, 2010/C 83/02, OJ 30 March 2010 C 83/389.
10 Article 3 (3) TEU.
11 ECJ 11 December 2007, C-438/05 (Viking) and ECJ 18 December 2007, C-341/05 (Laval).
12 ECJ 15 July 2010, C-271/08 (European Commission - v - Germany).
13 Viking, pararaph 41.
14 ECJ 22 September 1999, C-67/96 (Albany).
15 Viking, paragraph 48-55.
16 Viking, paragraph 81.
17 Viking, paragraph 84.

Subject: Collective action
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Illegal monitoring of employees makes collected evidence of computer abuse inadmissible in dismissal proceedings

COUNTRY ITALY

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Summary

An employee was discovered having repeatedly accessed the Internet

during working time and was dismissed on the grounds that such computer use was in breach of the company's regulations. The employer had found out about the transgression with the aid of "Superscout" software. This made the discovery illegal. Hence the evidence of the transgression was inadmissible and the dismissal was ineffective.

Facts

The employee in this case was dismissed following an internal disciplinary procedure, which had been initiated after it had been established that she had repeatedly accessed the Internet for private purposes on her computer while at work, which the company's regulations prohibited. The employer had found this out with the aid of "Superscout" software, which enables employers – *inter alia* – to monitor their staff's computer behaviour. An Italian law dating back to 1970 (Section 4 of the *Statuto dei lavoratori*) outlaws the use of any device designed to monitor employees' activities "remotely". The essence of "remote" monitoring is that the employee does not know he is being monitored and that, as a rule, the results of the monitoring are not known until afterwards. It also outlaws devices that, although not designed to do this, can be used for that purpose, unless the devices have been approved either by the relevant trade unions or by the local Employment Inspectorate.

The employee challenged her dismissal in court. Both the court of first instance and the appellate court held the dismissal to be ineffective, for a combination of two reasons: (1) as it was illegal for the employer to use the Superscout software, the evidence of computer abuse had been collected unlawfully and was therefore inadmissible and (2) the employer had failed to comply with the principles of proportionality and "graduated response", which hold that a disciplinary sanction must be proportionate to the transgression and must, where appropriate, be preceded by a lesser sanction. The employer appealed both to the Court of Appeal (who rejected the Appeal) and to the Supreme Court.[1]

As the principles of proportionality and graduated response are based on domestic Italian law, this case report will deal only with the evidentiary aspects of the case.

Judgment

The Supreme Court upheld the appellate court's judgment. It ruled, *inter alia*, that even if the employee knew that accessing the Internet during work was not permitted, and even if she knew that her employer might monitor her computer use, the employer was still not permitted to use the Superscout program.

Commentary

The novelty of this judgment is that the Supreme Court is partially departing from previous doctrine. Up until this judgment it had held that "remote" monitoring of employee behaviour was excluded from the scope of said Section 4 if the purpose of the monitoring was to prevent illegal activities. In this case, however, the Supreme Court had unequivocally outlawed computer monitoring, even if the employee has been warned by an internal regulation not to access the Internet for private use and that computer use might be monitored. The Supreme Court held that, since the employer's purpose in doing the remote monitoring was simply to check compliance with company rules, this should be considered as illegal monitoring – which is inadmissible, and cannot be used as the basis for disciplinary action.

Comments from other jurisdictions

France (Claire Toumieux and Aude Pellegrin): In France, unlike Italy, surveillance and monitoring of employees in their place of work and during their working time, as well as the option to sanction reprehensible behaviour, is a prerogative of the employer.

The monitoring of employees may be done provided, notably, that the employer informs the works council and the employees of the means and techniques used to monitor their activities prior to their implementation and that the means of control put in place by the employer do not place disproportionate restrictions on the rights and freedoms of the employees.

It is only if the employer does not comply with such conditions that he may be prevented from using the evidence gathered to justify the dismissal of an employee.

Germany (Dr. Gerald Peter Müller): The protection of employees' personal data has very recently been an issue of broad discussion in Germany. Currently the German Act on the Protection of Personal Data (*"Bundesdatenschutzgesetz"*) is being reformed and tightened up in this respect following a number of recent scandals in well-known companies.

The question of the admissibility of evidence obtained illegally has also been broadly discussed in German judicial literature. The basic dilemma is that two legitimate interests clash in the event information has been found, while it is clear that the way in which it was obtained breached the law in general or in terms of legitimate personal interests. The German civil law courts, along with the labour courts in Germany, have held that to admit evidence that has come into being illegally is alien to the German civil law system. There are, however, exceptions to this. Developing from the legal principle that an individual has the "right to informational self-determination" (as made clear by the German Constitutional Court), an individual has the constitutional right to decide about the disclosure and use of his or her personal data. A distinction must be made between those cases where evidence was obtained in a way that seriously violated that right and those cases where there was no such violation.

Returning to the question of the admissibility of *illegal* evidence in court, it can be said that the public interest in ascertaining the truth clashes with the individual's right to informational self-determination. With respect to the use of collected computer data, the following case-law has evolved.

The scope of permissible monitoring of the use of an employee's computer system is split into two categories. The first being cases where private use of the computer equipment is generally permitted and the second, where such private use is specifically prohibited by the employer. Within the first group, the employer is subject to the rules for providers of telecommunication installations and is thus generally barred from examining the content accessed by employees on the employer's computer system. In such cases, the employer would not be allowed to monitor, for example, the amount of time that an employee has spent on the private use of the internet or control the pages that the employee has visited. The second category is where any private use of the employer's computer installations has been prohibited. Under these circumstances, any use of the computer is deemed to be a professional one and since the employer generally has the right to access any professional files (i.e. especially paper files) there is no reason to bar it from viewing the computer files. This being said, systematic or continuous monitoring is still not permitted. Violations of these rules will lead to the inadmissibility of the evidence in court.

An additional "pitfall" is added where the employer's establishment is subject to the rules of co-determination of the works council.

Basically the introduction of (electronic or technical) measures to monitor employees' conduct is subject to the works council's right of co-determination. While the question of whether monitoring measures taken by the employer which have not been approved by the works council are automatically inadmissible in court was controversial for a long time, the federal employment court (*Bundesarbeitsgericht*) ruled in 2007 that where unapproved measures are taken by the employer in the face of the works council's right to co-determination, this will not *in itself* lead to the inadmissibility of the evidence in court. For the evidence to be ruled inadmissible, the violation must impact on the works council's ability to protect the employee's right to informational self-determination.

The Netherlands (Peter Vas Nunes): I find two aspects of this case noteworthy. The first relates to the Italian prohibition on monitoring employee behaviour. The second has to do with inadmissibility of illegally collected evidence.

If a Dutch court had been called upon to adjudicate the case reported above, it would most likely have based its decision on a combination of Article 8 of the European Convention on Human Rights (ECHR), which provides that "Everyone has the right to respect for his private life, his home and his correspondence", and the Data Protection Act, which is the Dutch transposition of Directive 95/46/EC. Article 8 ECHR has been invoked frequently, both before Dutch courts and before the European Court of Human Rights (ECtHR), in situations where an employer monitored computer use. Notable is the ECtHR's judgment in the *Copland* case (3 April 2007, case No 62617/00) in which the court held that "the collection and storage of personal information relating to [an employee's] [...] internet usage, without her knowledge, amounted to an interference with her right to respect for her private life and correspondence within the meaning of Article 8". The employee in the *Copland* case had been given no warning that her internet usage would be liable to monitoring, therefore she had a "reasonable expectation as to the privacy" of the usage. Had Ms Copland been warned that her internet usage would be monitored, she would not have had a reasonable expectation of privacy and the monitoring would not have violated Article 8 ECHR. This is also the Dutch courts' position. However, the Data Protection Act goes further to protect employees' privacy than does Article 8 ECHR. Based on this Act, Dutch courts tend to find that, although employers may take reasonable steps to prevent private internet usage during work, they may not be informed (by their IT departments) which sites the employee has accessed. Also, any corporate policy in this field must be vetted by the works council in advance.

My second observation of this is that the Italian Supreme Court seems to rule out unconditionally all evidence gathered illegally. The Dutch courts have so far been reluctant to adopt such a strict "exclusionary rule". It is generally held that an employer who has illegally gathered evidence of wrongdoing by one of its employees may be liable (criminally, administratively and civilly) for this breach of the law, but that a dismissal based on such evidence is not invalidated by this fact in itself. Not all courts take this view, however, and it would not surprise me if the Supreme Court took a stricter stance. In its well-known *Wennekes* case (2001) it allowed evidence gathered by means of a concealed video camera in a shop, that had been installed without the staff's knowledge and therefore illegally. The Supreme Court did not find it necessary to exclude this evidence because (1) the employer in question – the shop-owner – had a concrete suspicion that one of his employees was stealing money out of the till, (ii) there was no other means of discovering who the thief was and (iii) the camera was directed exclusively at the cash register. Had not all of these conditions been fulfilled, the Supreme Court might well have ruled the other way.

United Kingdom (Richard Lister): UK law ostensibly allows significant scope for employers to monitor employees' use of their computer systems, for various purposes, under the Telecommunications (Lawful Business Practice) (Interception of Communications) Regulations 2000. Notwithstanding this, it is becoming increasingly common for employees to use Article 8 of the ECHR and/or UK data protection legislation to challenge employer surveillance practices.
For example, cases have established that human rights law – including Article 8 – is relevant to the "reasonableness" of a dismissal. Where surveillance has been used during disciplinary proceedings, an employee can argue that this renders the dismissal procedurally unfair or that a tribunal must disregard the evidence.
However, the courts appear to be taking a narrow view of when privacy rights will apply and when employer justifications will be challenged. In *McGowan – v – Scottish Water* [2005] IRLR 167, for example, the Employment Appeal Tribunal did accept that covert surveillance of an employee's home to investigate falsification of timesheets raised a "strong presumption" that the right to respect for private life was being infringed. But the EAT went on to find that this was justified because the employer was trying to protect its assets, had considered alternatives and the evidence went to the heart of the investigation.
The Data Protection Act 1998 (DPA) is the other main piece of UK legislation which regulates surveillance practices. Related to this is the *Employment Practices Code* published by the Information Commissioner – the UK's privacy watchdog – which places various limits on employers' monitoring powers. With regard to electronic communications and video/audio monitoring, the Code emphasises the need to have a clear policy, warn employees in advance and target the monitoring carefully. Covert monitoring is particularly difficult to justify, with the Code stating it should only be used where there are grounds for suspecting "criminal activity or equivalent malpractice".

(Footnote)

1 Following the court of first instance's judgment, the employer dismissed the employee again, for the same computer abuse, this time not based on evidence collected through the Superscout software but based on the server logs. This second termination was also declared invalid both by the court of first instance and the appellate court. The judgments on both terminations were appealed to the Supreme Court. The second dismissal has been left out of this report.

Subject: Privacy
Parties: Anonymous
Court: Supreme Court (*Corte di cassatione*)
Date: 23 February 2010
Case number: 4375
Internet publication: www.eelc-online.com

2010/71

Provision limiting Member States' right to derogate from Working Time Directive in respect of public transport has direct (vertical) effect

COUNTRY FRANCE

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Summary

Article 17 of the Working Time Directive allows Member States to exclude certain activities, such as passenger transport, from the obligation to grant employees a rest break after six hours of work. However, Member States that do this must afford the employees concerned equivalent periods of compensatory rest or, if that is not possible, with appropriate protection. An exempted public body, in this case the Paris metro, that fails to afford its employees such equivalent compensation or appropriate protection cannot rely on its exempted status and must therefore apply the normal national rules.

Facts

This case deals with Directive 2003/88/EC on working time (the "Directive"). Article 4 of the Directive requires Member States to take "the measures necessary to ensure that, where the working day is longer than six hours, every worker is entitled to a rest break, the details of which, including duration and the terms on which it is granted, shall be laid down in [...] national legislation". It is up to the Member States to determine the duration of the rest break and its terms (e.g. whether the break time counts towards determining salary). France transposed (the predecessor of) the Directive by means of Article L.3121-33 of the Labour Code (*Code du travail*). This provision entitles workers with a working day that exceeds six hours to a rest break of at least 20 minutes.

The Labour Code does not apply to the Parisian public transportation company RATP, as this is a publicly owned organisation (*entreprise à statut*). This is in conformity with Article 17(3)(c)(viii) of the Directive, which provides: "In accordance with paragraph 2 of this Article derogations may be made from Articles 3, 4, 5, 8 and 16 [...] in case of activities involving the need for continuity of service or production, particularly [...] workers concerned with the carriage of passengers on regular urban transport services". Instead, there are rules, laid down by the government in a decree (*décret*), that regulate the working conditions of RATP's staff, including a rest break that is less favourable than that provided in the Labour Code.[1]

A bus driver employed by RATP claimed a 20 minute rest break as per the Labour Code, arguing that the special rules for RATP were incompatible with the Directive, and that therefore the Labour Code was applicable. The court of first instance and, on appeal, the Parisian Court of Appeal, turned down his application. The Court of Appeal based its decision on two arguments. First, it held that Directive 2003/88 lacks direct effect. Secondly, it invoked said Article 17 of the Directive, which allows urban transport companies to derogate from Article 4 of the Directive. The bus driver appealed to the Supreme Court (*"Cour de Cassation"*).

Judgment

The Supreme Court, taking a cue from the ECJ's *Pfeiffer* ruling[2], began by reaffirming that *"the various requirements set out in the above-mentioned Directive regarding the minimum rest break time constitute a rule of social law of particular importance from which every worker must benefit, since it is a minimum requirement necessary to ensure protection of his safety and health".*

The Supreme Court went on to agree with the Court of Appeal's finding that Article 4 of the Directive lacks direct effect, given that it specifies neither the duration nor the conditions of the rest break. However, the Supreme Court made reference to Article 17 (2) of the Directive, which provides that the Member States may exempt certain organisations, such as RATP, from Article 4, *"provided that the workers concerned are afforded equivalent periods of compensatory rest or that, in exceptional cases in which it is not possible, for objective reasons, to grant such equivalent periods of compensatory rest, the workers concerned are afforded appropriate protection"*. The Supreme Court criticised the Court of Appeal for not *"verifying whether the provisions of national law that grant an exception in the case of RATP employees from the regime of rest time provided by French labour law allow these employees either equivalent compensatory rest periods or an appropriate protection for the exceptional cases where the granting of such equivalent periods is not possible for objective reasons".* The Supreme Court remitted the matter back to the same Court of Appeal (but differently composed), which must now, presumably, determine whether the rules on the rest breaks of RATP's employees provide "equivalent" compensatory rest breaks, i.e. rest breaks that are no less favourable than those of the Labour Code, or, alternatively, whether those rules afford those employees "appropriate protection".

Commentary

In this judgment the French Supreme Court implicitly found a provision of an EU directive to have direct vertical effect. This is consistent with the ECJ's case law according to which individuals can invoke clear, precise and unconditional provisions of a poorly transposed or untransposed European directive against *"organisations or bodies which are subject to the authority or control of the State or have special powers beyond those which result from the normal rules applicable to relations between individuals"*, whether this relates to a public corporation[3] or to a private company to which a public service has been entrusted[4]. The judgment reported above is fully in line with this European case law given that RATP *"is by virtue of being an instrument of public authority charged with carrying out, under the control of the latter, a public service and for this purposes has special powers that go beyond the rules applicable in relations between individuals".*

A more interesting aspect of the judgment is that the Supreme Court seems to have found Article 17 (2) of the Directive to be "sufficiently clear and precise" to give it direct effect. This is significant. Many, if not all, Member States have made use of Article 17 (3) of the Directive to exempt large segments of their working population, not only from Article 4 (daily breaks) but also from Articles 3 (daily rest periods), 5 (weekly rest period), 6 (maximum weekly working time) and 16 (reference periods). Article 17 (2) applies to all of these exemptions. If the courts in other European jurisdictions follow this French example, that could lead to many of the exemptions being challenged.

On a more fundamental level, this decision is noteworthy in that it emphasises the intention of the French Supreme Court to transcend the segmentation, from an employment law perspective, in which work

relations are evolving under French law (companies under private law, statute workers, public corporations, etc.) in creating a common legal basis. This case reminds us that Directive 2003/88 applies *"to all business sectors, whether private or public within the meaning of Article 2 of Directive 89/391"* (the basic directive on safety and health). Whatever the particularity of the rules which may apply to its workers, RATP must also comply with European labour law.

Comments from other jurisdictions

Germany (Paul Schreiner): A comparable case was adjudicated in Germany a short time ago by the *Bundesarbeitsgericht,* the "BAG", (Federal Court for Employment law Matters, 13 October 2009, 9 AZR 139/08). A tramway driver felt that the breaks he was allowed to take were too short to constitute a break in the sense of the German *Arbeitszeitgesetz* (Act on working time regulation). Generally, this law provides for a break of 45 minutes in total for employees who need to work between six and nine hours. A break must last for at least 15 minutes. However, section 7 of the Act allows deviations from this general rule if a collective bargaining agreement for companies providing public transport provides different break time regulations. In this case the minimum break time was set at 8 minutes by the applicable collective bargaining agreement. In its decision the BAG clarified that even in a situation in which the parties to a collective bargaining agreement set a special regulation for shorter breaks than those provided by law, such breaks must still qualify as breaks in the meaning of the law. This requires that a break is not reduced to a mere sit down breather, but has a significant minimum duration. Since the main recreational effect occurs in the first 3 to 5 minutes of a break, the BAG concluded that 8 minutes is sufficient to create a break in the meaning of the law. Summarising, the BAG checked the issues that the French court believes necessary, without reference to the European law background.

(Footnotes)

1 In 2006 the government replaced the old *décret* with a new one, but on 25 June 2007 the *Conseil dÉtat* annulled the new *décret*, as a result of which the old rules automatically revived.
2 ECJ 5 October 2004, case C-397/01 (*Pfeiffer*), see § 101.
3 ECJ 12 July 1990, case C-188/89 (*Foster*)
4 ECJ 14 September 2000, case C-343/98 (*Collino*).

Subject: Organisation of working time
Parties: Cots – v – RATP
Court: Supreme Court (*Cour de Cassation*)
Date: 17 February 2010
Case number: 08-43.212
Internet publication: www.legifrance.gouv.fr

2010/72

Failure to inform works council means management may not close down plant

COUNTRY FRANCE

CONTRIBUTORS CLAIRE TOUMIEUX AND SUSAN EKRAMI

Summary

Total was ordered to restart production at its Dunkirk refinery, which had stood idle for nine months, within 15 days of service of the judgment, or face fines of € 100,000 per day, because the refinery's management had failed to follow proper procedures to inform and consult its works council before deciding to close down the refinery.

Facts

SNC Raffinerie des Flandres, a TOTAL subsidiary, ("SNC Flandres") operates a refinery near Dunkirk, in the North of France. At the relevant time it employed 364 people. On 7 September 2009 management informed the refinery's works council that production would be stopped temporarily for economic reasons, as there was insufficient demand for the refinery's products. The announcement was no more than that: an announcement, not an invitation to consult with the works council. Production was indeed stopped one week later and the employees were instructed to perform maintenance and security work only. The idea was to resume refining operations as soon as the market improved, so management said.

On 2 February 2010, corporate headquarters of TOTAL issued a press release to the effect that, although no final decision had been made on the refinery's future, it would cease refining crude oil and that a certain inspection procedure, which by law must be carried once every six years, and which had to be completed before October 2010 in order to avoid the refinery losing its operating licence, would not be carried out.

On 8 March 2010 the central works council for the relevant part of the TOTAL organisation was informed that the refinery would cease operating as a refinery, that the plant would be transformed into a training centre for TOTAL employing 240 people and that alternative jobs would be found for (almost all of) the remaining staff. The central works council was invited to consult regarding this decision.

The works council protested, arguing that the decision to close down the refinery had effectively already been made in September 2009 and that by law the works council should have been invited to consult at that time. Management disputed this, stating that in September 2009 there was no more than a decision to suspend production temporarily, which is not a decision requiring consultation. The works council did not accept this explanation and on 25 March 2010 issued summary (*référé)* proceedings in which it applied for temporary injunctive relief consisting mainly of a court order to resume refining operations. The works council was joined as plaintiff by the central works council, two unions and 161 individual employees.

The provision of law on which the plaintiffs based their claim is Article L 2326-6 of the Labour Code (*Code du travail*), which provides that a

company's works council shall be consulted on issues concerning the organisation, management and business of the company as well as, in particular, measures likely to affect the volume or structure of the workforce, the working hours, the terms of employment, the working conditions or vocational training.

Court of first instance

The issue was whether the decision that had been made in September 2009 was truly no more than a decision to suspend refining operations temporarily, as management asserted, or whether it was effectively a decision to close down the refinery, as the plaintiffs argued. In the former case, there was no issue concerning the organisation, management or business of the company, let alone a measure likely to affect the volume or structure of the workforce, as provided in said Article L 2326-6.

In a judgment delivered on 22 April 2010, the court of first instance in Dunkirk agreed with the plaintiffs that the decision taken in September 2009 was a decision as provided in said Article L 2326-6 and that therefore, given that the works council (and the central works council) had not been consulted on it, it was manifestly illegal (*manifestement illicite*). In such a case the court, in summary proceedings, has significant power to order that measures be taken to cease the illegal situation. However, the court declined to order the resumption of refining operations, since resuming refining activity would not alter the fate of the staff and would even appear to exceed what is permissible in *référé* proceedings. As a result, TOTAL and its subsidiary SNC Flandres were merely ordered to resume the consultation procedure and to pay the plaintiffs damages.

Court of Appeal

The works council and the unions appealed the ruling before the Court of Appeal of Douai. On 30 June 2010, this court not only confirmed the court of first instance's finding that management's decision of September 2009 was manifestly illegal; it went further, by ordering the defendants, on pain of a penalty of € 100,000 per day, to resume within a period of fifteen days from notification of the judgment, the activity of refining at the refinery, which by this time had been suspended for almost nine months.

The Court of Appeal held that the temporary cessation of activity in September 2009 was in fact a permanent cessation, proved by the decision to cancel the inspection of its facilities, which had to be carried out before October 2010 in order to allow the refinery to retain its exploitation permit. This had affected the refinery's staff, its structure and employment conditions within the meaning of Article L. 2323-6 of the Labour Code and Article 4 of Directive 2002/14/EC, which provides that the information and consultation must cover *"decisions likely to lead to substantial changes in work organisation or in contractual relations"*.

The Court concluded by stating that under such circumstances, failure to consult the Central Works Council and the works council in September 2009 was illegal and that the only way to put an end to the illegal situation was to order the resumption of activity at the refinery.

Commentary

French law grants courts in summary (*référé)* proceedings considerable power with regard to measures aimed at putting an end to a "manifestly illegal" situation *(trouble manifestement illicite*). In this decision the court goes even further, by ordering the resumption of an activity that had been suspended for nearly nine months.

In the past, *référé* judges have had the opportunity to suspend the implementation of important projects pending proper consultation with staff representatives. For example, they ordered management of Gaz de France to summon their European Works Council to an extraordinary meeting, meanwhile suspending management's decision on a merger project pending that council's opinion on the project.[1] In a more recent case, the *référé* judge ordered Dunlop Tires to stop a restructuring project, involving 820 job cuts, until the European Works Council consultation was complete and this council was provided with full information and accurate documents on the project.[2]

However, the TOTAL decision is more surprising, since the *référé* judge goes much further, by ordering the resumption of an activity that had been suspended for several months. In other words, by ordering the resumption of activity, the judge undid a measure already applied by management, as it were, reviving the situation that had existed before the management's unlawful decision in September 2009. In fact, this is not the first time a *référé* judge has undone a measure that had already been implemented. In a 2002 decision, Honeywell was ordered to put on hold a merger project and to reinstate 37 employees who had been transferred pursuant to the merger, pending the resumption of an information and consultation procedure with the company's Central Works Council.[3]

In the TOTAL case, the court based its decision on breach of both the French Labour Code and Article 4 of Directive 2002/14/EC. Article 4 of this directive provides that information and consultation shall cover *''decisions likely to lead to substantial changes in work organisation or in contractual relations''*. Although it does not provide for any sanction in case of breach of such obligation, Article 8(2) provides that *"Member States shall provide for adequate sanctions to be applicable in the event of infringement of this Directive by the employer or the employees' representatives. These sanctions must be effective, proportionate and dissuasive".*

So, was the sanction imposed on TOTAL effective, proportionate and dissuasive? That it is dissuasive is undeniable; surely employers will think twice in future before by-passing their works council. However, the proportionality and effectiveness of the sanction can be questioned.

In its arguments, TOTAL highlighted the damages that resumption of its refining activity would cause, namely losses of several million Euros per month, in a context in which the activity was already in serious economic difficulties and, secondly, the need to inspect its facilities, which had stood idle for several months, before considering any resumption. The Court of Appeal of Douai, however, seems to have completely ignored the technical delays that such resumption would entail, by ordering TOTAL to resume the refinery's activity within fifteen days of service of its decision.

Finally, the effectiveness of a sanction such as the one imposed on TOTAL is also questionable. If the decision to temporarily stop production in September 2009 were a permanent and irreversible decision, as claimed by the appellants and accepted by the Court of Appeal of Douai, the resumption of activity would be unlikely to have any positive effect on the information and consultation procedure with staff representatives, since, in any case, TOTAL would be perfectly free to permanently cease the activity of the refinery once the information and consultation procedure has been conducted.

All these factors combine to give the impression that the Court of Appeal of Douai may have gone too far by imposing such a severe sanction. The sanction seems harsh even by the standards of French labour law,

which provides that the absence of, or poor quality of, consultation with a works council is a criminal offence, namely that of *délit d'entrave* (obstruction)[4]. However, this should not lead to the annulment of the measure taken in breach of the consultation requirements. This was highlighted by a 1998 Supreme Court decision, in which it was held that the absence of consultation with the works council, punishable as a *délit d'entrave*, could not lead to the invalidity or annulment of the employer's decision.[5]

In the meantime, TOTAL has appealed to the Supreme Court. Naturally we will keep our readers informed of the sequel to this fascinating saga.

Comments from other jurisdictions

Austria (Andreas Tinhofer): In Austria, the most the works council could have done in such a situation would be to sue the employer for failure to inform and consult and to delay the measure by a maximum of four weeks. It is very rare in practice that works councils resort to either of those two remedies.

There is no means by which to order an employer to undo a management measure that has already been implemented. The employer (or the management) risks an administrative fine only if the works council is not informed on a planned mass redundancy on time (the maximum fine amounting to € 2,180). Even in such cases the works council would need to initiate proceedings against the employer, which in practice rarely happens.

Measures entailing "changes in the establishment" (*Betriebsänderungen*) give the works council under certain circumstances the right to ask for a so-called "social plan" in order to avoid, remedy or mitigate the negative effects on the workforce. A social plan can be enforced before a special conciliation committee set up to hear each individual case, at the employment court. Incomplete or delayed information will be taken into account when the committee decides upon the compensation package. The managerial measure itself, however, may not be questioned by the conciliation committee or the employment court.

Germany (Paul Schreiner): In Germany there are a couple of sanctions an employer can face and neither of these would have allowed a court to order the employer to resume production.

In general, an employer is under a duty to consult with its works council if it decides to stop production. If the decision also involves negative consequences for the employees, a social plan must be concluded, providing benefits for the employees. Whether the works council can claim injunctive relief for the employer's failure to consult with it is a matter of hot dispute. About half of the labour courts in Germany grant injunctive relief, whilst the other half disallows such claims, on the grounds that an individual employee can claim damages if the employer fails to conclude a social plan. However, injunctive relief can only be granted so long as the intended measure of the employer has not been implemented. The question under German law would rather be whether the production had genuinely ceased in the case at hand – and it seems that it had since the refinery could not resume production without further measures.

Moreover, failure by an employer to consult with the works council constitutes a misdemeanour under s121 of the Works Council Constitution Act (*Betriebsverfassungsgesetz*, BetrVG).

The Netherlands (Peter Vas Nunes): Had a Dutch court delivered this judgment, it would not be considered out of the ordinary. In fact, court orders against companies to revoke a decision and to undo everything that has been done to implement it, on account of failure by management to consult adequately and in a timely fashion with the works council, are fairly routine.

Spain (Ana Campos): According to Spanish Law, failure to consult with employees' representatives would have constituted two infractions, because the closing of a business activity requires an administrative authorisation, which will not be granted if the employee representatives' consultation and participation rights have not been complied with. The fines range from € 626 to € 6,250 for the lack of consultation and from € 6,251 to € 187,515 for closing the company without authorisation. In addition, failure to follow the procedures for the collective termination of employment contracts would result in such terminations being void, and entail the reinstatement of the employees with back pay. We are not aware of any case in Spain in which a company was obliged to reopen and reinitiate activities.

(Footnotes)

1 Cass. soc., 16 January 2008, No 07-10597 *Gaz de France*.
2 Court of Appeal of Versailles, 27 January 2010, No 09-07384 *Goodyear Dunlop Tires France Co*.
3 Cass. soc., 25 June 2002, No 00-20939 *Honeywell*.
4 *Délit d'entrave* carries a fine of € 18 750.
5 Cass.soc. 5 May 1998 No 96-13498.

Parties: *Comité d'Etablissement de la Raffinerie des Flandres et al – v – SNC Raffinerie des Flandres et al*
Counsel: Patrick Tillie (for 3 of the plaintiffs), Philippe Raymond and Jean Benoit Lhomme (for two of the defendants)
Court: *Cour d'appel de Douai*
Date: 30 June 2010
Case number: 1179/10 RG 10/03260
Hard copy publication: not available
Internet publication: not available

ECJ Court Watch

Summaries by Peter Vas Nunes

RULINGS

ECJ 24 June 2010, case C-98/09 *(Francesca Sorge – v – Poste Italiane)* (Italy) (FIXED TERM WORK)
This case concerns the Framework Agreement on fixed-term work annexed to Directive 1999/70 ("the Framework Agreement"). Clause 5 requires Member States to take measures to prevent abuse of successive fixed-term contracts. Member States have the choice of several measures, one of which is that the employer must provide "objective reasons" for justifying the renewal of a fixed-term contract. Italy already had such a measure in place as early as 1962, long before the Directive came into force. The law introduced in that year provided that an employment contract must always be considered permanent except in certain situations. One of these exceptions allowed for a fixed-term contract "where the recruitment takes place in order to replace absent workers who are entitled to retain their post, provided that the fixed-term employment contract gives the name of the replaced worker and the reason for his replacement". In 2001 this provision of law was relaxed. The biggest change was the removal of the requirement that the fixed-term contract specify the name of the replaced worker and the reason for his or her replacement.
In 2004, i.e. after the 1962 law had been amended, Ms Sorge was employed by Poste Italiane for a fixed term of 3½ months. Her contract stated that she was to replace an unnamed person. Apparently, the contract was not renewed, given that she applied to the court, seeking an order that the fixed-term clause in her contract was illegal. The court of first instance referred two questions to the ECJ. The first relates to Clause 8(3) of the Directive, which provides: "Implementation of this agreement shall not constitute valid grounds for reducing the general level of protection afforded to workers in the field of this agreement". The referring court wished to know whether Clause 8(3) precludes a change of law such as the one at issue. The referring court's second question was whether, if Clause 8(3) precludes a change of law such as the one at issue, the national court should disapply it, i.e. (in this case), whether the Italian courts should apply the 1962 law as if it had not been amended.

Before answering these questions, the ECJ examined the Italian government's contention that the Framework Agreement applies exclusively to workers who have entered into successive fixed-term contracts, not to workers on their first fixed-term contract such as Ms Sorge. The ECJ dismissed this argument, *inter alia*, because Clause 8(3) cannot be interpreted narrowly.

The referring court noted that the 2001 law relaxing the requirement for fixed-term contracts in the event a temporarily absent employee is to be replaced "constitutes 'a reduction' of the general level of protection afforded to fixed-term workers for the purpose of Clause 8(3) of the framework agreement, which was formerly compulsory and which enabled the worker to asses in advance whether the reason for the contract was genuine and actually existed, to be fully informed and, lastly, to decide whether it would be appropriate to bring legal proceedings."

The ECJ, however, notes that not every reduction of the level of protection of fixed-term workers is a reduction prohibited by Clause 8(3). For a change of law to be prohibited, two requirements must be satisfied: (a) the reduction must be clearly connected to the transposition of the Framework Agreement into national law and (b) the reduction must be in the general level of protection.

Re (a): it is up to the Italian courts to establish whether the relaxation of the rules in 2001 was "a result of the legislature's wish to achieve a fresh balance in the relations between employers and workers" or "an alteration stemming from a clearly identified different objective". In particular, the Italian courts will have to examine whether the reduction followed "from the wish to counterbalance, in order to alleviate the constraints weighing on employers, the rules regulating the protection of workers introduced by *[the 2001 law]* with a view to giving effect to the framework agreement". Although, as noted, it is up to the Italian courts and not the ECJ to examine this, the ECJ remarks that it is not apparent from the order for reference that the Italian legislature wished to pursue any other objective than to give effect to the Framework Agreement. In other words, condition (a) has most likely been satisfied.

Re (b): the condition that a change of law must reduce the general level of protection implies that only a reduction on a scale likely to have an overall effect on the relevant national legislation is capable of being covered by Clause 8(3). Although this is also something to be determined by the Italian courts, the ECJ makes three points in this respect. First, the relaxation of the law in 2001 only reduces the level of protection of those fixed-term workers who replace temporarily absent permanent employees. These replacers may represent no more than a small proportion of all fixed-term workers, in which case the change of law is not likely to have an "effect overall" on the level of protection of fixed-term workers. Secondly, the reduction in the level of protection of replacers is offset by an increased level of protection of other types of fixed-term workers, given that their contracts must be in writing and must state the reasons for their use, which was not the case before 2001. Finally, the 2001 change of law must be assessed having regard to all the other measures under Italian law aimed at preventing wrongful use of fixed-term contracts. In summary, condition (b) has most likely not been satisfied.

As for the second question referred to the ECJ, it notes that Clause 8(3) does not fulfil the conditions required for it to have direct effect, *inter alia*, because it merely prohibits a general reduction in the level of protection.

(See EELC 2010-3 for a summary of the Advocate-General's opinion.)

ECJ 1 July 2010, Case C-471/08 *(Sanna Parviainen – v – Finnair)* (Finland) (MATERNITY)
Sanna Parviainen was an air hostess with the rank of purser, employed by Finnair. Her basic salary was € 1,821 per month, but because she was entitled to a large number of supplementary allowances, her average monthly income totalled € 3,383. Some of these allowances constituted compensation for seniority (= rank of purser), for length of service and for professional qualifications. Others were compensation of discomfort, such as night work, work on Sundays and national holidays, work in excess of eight hours in any day, long-haul flights and time differences. Lastly, there was the fact that the amount a cabin attendant earns in any month depends on the number and sort of flights to which she is assigned, which varies from month to month.

Ms Parviainen became pregnant. In accordance with EU and Finnish

law, she was no longer allowed to work on aeroplanes. For this reason she was temporarily relieved of her flight duties and given clerical work on the ground as from 30 April 2007. This was over four months before the start of her maternity leave, which was 15 September 2007. Finnair reduced her income by € 834 per month. This reduction was in accordance with a collective labour agreement that provided that in such a situation the pregnant employee is eligible to payment of her basic salary plus the average additional pay of all air hostesses in the same pay grade. Ms Parviainen found her pay reduction unfair. She took her employer to court, claiming the balance between her average monthly income and what she was actually paid during the period 30 April - 15 September 2007 ("the ground work period"). Finnair countered that Ms Parviainen had no reason to complain, as she was paid more than other workers were paid for doing the same clerical work on the ground. The court of first instance stayed the proceedings and asked the ECJ for guidance on the interpretation of Article 11(1) of Directive 92/85/EC, which is the directive on health and safety of pregnant (etc.) workers.

Directive 92/85/EC distinguishes between two periods during a worker's pregnancy. **Article 5** provides that, if the worker's job involves safety or health risks to herself or her unborn child, the employer shall (1) adjust her working conditions and/or working hours and, if this is not reasonably possible, (2) move her to another job or, if this is not reasonably possible, (3) grant leave of absence. **Article 8** deals with the period of maternity leave. The right to income for workers during the period prior to their maternity leave in which they may not perform their own job ("Article 5 workers") and for workers during maternity leave ("maternity leavers") is dealt with in Article 11, but in separate sections of this Article. Article 11(1) provides that an Article 5 worker is entitled to "a payment" or "an adequate allowance" "in accordance with national legislation and/or national practice". *[Note: "payment" refers to sums paid by the employer; "allowance" refers to income from social insurance etc.]* Article 11(2)(b) likewise provides that a maternity leaver is entitled to a payment or an adequate allowance, but with the difference that such an allowance shall be deemed adequate if it guarantees income at least equivalent to sick pay (Article 11(3)).

The ECJ begins by stressing that the situation of an Article 5 worker cannot be compared to that of a maternity leaver. Therefore, it is not possible to apply the ECJ's case law on income during maternity leave (*Gillespie*, etc.) to Article 5 workers. Does this mean that Article 5 workers are entitled to continued payment of their full salary including all allowances? No, Article 11(1) ("in accordance with national legislation and/or national practice") makes clear that this is not the case. However, the exercise by the Member States of their right to determine the level of pay cannot undermine the Directive's objective of protecting pregnant workers' health and safety. For this reason, the ECJ finds that that level of pay of an Article 5 worker may not be (1) less than that paid to workers doing similar work *[in Ms Parviainen's case: clerical workers]* nor less than (2) her own basic salary plus "the pay components or supplementary allowances which relate to her professional status, such as, in particular, her seniority, her length of service and her professional qualifications". An Article 5 worker need not be paid supplementary allowances which "are dependent on the performance by the worker concerned of specific functions in particular circumstances and which are intended essentially to compensate for the disadvantages related to that performance".

As for Ms Parviainen, the Finnish courts will need to determine whether her income during the ground work period, which was based on the average earnings of all air hostesses in that period, was no less than her basic pay plus her (own) allowances for seniority, length of service and professional qualifications.

ECJ 1 July 2010, case C-194/08 *(Susanne Gassmayr – v – Bundesminister für Wissenschaft und Forschung)* (Austria) (MATERNITY)
Suzanne Gassmayr was a junior hospital doctor in the employment of the University of Graz, which is operated by the Austrian state. Her job included being on call outside normal working hours. This made her eligible for an "on call allowance" on top of her regular salary. The allowance was not paid at a flat rate but depended on the time actually spent on call. Ms Gassmayr became pregnant and produced a medical certificate which stated that she had to stop working (entirely) from 4 December 2002 for reasons related to her pregnancy, as per Austrian law, which in turn was in line with Directive 92/85/EEC. Article 11(1) of this directive provides that, in situations where a pregnant employee may not perform her duties for health reasons, "the employment rights relating to the employment contract [...] must be ensured in accordance with national legislation". Ms Gassmayr's absence lasted until and after she gave birth. Thus, her absence covered two periods: (i) an initial period between 4 December 2002 and the start of her maternity leave (8 weeks before the delivery date), and (iii) a subsequent period of maternity leave, during which she would not have worked anyway, regardless of her condition.

The university continued paying Ms Gassmayr her full basic salary but stopped paying the on call allowance from 4 December 2002. Ms Gassmayr objected and eventually took her case to court, claiming continued payment of the allowance. The court *(Verwaltungsgericht)* referred three relevant questions to the ECJ (the fourth question was moot).

The first question was whether Article 11 of Directive 92/85 has direct effect. *[Note that the University of Graz is a state-run institution and that the direct effect at issue was therefore direct vertical effect.]* If so, the second question went on to ask, does it entitle expectant mothers to continued payment of an allowance for on-call duty during periods in which they are prohibited from working and/or during maternity leave? The third question asked whether such an entitlement also applies where such an expectant mother/maternity leaver continues to receive her full income with the only exception of extra pay for tasks actually performed.

Before answering these questions, the ECJ had to rule on a challenge by the Commission as to the admissibility of the reference for a preliminary ruling. The Commission argued that Article 11 of the directive was not relevant to the case since the dispute did not concern Ms Gassmayr's right to have her health and that of her child protected but merely concerned the amount of her remuneration. The ECJ disagreed, noting that "it is not evident that the interpretation of Article 11(1) of Directive 92/85 [...] bears no relation to the actual facts [...]".

As for the first question, the answer depends on whether Article 11(1) is unconditional and sufficiently precise. The ECJ finds that this is the case, despite the fact that Article 11(1) provides that income must be guaranteed "in accordance with national legislation" and despite the fact that Article 11(3) allows the maternity leave allowance to vary from one Member State to another. The fact that Article 11(1) grants Member States a certain degree of latitude and that the amount of salary to which a pregnant worker is entitled differs from one Member State to another "does not affect the precise and unconditional nature" of the

right bestowed by Article 11(1), in the sense that Member States may not limit the existence or restrict the scope of that right.

As for the second and third questions, the ECJ distinguished between two periods: (i) the period during which a pregnant worker, *prior* to her maternity leave, is prohibited from working and (ii) the period *during* maternity leave. The ECJ takes no less than 20 paragraphs to more or less repeat what it said in the *Parviainen* case, namely that during period (i) the pregnant worker must continue to receive an income that must in any event be made up of her basic monthly salary and the pay components or supplements relating to her occupational status, such as allowances relating to seniority, length of service and professional qualifications. The Directive does not require maintenance of the pay components or supplements "which are dependent on the performance by the worker concerned of specific functions in particular circumstances and which are intended essentially to compensate for the disadvantages relating to that performance".

During period (ii), i.e. the maternity leave, the ECJ basically repeats what it said in *Gillespie* (C-342/93), *Boyle* (C-411/96) and *Alabaster* (C-147/02), namely that the Member States are free to determine how much income a pregnant worker receives during her pregnancy leave, provided it is no less than employees receive during sick leave. Therefore, a national law, such as the Austrian law at issue, that goes beyond what the Directive requires as a minimum – in this case, by affording maternity leavers (and pregnant workers who are prohibited from working for pregnancy-related health reasons) the right to continued full pay with the sole exception of on-call duty allowances – is compatible with EU law.

ECJ 8 July 2010, Case C-246/09 *(Susanne Bulicke – v – Deutsche Büro Service* (Germany) (SEX DISCRIMINATION)
Deutsche Büro Service published an advertisement seeking job applications from 18-35 year olds. Ms Bulicke, who was 41, applied. Her application was rejected on 19 November 2007 on the ground that all the vacancies had already been filled. Shortly afterwards (the ECJ's ruling does not reveal when this was) she found out that this was not true and that she would appear to have been discriminated against on the basis of her age. On 29 January 2008 she brought a claim for age discrimination before a German court. The court denied her claim on the ground that it had not been brought within the two-month time-bar period prescribed by the General Law on Equal Treatment (the "AGG"), which is the German transposition of Directive 2000/78/EC (the "Directive"). The AGG was introduced in 2006. Previously, German law did not outlaw age discrimination, but it did outlaw sex discrimination. Claims for sex discrimination, as a rule, had to be brought within six months following the rejection of a job application. The rules on sex discrimination were replaced in 2006 by the AGG, which now covers all forms of outlawed discrimination. According to the wording of the AGG, in the case of a rejected job application, the two-month time-bar period starts to run on the date the applicant is informed of the rejection. Despite this wording, it is possible to interpret the relevant provision (the "two-month rule") in such a way that the two-month period does not start to run until the applicant has knowledge of the discrimination (which may be much later than the rejection of the application).

The Directive merely enjoins the Member States to outlaw certain forms of discrimination, including age discrimination. It does not provide for procedural rules. In fact, it explicitly allows the Member States to determine the procedure for bringing discrimination claims according to their own domestic law. This means that each Member State is free to legislate time-bar rules as it wishes. Thus, on the face of it, the case of Ms Bulicke would not seem to involve EU law. However, it is settled ECJ case law that national time-bar rules must comply with two basic principles of EU law: the principle of *equivalence*, which means that a national time-bar period in a law transposing an EU directive must not be shorter than a time-bar period for bringing "similar" domestic claims, that is to say claims in matters where the "purpose and cause of action" are similar and; the principle of *effectiveness*, which means that a time-bar rule may not be such as to render the exercise of the rights conferred by the directive to be "impossible or excessively difficult". In addition, there is the principle of "non-regression" laid out in Article 8 of the Directive, which prohibits the Member States from reducing any existing level of protection against the sort of discrimination that the Directive aims to outlaw.

Ms Bulicke appealed to the relevant Court of Appeal, which asked the ECJ whether the two-month rule in the AGG complies with the Directive.

The ECJ declined to rule on the compatibility of the two-month rule with the principle of equivalence, as it is up to the national court, "which alone has direct knowledge of the procedural rules governing actions in the field of employment law", to establish whether this is the case. However, the ECJ did provide guidance by stating that the two-month rule "does not appear" to be less favourable than provisions governing similar domestic actions in employment law, so that the principle of equivalence had probably been complied with.

The question as to the compatibility of the two-month rule with the principle of effectiveness breaks down into two sub-questions: (i) is two months too short? and (ii) is it reasonable for the period of two months to commence on the date that a job application is rejected, given that the applicant may not know until (much) later that the rejection was discriminatory?

The ECJ held that two months is not too short a period in view of "the fundamental principle of legal certainty" and the importance for an employer to be informed quickly of a claim and not to be required to retain documents relating to recruitment procedures for an excessive amount of time. As for the starting point of the two month period, if the AGG is to be interpreted in such a way that – contrary to its literal text - the two month period does not start to run until the applicant "has knowledge of the alleged discrimination", then there is no incompatibility with the Directive.

As for the "non-regression" aspect (see also the ECJ's ruling in *Sorge – v – Poste Italiane*, summarised above) the ECJ referred to its ruling in the *Angelidaki* case (C-378/07 to 380/07, para 126), in which it held that, in order to be caught by a non-regression prohibition, a provision of law must (1) be connected to the implementation of the directive in question and (2) relate to the "general" level of protection afforded to the workers in question. Since Directive 2000/78/EC does not refer to sex as a ground for discrimination, and since the directive on which the pre-2006 German prohibition of sex discrimination was based lacked a non-regression clause, the two-month rule is not incompatible with the non-regression clause in the Directive.

ECJ 15 July 2010, case C-74/09 *(Bâtiments et Ponts* and *WISAG Produktionsservice – v – Berlaymont)* (Belgium) (PROCUREMENT)

This case deals with the renovation of the Berlaymont Building, the European Commission's headquarters in Brussels. In 1994 the

building's owner ("the contracting authority") invited tenders. The invitation stated, as a condition for being awarded the contract, that the contractor be registered in Belgium as a contractor. In order to be so registered, a company must provide, *inter alia*, to the Belgian "Registration Committee", evidence that it has no arrears of taxes or social insurance obligations in its home country or in Belgium. This committee consists of nine members, three each of whom are nominated by the Belgian government, the unions in the construction industry and the employers' federation in the construction industry. Two contractors submitted tenders. A Belgo-German consortium, BPC/WIG, lost the bid on account of not having submitted a Belgian registration. Instead, it submitted with its bid statements by the German tax and social insurance authorities that it had no tax or social insurance arrears. It brought a claim before the Belgian courts. The claim ended up in the Belgian Supreme Court, which referred to the ECJ two questions regarding the compatibility of the Belgian rules described above with Directive 93/37/EC (now 2004/18/EC) on the public procurement of works ("the Directive").

The first question was whether the Directive precludes national legislation requiring a foreign tenderer to register with an authority in the contracting authority's Member State even in the event the tenderer has provided evidence that it has fulfilled its tax/social security obligations in its own home country.
The ECJ compared the Belgian legislation at issue with the Directive. The Directive lists exhaustively the reasons for which a foreign contractor may be excluded from a tender. One of these reasons is that the contractor has failed to comply with its tax/social security obligations in its home country or in the country where the work is to be performed. Belgian law incorporated this reason in its national legislation by requiring foreign contractors to register with said committee and by giving that committee the task of examining compliance.

The Belgian legislation at issue does not go beyond what the Directive allows. The reason it requires evidence that tax/social security contributions have been duly made, not only in the contractor's home country but also in Belgium, is that Belgium has a reasonable desire to exclude from its territory contractors that do not play by the rules (§§ 40-42). Moreover, complying with Belgian law is not an undue hardship, given that (i) if a contractor has previously performed work in Belgium it should be relatively easy to obtain evidence that it has left no tax or social security contributions unpaid there and, if a contractor has not performed work in Belgium before, it can simply make a declaration to that effect, (ii) the Belgian committee must accept as sufficient evidence of non-arrears in the contractor's home country a certificate to that effect issued by the competent authority in that country, (iii) any investigation of such a certificate must be confined to its authenticity and (iv) such an investigation must be performed in a non-bureaucratic manner. Thus, in conclusion, the ECJ found that the Belgian law at issue was not contrary to any EU rules solely because it required foreign contractors to register with a committee for the purpose of verifying compliance with tax/social insurance obligations in the contractor's home country and in Belgium.

The second question had to do with the fact that the Directive allows the contracting authority (in this case the owner of the building to be renovated) to require proof of tax/social security compliance, whereas Belgian law requires foreign contractors to provide such proof, not to the contracting authority, but to a third party, namely said committee. The ECJ began by noting that the Directive's wording does not preclude the compliance-check from being done by a third party. However, such a third party must be impartial and neutral. This is not the case in Belgium, where two-thirds of the committee's members are appointed from the ranks of the Belgian construction industry. Therefore, if the committee's power includes exercising a check as regards the substance of the requirements which underlie the issue of certificates in the contractor's home country, then that would clearly be incompatible with the Directive. On the other hand, however, if the committee's power goes no further than to check the authenticity of the certificates, then there is no incompatibility with the Directive.

ECJ 15 July 2010 (Grand Chamber), case C-271/08 *(European Commission – v – Germany)* (Germany) (PROCUREMENT)

In 2003, an employer's federation representing all German local authorities (town councils) concluded a collective labour agreement with two unions. The agreement provided, *inter alia*, that the local authorities could insure certain pension obligations they had in respect of their employees exclusively with a limited group of insurance companies, listed in an appendix to the agreement ("the approved insurers"). The European Commission challenged this provision in the collective agreement as being at odds with Directive 92/50/EC and – from 1 February 2006 – its replacement 2004/18/EC in the field of procurement (the "Directives"). In the Commission's view, the parties to the collective agreement should have issued a European call for tenders. The Commission asked the ECJ to declare that Germany had violated the Directive as well as the principles of freedom of establishment and freedom to provide services. The German government, supported by Sweden and Denmark, defended the action.

The Directives require "contracting authorities" (which essentially means States and all public bodies, such as local authorities) to tender "public contracts" (which includes contracts for the provision of financial services), with a "pecuniary interest" over a certain threshold, at the European level. The Directives exempt "public service contracts for [...] employment contracts" from their scope.

Germany's first line of defence was that a public body, such as a local authority, that awards a contract for services, not in its public capacity but in its capacity as an employer, does not act as a "contracting authority". Secondly, Germany denied that the contracts in question qualified as "public contracts" for a "pecuniary interest", given that the local authorities do no more than act as an intermediary between the approved insurers and their employees.

The first question the ECJ needed to address was whether the fact that the contracts between the local authorities and the approved insurers "follow from the application of a collective agreement" exempts them from the scope of the Directives, as ruled by the ECJ in the cases of *Albany* (C-67/96) and *Van der Woude* (C-222/98). In these cases, the ECJ had held "that, despite the restrictions of competition inherent in it, a collective agreement between the organisations representing employers and workers which set up in a particular sector a supplementary pension scheme managed by a pension fund to which affiliation is compulsory does not fall within Article 101(1) TFEU" *[Note: Article 101(1) TFE, formerly Article 81 EU, prohibits all manner of behaviour limiting free competition.]* In other words, a collective agreement may obligate employers and employees in a particular sector to contribute to a certain pension plan. That is a different issue from the one at hand. The issue in this case is whether, given that there is a collective obligation to pay contributions into a certain scheme, the award of a contract to an insurance company to

operate that scheme is subject to the EU's procurement rules. This is an issue involving tension between, on the one hand, the freedom to bargain collectively, which is a fundamental right enshrined in many international and European conventions, charters, etc. and, on the other hand, the freedom to provide services throughout the EU. As the ECJ ruled in *Viking* and *Laval*, the freedom to bargain collectively is not unlimited. Based on the foregoing, the ECJ concluded by answering the first question negatively. The mere fact that the award of contracts to the approved insurers followed from the application of a collective agreement did not exempt them from the scope of the Directives.

The next question was whether compliance with the Directives was irreconcilable with the attainment of the social objective pursued by the collective agreement. The defendants advanced four arguments as to why this was the case, but the ECJ dismissed them all. First, it is not so that the interests of the employees involved were served better by having their pension obligations insured with a limited group of pre-approved insurers as compared with each local authority having to negotiate with insurance companies on its own. Secondly, it is not the case that only pre-approved insurers are able to guarantee the required level of solidarity between "good risks" and "bad risks". Thirdly, there is no reason to believe that the approved insurers are more financially sound than other insurers in Europe. Finally, the fact that limiting the local authorities' choice of pension insurers to those approved in the collective agreement will save management costs, is not a reason to exclude other insurers from applying for a contract.

Having thus established that compliance with the Directives was by no means irreconcilable with social objectives pursued by the collective agreement, the ECJ went on to examine whether the contracts concluded between the local authorities and the approved insurers represented "public service contracts". The ECJ found that they were.

The upshot of the matter was that Germany was found to have failed to fulfil its obligations under the Directives.

ECJ 29 July 2010, case C-151/09 *(UGT-FSP – v – Ayuntamiento de La Liñea de la Concepción)* (Spain) TRANSFER OF UNDERTAKING
La Liñea is a town in Spain. It had outsourced certain activities, namely caretaking and cleaning of schools, street sweeping and the maintenance of parks and gardens, to private companies (the "Contractors"). In 2008, the municipal authorities terminated the contract with the Contractors and took the said activities back in-house ("insourcing"). The employees involved in performing those activities (the "Employees") continued to do the same work, in the same places, under the same terms and conditions and under the supervision of the same managers, the only difference with the pre-insourcing situation being that these managers now reported to elected officials of La Liñea rather than to the owners/directors of the Contractors.

Prior to the insourcing, some of the Employees had been members of the works councils that were in place at the Contractors. They asked the municipal authorities of La Liñea to be given time off so that they could continue performing their duties as employee representatives. Their request was turned down. The municipal authorities reasoned that these individuals had ceased to be worker representatives in the meaning of the law, having now been integrated into the personnel organisation of La Liñea, which had a works council of its own. On behalf of the individuals involved, a union (UGT-FSP) brought an action before the local court, challenging the rejection of the demand for time off. The court stayed the proceedings and asked the ECJ for clarification of the meaning of Article 6(1) of the Acquired Rights Directive 2001/23/EC.This Article 6(1) provides: "If the undertaking, business or part of an undertaking or business preserves its autonomy, the status and function of the representatives [...] of the employees affected by the transfer shall be preserved on the same terms and subject to the same conditions as existed before the date of the transfer [...]". Spain transposed this provision, the relevant provision of Spanish law also referring to an entity that "preserves its autonomy".

After dealing with the Spanish government's objection that the insourcing in question did not constitute a transfer of undertaking *[and although the ECJ left this aspect for the Spanish courts to determine, it is clear that the ECJ found little merit in the objection]*, the ECJ addressed the main question, which was whether the concept of *autonomy* in Article 6(1) of the Directive must be interpreted as being equivalent to the concept of *identity* in Article 1(1)(b) ("an economic entity that retains its identity").

The ECJ began by noting that the question of retention of identity is to be assessed at the time the transaction (in this case, the insourcing) takes places, whereas the question of preservation of autonomy is to be assessed after that time. This is a relevant distinction given that, in *Klarenberg*, the ECJ had ruled that a transaction can qualify as a transfer of undertaking even if the transferred entity does not preserve its autonomy. Thus, the concepts of identity and autonomy are different.

As the Directive does not define the concept of autonomy, the ECJ had to analyse it. Following some observations of a general nature, the ECJ – in paragraph 44 – found that "autonomy is as a general rule preserved, within the meaning of [...] Article 6(1) of Directive 2001/23, if, after the transfer, the organisational powers of those in charge of the entity transferred remain, within the organisational structures of the transferee, essentially unchanged as compared with the situation before the transfer". In other words, if the managers who transferred from the Contractors to La Liñea more or less retained the powers they had, before the transfer, to organise the work, give orders and instructions, allocate tasks to the employees performing the road sweeping, cleaning activities etc. and determine the use of the transferred assets, all without direct intervention from the transferee's organisational structures, then the entity transferred preserved its autonomy. Neither the fact that there was a change in the individuals ultimately in charge nor the fact that La Liñea already had a works council of its own (with "double representation" as a result) is relevant.

In brief, the union seems likely to win this case.

ECJ 16 September 2010, case C-149/10 *(Zoi Chatzi – v – Ipourgos Ikonomikon)* (Greece) (PARENTAL LEAVE)
Ms Chatzi, a Greek civil servant, gave birth to twins. Following her maternity leave she applied for, and was granted, parental leave pursuant to Greek law, which at that time entitled working parents to nine months of paid parental leave. When her period of parental leave ended, she applied for a second period of leave. Her application was denied and she brought legal proceedings. The Greek court asked the ECJ how to interpret Clause 2.1 of the Framework Agreement on parental leave annexed to Directive 96/34, as amended by Directive 97/75. This Clause 2.1 grants workers "an individual right to parental leave on the grounds of the birth or adoption of a child to enable them to take care of that child". The referring court wanted to know how to interpret Clause 2.1 in conjunction with Article 24 of the Charter of Fundamental Rights. This Article 24 provides that children are to have the right to such protection

and care as is necessary for their well-being. Thus, does Clause 2.1 in conjunction with said Article 24 create a right to parental leave, not only for the parents of a child but also ("in parallel") for the child itself? If so, does the grant to twins of only one period of parental leave infringe Article 21 of the Charter, which prohibits discrimination on the basis of birth? This was the Greek court's first question. Its second question was whether, if the right to parental leave is not (also) a child's own right, the term "birth" in Clause 2.1 means that the parents of twins are eligible for two periods of leave.

Before addressing these questions, the ECJ needed to deal with an objection raised by the German government, namely that it is exclusively up to the parties to the Framework Agreement, i.e. the social partners, and therefore not up to the courts, to interpret that Agreement. This objection was based on Clause 4.6 of the Framework Agreement, which states that any matter relating to its interpretation at the European level should, in the first instance, be referred to the social partners. The ECJ rejected this view for two reasons. First, the issue of twins had not been referred to the social partners. Secondly, the Framework Agreement has been implemented in a directive, which is exclusively for the ECJ to reject.

Now turning to the first question, the ECJ noted that Clause 2.1 grants parental leave "to men and women workers", not to their children. It is in line with the purpose of parental leave to read Clause 2.1 literally. Article 24 of the Charter does not stand in the way of a literal interpretation, as children's right to protection and care can be sufficiently safeguarded by entitling their parents to leave.

As to the second question, a literal interpretation is more problematic. The use of the singular ("the birth ... of a child") can be read as meaning that a worker is entitled to a separate period of leave for each child. It is therefore necessary to interpret Clause 2.1 purposively. The purpose of Clause 2.1 is to enable parents to take care of their child. The increased burden of twins as compared to a single child is quantitative in nature, in that the parents must simultaneously meet the needs of two children, but this additional effort does not extend over a greater period of time, since twins, in principle, go through the same stages of development at the same time (§ 58). Accordingly, Clause 2.1 "does not require that entitlement to a number of periods of parental leave equal to the number of children born be automatically recognised in the event of the birth of twins" (§ 61).

However, this is not the whole story. Account must also be taken of the principle that comparable situations be treated equally and that different situations not be treated in the same way, unless objectively justified. This raises the question as to which situations are comparable. Is having twins comparable to giving birth to two babies one shortly after the other? The ECJ does not provide a hard answer, pointing to "the difficulty that exists in defining the group of persons with whom the parents of twins may be compared". The ECJ does, however, rule that Member States, when transposing the Directive, and in particular when adopting measures that exceed the Directive's minimum requirements, should ensure "that the parents of twins receive treatment that takes due account of their particular needs".

ECJ 7 October 2010, case C-224/09 *(Nussbaumer)* (Italy) (HEALTH AND SAFETY)
This case concerns the interpretation of Directive 92/57 on health and safety on construction sites. Article 3(1) requires a safety coordinator to be appointed in the event that more than one contractor is involved. Article 3(2) has two subparagraphs. The first requires a safety plan to be drawn up prior to beginning construction. The second allows Member States, in certain cases, to derogate from "the provisions of the first subparagraph". Does this refer to Article 3(1) or only to the second subparagraph of Article 3(2)? This question came up during the inspection of a site where the roof of a private dwelling was being replaced. There was no safety coordinator and no safety plan. This was not needed according to Italian law, which exempted from certain safety requirements construction on private homes, for which no building permit is required.

The ECJ interpreted the Directive as meaning that Italian law is not compatible with the Directive, taking pain, however, to remind the parties "that a directive cannot of itself impose obligations on an individual and that a provision of a directive cannot therefore be relied on as such against that individual".

ECJ 12 October 2010 (Grand Chamber), case C-499/08 *(Ingeniørforeningen i Danmark on behalf of Ole Andersen – v – Region Syddanmark)* (Denmark) (AGE DISCRIMINATION)
Mr Andersen was employed for 27 years by a Danish provincial authority when he was dismissed for reasons of performance. He was 63 at the time of his dismissal. Danish law entitles an employee who loses his job after having held that job for 12 years or more to severance compensation of between one and three months' salary. Let us call this provision of the law "Section 1". In Mr Andersen's case, Section 1 would have entitled him to compensation equalling three months of salary. This is what he claimed. His demand for payment was turned down because Danish law provides that an employee who already collects retirement ("old age pension") benefits at the time he loses his job, or who is eligible to receive such benefits following termination of his employment and who joined the relevant pension scheme before he was 50, is not entitled to severance compensation. Let us call this exception to the main rule "Section 2/3". Mr Andersen participated in a pension scheme that had a normal retirement age of 65 but allowed participants to begin drawing retirement benefits - obviously, with a discount - from age 60. In Mr Andersen's case, the difference between collecting retirement benefits from the date he lost his job (1 August 2006) and collecting those benefits from age 65 (1 June 2008), i.e. the discount, was over 15%. The court to which Mr Andersen applied referred a question to the ECJ. It wanted to know whether Section 2/3 is compatible with Framework Directive 2000/78/EC on equal treatment in employment and occupation (the "Directive").

The ECJ examined, in turn, (i) whether Section 2/3 falls within the scope of the Directive, (ii) if so, whether it constitutes a difference of treatment on grounds of age and (iii) if so, whether that difference is objectively justified.

The ECJ answered question (i) affirmatively. By excluding a whole category of workers from entitlement to severance allowance, Section 2/3 affects "the conditions regarding the dismissal" of those workers (§§ 19-21).

Question (ii) was also answered affirmatively. Given that the entitlement to old age pension depends on having reached the age of 60, Section 2/3 is based on "a criterion which is inextricably linked to the age of employees". It follows that Section 2/3 is directly age discriminatory. *[The ECJ does not go into the observation in Advocate-General Kokott's opinion as to the relevance of the fact that the discrimination is direct and not indirect]* (§§ 22-24).

Question (iii) regarding objective justification, required investigation of three sub-questions: (a) is Section 2/3's aim legitimate, if so (b) does it constitute an appropriate means to achieve that aim and, if so (c) does it go beyond what is necessary to achieve that aim?

The aim pursued by Section 2/3 is to facilitate employees who have been employed with the same employer for a lengthy period of time, and who are therefore likely to have difficulty in finding another job. Clearly, paying a severance allowance to someone who is leaving the labour market, and who is therefore not seeking re-employment, would not help to achieve this aim. Someone who receives an old-age pension is, as a rule, such a person. Therefore, the objective of restricting severance allowances to those who need it is a legitimate one, falling within the category of legitimate labour market objectives provided in Article 6(1)(a) of the Directive, which allows "the setting of special conditions on [...] dismissal" and "conditions for [...] older workers [...] in order to promote their vocational integration" (§§ 25-31).

Is Section 2/3 an appropriate means to achieve said aim? Given the Member States' broad discretion in choosing measures capable of achieving their social and employment policy objectives *(Mangold, Palacios, Age Concern)*, the exclusion of workers who are entitled to old age pension benefits is "not manifestly inappropriate", the court held (§§ 32-35)

Is the exclusion necessary to achieve said aim? The ECJ answered this question in two steps. First, it found that Section 2/3 does not go beyond what is necessary to attain said objective in so far as it excludes from the allowance workers who will actually receive an old-age pension on termination of their employment, because Section 2/3 aims to ensure "that the severance allowance is paid only to those for whom it is intended, namely those who intend to continue to work but, because of their age, generally encounter more difficulties in finding new employment" (§§ 36-40).

The second step in the court's reasoning consisted of examining whether it was necessary also to exclude from the allowance workers who do not actually receive an old-age pension but are merely eligible to receive such a pension. This exclusion is based on the idea that, generally speaking, employees leave the labour market when they become eligible for an old-age pension that is sufficiently generous to allow them to stop working (which is the case if they joined the relevant pension scheme before the age of 50). The result of this assumption is that it disfavours redundant workers who wish to remain in the labour market and that it makes it more difficult for them to exercise their right to work. Thus, Section 2/3 unduly prejudices the legitimate interests of such workers and goes beyond what is necessary to attain the social policy aims pursued by Section 2/3 (§§ 41-47).

Conclusion: Section 2/3 is incompatible with the Directive.

ECJ 12 October 2010 (Grand Chamber), case C-45/09 *(Gisela Rosenbladt – v – Oellerking Gebäudereinigungs GmbH)* (Germany) (AGE DISCRIMINATION)
For 39 years, Ms Rosenbladt worked as a part-time cleaning lady (2 hours a day) in a barracks. Her contract referred to the collective agreement for the cleaning sector, which was binding on all employers and employees in that sector. The collective agreement provided that an employment contract terminates automatically at age 65. Accordingly, when she turned 65, her employer informed her that she was no longer employed. She protested, because her income stood to drop substantially and she needed to care for her disabled son. She claimed that her employment continued beyond age 65 and sued her employer for continued payment of salary.

Article 6(1) of Directive 2000/78/EC (the "Directive") allows the Member States to provide that differences of treatment on grounds of age do not constitute discrimination if, within the context of national law, they are objectively justified. Germany implemented the directive through its General Equal Treatment Act (*Allgemeine Gleichbehandlungsgesetz*, abbreviated AGG). Article 10(5) of this Act provides, *inter alia*, that a provision in a (collective or individual) employment contract that lets a contract terminate automatically on the date on which the employee's retirement benefits commence is legitimate, provided it meets the objective justification test. The collective agreement for the cleaning industry (the "RTV") more or less repeated this test, adding that the contract shall terminate no later than at age 65. The referring court asked the ECJ four questions. The main question – no 2 – was whether a provision of national law such as Article 10(5) AGG is compatible with the Directive. Questions 1 and 3 asked whether a provision in a collective agreement providing for automatic termination at age 65 is compatible. Question 4 related to a Member State's decision to declare such a collective agreement universally binding.
Before addressing these questions, the ECJ dispensed with an objection, raised by the Irish government, that the answer had already been given in *Palacios* and *Age Concern*.

Question 2 asked whether Article 6(1) of the Directive precludes a provision of national law that allows the parties to a (collective or individual) employment agreement to provide that an employee's employment shall terminate automatically upon him reaching retirement age. Such a provision is clearly age-discriminatory, but is it objectively justified? The court began by making three introductory observations.

First, automatic termination of an employment is not included in the list of examples that Article 6(1) of the Directive gives of discriminatory provisions that are objectively justified. This, however, does not prevent it from being justified.

Secondly, termination of employment as a result of an automatic termination clause is basically a form of voluntary termination, distinct from dismissal. In the words of the court, a provision such as the one at issue "does not establish a regime of compulsory retirement but allows employers and employees to agree [...] on a means, other than resignation or dismissal, of ending employment relationships".

Thirdly, Member States enjoy a broad discretion in their choice to pursue a particular aim in the field of social or employment policy and to determine how to achieve that aim.

Following these introductory observations, the court turned to the three criteria for objective justification: aim, appropriateness and necessity.

The aim of Article 10(5) AGG is twofold. Its primary objective is to create vacancies for young people ("sharing employment between the generations"). This aim is not unreasonable given that retirees tend to receive retirement benefits. An additional objective is "not requiring employers to dismiss employees on the ground that they are no longer capable of working, which may be humiliating for those who have reached an advanced age". Both of these aims are legitimate (§§ 41-45).

The court found the means of achieving these aims appropriate and necessary for the following reasons. First, Article 10(5) AGG is based not only on a specific age, but also takes account of entitlement to old-age pension benefits. Secondly, the mechanism of automatic termination is distinct from dismissal and from resignation, and it allows the social partners to set the age so as to take account of the labour market in each specific sector and of the features of each specific job. In other words, it is a flexible mechanism. Thirdly, the AGG provides that automatic termination clauses that lead to termination before the normal retirement age are ineffective in the absence of the employee's consent (§§ 47-51).

In brief, Article 10(5) is objectively justified. However, a Member State may only allow such clauses in an employment contract on condition that they are subject to judicial review. The courts must be able to disallow such clauses if they fail to meet the objective justification test.

Questions 1 and 3 asked whether a collective agreement such as the RTV may provide for automatic termination of employment at age 65. The provision's aim is not only to facilitate the recruitment of young people, but also "to give priority to appropriate and foreseeable planning of personnel and recruitment management over the interest of employees in maintaining their financial position". The court considered both of these aims to be legitimate (§§ 59-62).

The referring court was not sure whether the means adopted to achieve these aims were appropriate, for a number of reasons. First, automatic termination clauses such as the one at issue have been widespread in Germany for a long time, and yet high unemployment among young people persists. They do not seem to be very effective. Secondly, the RTV does not prohibit employers from (re-)employing persons aged over 65, nor does it require employers to replace retired workers with younger persons. Thirdly, "as regards the aim of ensuring a sound structure for the age pyramid in the cleaning sector, the referring court doubts its relevance, given that there is no particular risk of an ageing workforce in that sector". The ECJ did not share these doubts. It found the "automatic termination at 65" clause in the RTV an appropriate means to achieve the above-mentioned aims, reasoning as follows. The RTV was negotiated between social partners who, in doing so, exercised the fundamental right to bargain collectively with a view to striking a balance between the interests of the older and the younger workers. Each of them - the employer representatives and the unions - was and will in the future continue to be free to adapt or renew the agreement. This fact allows for flexibility (see *Palacios*). In summary, "By guaranteeing workers a certain stability of employment and, in the long term, the promise of foreseeable retirement, while offering employers a certain flexibility in the management of their staff, the clause on automatic termination of employment contracts is thus a reflection of a balance between diverging but legitimate interests, against a complex background of employment relationships closely linked to political choices in the area of retirement and employment". This, in combination with the wide discretion granted to the social partners with respect to aim and means, allows the relevant provision in the RTV to meet the appropriateness test (§§ 64-69).

Finally, the ECJ examined whether the automatic termination clause in the RTV was necessary to achieve the said aims. Again, the referring court is unsure, pointing out (i) that, as poorly paid part-time work is a typical feature of the cleaning sector, the statutory pension is not sufficient to meet cleaners' basic needs, and (ii) there are less onerous measures than automatic termination, for example, employers who need to plan personnel management can simply ask their employees whether they plan to work beyond retirement age. The ECJ prefers to see these points in a broader context: account must be taken not only of the hardship forced retirement can cause to the workers concerned, but also of the benefits of forced retirement to society as a whole. In this regard, the court repeats that automatic termination does not prevent a worker from being rehired or from working for another employer. These considerations lead the court to conclude that the RTV also satisfies the necessity test (§§ 71-76).

Question 4 was answered simply. As long as a collective agreement is not discriminatory, a Member State may declare it universally binding.

ECJ 21 October 2010, case C-227/09 *(Accardo et al – v – Commune di Torino)* (Italy) (WORKING TIME)
The plaintiffs in this case – Accardo and over 60 others – were police officers in the employment of the city of Turin ("Turin"). The case relates to the period 1998-2007. In this period a collective agreement, entered into by Turin and the relevant unions in 1986, as well as a number of other collective agreements (together: the "collective agreement"), obligated the plaintiffs to work according to a shift system whereby they had to work for seven days in a row once every five weeks. The plaintiffs sued Turin, seeking compensation for the psychological and physical harm they claimed to have suffered as a result of being robbed of their weekly day off. One of Turin's defences was to invoke the Working Time Directive 93/104 (for the period prior to 2 August 2004) and its almost identical successor 2003/88 (for the period from 2 August 2004) (together: the "Directive"). It was for this reason that the local labour court of Turin referred four questions to the ECJ.

The Directive requires Member States to grant workers a weekly day of rest. However, it allows the Member States to derogate from this rule in certain cases and under certain conditions. The Directive's provisions allowing for such a derogation are referred to below as "the Directive's derogating provisions".

The ECJ examined question 4 first. It was triggered by the fact that Article 17(2) of the Directive permits derogation, by law or by collective agreement, for a number of specifically listed activities, none of which included police activities, whereas Article 17(3) permits derogation, by collective agreement, for all types of activities. The plaintiffs argued that it would be illogical to interpret Article 17(3) without reference to Article 17(2), otherwise the latter provision would almost be without relevance. However, applying a contextual and historical method of interpretation, the ECJ rejected this argument. Hence, the Directive did not stand in the way of the collective agreement (§§ 30-36).

Questions 1-3 related to Italian legislation. Both the Constitution and the Civil Code grant all workers the right to a weekly day of rest. Let us call the relevant provisions of the Constitution and the Civil Code the "constitutional rest rule". It is not clear whether the constitutional rest rule can be seen as the Italian transposition of the Directive. Whether or not this is the case is a question that is up to the Italian court to determine.

In the period 29 April 2003 - 29 August 2004 an Italian law, known as Decree 66/2003, was in force. This law explicitly allowed derogation from the constitutional rest rule by means of collective agreement. Therefore, there was no doubt that during this period, the collective agreement obligating the plaintiffs to work according to said shift was valid and enforceable. The question was whether the same applied

to the periods prior to 29 April 2003 and after 29 August 2004, during which periods the constitutional rest rule was fully in force.

Under Italian law, it was unclear whether a collective agreement could derogate from the constitutional rest rule. Given this uncertainty, the referring court wished to know – questions 1, 2 and 3 – whether the Directive's derogating provisions can be applied directly (thereby trumping the constitutional rest rule) and, if not, whether the Directive obligates (or allows) Italian courts to construe their domestic law as not permitting derogation from the constitutional rest rule by means of a collective agreement.

Regardless whether or not the constitutional rest rule is to be seen as the Italian transposition of the Directive, Turin cannot rely on the Directive's derogating provisions against the plaintiffs. If the Directive was not transposed, then obviously its derogating provisions cannot apply. In order for a derogating provision in any directive – i.e. an exception to a rule – to be valid it must comply with the EU *principle of legal certainty*, which requires such provisions to be precise and unequivocal (§ 55).

In view of the foregoing, the referring court will be faced with two alternative possibilities. The first is that the collective agreement does not comply with the principle of legal certainty. If that is the case, the Directive cannot be relied on against the plaintiffs (§ 57). The second possibility is that the collective agreement constitutes the correct implementation of the Directive's derogating provisions. In that situation, Turin may rely on the collective agreement against the plaintiffs, but only as long as the collective agreement is interpreted in such a way that its scope is limited to what is strictly necessary in order to safeguard the interests that can be protected by virtue of the Directive's derogating provisions.

ECJ 21 October 2010, case C-242/09 *(Albron Catering – v – FNV Bondgenoten and John Roest)* (The Netherlands) (TRANSFER OF UNDERTAKING)

"Heineken" is the shareholder of a number of Dutch companies. One of them is Heineken Nederlands Beheer B.V. ("HNB"). This company has employment contracts with all of the individuals who perform work in any of Heineken's Dutch subsidiaries. HNB does not itself carry out any commercial activities. All it does is loan (assign) its employees, on a permanent basis, to the other Dutch group companies. It is the "central employer" within the Dutch part of the Heineken group, a kind of internal employment agency. One of the subsidiaries to which HNB loaned employees was Heineken Nederland B.V. ("HN"). This was a catering company. It ran the canteens and performed catering services for Heineken's other companies in The Netherlands. One of the HNB employees who worked at HN was John Roest. He worked in and for HN, which gave him instructions, but like all other Heineken staff in The Netherlands, he was in the employment of HNB, which paid his salary.

With effect from 1 March 2005 HNB entered into an agreement with an external catering company, "Albron". Under this agreement, HN was replaced by Albron as the company that was entrusted with providing catering services to Heineken's Dutch subsidiaries. Accordingly, HNB informed John Roest that there was no longer any work for him in HN. It paid him and his colleagues severance compensation. At the same time, Albron offered to employ John Roest and his colleagues, albeit on less favourable terms than they had enjoyed up until that time. John Roest and the union of which he was a member, FNV Bondgenoten, protested, claiming that the cessation of HN's catering activities and the simultaneous start of Albron's catering activities constituted a transfer of undertaking as provided in (the Dutch transposition of) the Acquired Rights Directive 2001/23 (the "Directive"). They brought legal proceedings against Albron, claiming continued entitlement to John Roest's former terms of employment.The parties were in agreement that had John Roest been an employee of HN, he would have transferred into the employment of Albron, in which case he would have retained his original terms of employment. However, as John Roest was not an employee of the company whose activities had been taken over, Albron denied that its agreement with HNB qualified as a transfer of undertaking within the meaning of the Directive.

The court of first instance held that there had been a transfer of undertaking and awarded John Roest's claim. Albron appealed. The appellate court referred questions to the ECJ, essentially asking whether, in the case of a transfer (in the meaning of the Directive) of an undertaking belonging to a group of companies to a third party (in this case Albron), it is possible to regard as the "transferor" the company to whom the employees were assigned on a permanent basis without being in that company's employment (in this case, HN), given that there exists within that group of companies an undertaking with which the employees concerned were linked by a contract of employment (in this case, HNB).

The ECJ referred to HNB as "the contractual employer" and to HN as "the non-contractual employer" (§ 20), both concepts being foreign to Dutch law.

The court began by stating that the "transferor" referred to in Article 2(1)(a) of the Directive is the party which, by reason of a transfer, loses the capacity of employer (§ 21). Clearly, HN lost its capacity as non-contractual employer.

Next, the ECJ pointed out that Article 3(1) of the Directive makes reference to the rights and obligations arising for the transferor from the existence of an employment contract "or an employment relationship". This wording suggests that a contractual link with the transferor is not required in all circumstances.

Following a further analysis of the Directive's wording, the court found that the transfer of an undertaking in the meaning of the Directive presupposes a change in the entity that is responsible for the recent activity and that "establishes working relations as employer with the staff of that entity, in some cases despite the absence of contractual relations with those employees". This, in combination with the Directive's aim to protect employees in the event of a change of employer, led the court to conclude (at § 29) "that the position of a contractual employer, who is not responsible for the economic activity of the economic entity transferred, cannot systematically take precedence, for the purpose of determining the identity of the transferor, over the position of a non-contractual employer who is responsible for that activity".

Conclusion: a transfer of activities such as the one at issue qualifies as a transfer of undertaking in the meaning of the Directive. *[Note that the ECJ confines its ruling (1) to the situation where the contractual and non-contractual employers are group companies and (2) to situations of permanent assignment. The ruling does not, therefore, cover "temps"]*

Albron tried to get the ECJ to limit the effects of its judgment to pending and future cases, arguing (i) that a ruling in favour of John Roest would be likely to trigger a huge number of claims and (ii) that HNB had already paid John Roest and his colleagues severance compensation. The ECJ declined to do this.

OPINIONS

Opinion of Advocate-General Bot in joined cases C-307, 308 and 309/09 *(Vicoplus et al – v – Dutch Employment Department)* (The Netherlands) (FREEDOM OF MOVEMENT)
In the course of 2005 and 2006 the Dutch Labour Inspectorate *(Arbeidsinspectie)* discovered that Polish nationals (the "workers") were performing work in a number of Dutch companies. At that time, Poland was already an EU Member State, but certain transitional provisions restricting, *inter alia*, the free movement of persons (the "Transitional Provisions") were still in place. For this reason, the *Arbeidsinspectie* equated the workers with non-EU nationals for the purpose of applying the Employment of Foreigners Act (*Wet arbeid vreemdelingen*). This Act requires companies that employ non-EU nationals to have a permit. Accordingly, the companies where the Polish workers were found to be performing work (the "Companies") were fined. They appealed. They lost and appealed to a higher court, which referred questions to the ECJ. The questions had to do with the fact that the workers were not employed by the Companies but by Polish temporary employment agencies (the "temporary agencies"), which paid them their salaries and loaned them to the Companies. This fact was relevant because of the distinction in EU law between the freedom to provide cross-border services (formerly Article 49 EC, now Article 56 TFEU) on the one hand and the free movement of persons (formerly 39 EC, now Article 45 TFEU) on the other hand. In its rulings in the cases of *Rush Portuguesa* (C-113/89) and *Van der Elst* (C-43/93), as well as in a number of later rulings, the ECJ had held that companies that provide a service in another Member State may, in doing so, under certain conditions, make use of staff that are not entitled to work in that other Member State. *Rush Portuguesa* concerned a Portuguese company that contracted to perform certain contractual work in France, employing its own Portuguese staff, at a time when Portugal was not yet a full EU member.

The said Employment of Foreigners Act, taking a cue from *Rush Portuguesa* etc., allows Polish workers to work in The Netherlands for a foreign employer that temporarily performs a service in The Netherlands, as long as that employer is not a temporary employment agency.

The Advocate-General found in favour of the Dutch government's position. Providing temporary labour is not, in his view, a "service" in the meaning of Article 49 EC. The issue in this case is whether the movement of the workers from Poland to The Netherlands was ancillary to the provision of a service in the meaning of Article 49 EC (in which case there was a *Rush Portuguesa*-type situation) or whether the contract between the Polish temporary agencies and the Companies was merely entered into to enable the workers to enter the Dutch labour market (in which case the situation was covered by the Transitional Provisions and hence illegal).

A complication the A-G needed to address is that the Polish Accession Treaty granted Germany and Austria a temporary exemption from Article 49 EC, precisely to allow them to protect their labour markets from a disruptive influx of cheap labour under the guise of "service provision". The existence of this exemption would seem to suggest that the government of the Member States other than Germany and Austria accepted that Polish workers would have entry to their labour markets if it was in the performance of "services". The A-G, however, rejected this line of thinking, given the aim of the Transitional Provisions. Their aim was to prevent a massive influx of cheap labour from Poland. It would be artificial to distinguish between, on the one hand, Polish workers who come to The Netherlands on their own and are hired by Dutch employers once they are in The Netherlands and, on the other hand, workers who are sent over to The Netherlands by Polish temporary employment agencies.
This leads to the need to define temporary agency work. The A-G did this by identifying three elements:
- the worker remains in the employment of the temporary employment agency; i.e. no contract of employment arises between the worker and the company that uses his services;
- the worker receives work instructions exclusively from the company where he actually works; and
- the temporary employment agency's aim is exclusively to provide labour.

The A-G considers it irrelevant what the employer's principal activity is. Whether providing temporary labour is its principal activity or merely an ancillary activity does not matter.
Having thus defined temporary employment agency work, the A-G concluded that the "temps" such as the Poles in this case enter the Dutch labour market, where they are in direct competition with local job-seekers. Therefore, the work they perform is covered by the Transitional Provisions and the *Arbeidsinspectie* was entitled to fine the companies.

Opinion of Advocate-General Trstenjak of 26 October 2010, case C-463/09 (*CLECE)* (Spain) (TRANSFER OF UNDERTAKING)
Ms Martín was a janitor in the employment of a cleaning company called CLECE. This company had contracted with the municipality of Cobiso with respect to the cleaning of a number of municipal schools. The municipality terminated its contract with CLECE as of 31 December 2007, whereupon CLECE informed Ms Martín and her co-workers that they had transferred into the employment of the municipality. The municipality, however, took the position that Ms Martín and her colleagues had not become its employees, and it hired other janitors to do the same work. Ms Martín sued both CLECE and the municipality for wrongful dismissal. The court of first instance, finding that there had been no transfer of undertaking in the meaning of Directive 2001/23/EC, awarded the claim inasmuch as it was directed against CLECE and rejected the claim against the municipality. CLECE appealed, arguing that there had been a transfer of undertaking pursuant to the relevant provincial collective agreement for the cleaning business. This agreement provided that an organisation that contracts in cleaning work that it had previously contracted out, must take over the cleaning staff concerned unless it decides to have the cleaning work performed by its existing staff. The appellate court sought the ECJ's guidance on whether in these circumstances the Directive applied.

The Spanish government argued that the transfer of the cleaning work from CLECE to new staff hired by the municipality constituted a transfer of undertaking. The European Commission argued the other way, pointing to the ECJ's rulings in *Süzen*, *Hérnandez Vidal* and *Temco*.

The Advocate-General analysed whether all three conditions for a transfer of undertaking had been satisfied, namely (1) a change of employer as a result of (2) the transfer of an economic entity (3) pursuant to an agreement. Elements 1 and 3 were clearly satisfied, even though the transferee was local government. The Advocate-General therefore focused on element 2.

Whether or not there is an economic entity that retains its identity depends on the seven criteria formulated by the ECJ in the *Spijkers* case: the nature of the undertaking, whether material assets are transferred, the value of transferred immaterial assets, the take-over of almost all of the staff, the take-over of customers, the extent to which the activities pre and post transfer coincide and the duration of an interruption of activities, if any. In assessing these elements, the court has laid special emphasis on the nature of the business, such as whether it is labour-intensive, in which case an organised group of workers can constitute an economic entity and retain its identity, even if no material assets are transferred.

The Advocate-General proceeded to note that where neither material nor immaterial assets (such as a complex organisation or a business method) are transferred, and where no other criteria are satisfied, there is no economic entity and hence no transfer of undertaking, as was established in the almost identical case of *Hérnandez Vidal*. However, where a significant portion of the workforce – both in numbers and in terms of expertise – has transferred, this can be an indication that an economic entity exists.
The Advocate-General discusses the pros and cons of the theory that the mere take-over of staff can support the conclusion that an enterprise has been transferred. A major objection is that this theory makes a condition dependent on a result, which is not only illogical but also opens the possibility of abuse (employers in a labour-intensive business being able to avoid a transfer of undertaking from occurring merely by agreeing not to take on any of the transferee's staff). However, the theory has the advantage of allowing economically logical results. A company that terminates a service provision contract because it is not satisfied with the quality of the service provided should not be forced to retain the staff that were responsible for that poor quality. On balance, the Advocate-General concludes that the mere fact of workers moving across to the new service provider cannot be decisive. What is decisive, is the continued use of a business model that the transferor created, and the advantage of taking over that business model as compared with creating it anew. It is reasonable that a purchaser who profits from the organisational added value acquired from taking over an existing business model should be obligated to offer employment to the workers concerned. This is the reason that the ECJ, in *Süzen*, stressed that the relevant criterion is whether a significant amount of worker-expertise (rather than mere numbers of workers) has been purchased.

Finally, the fact that the Spanish collective agreement at issue granted workers additional rights over and above those required by the Directive, is not relevant for the answer to the question referred by the Spanish court. It is up to that court to determine whether this additional protection is applicable in this case.

PENDING CASES

Case C-151/10 (*Dai Cugini – v – Rijksdienst voor sociale zekerheid*), reference lodged by the Belgian *Arbeidshof Antwerpen* on 31 March 2010 (PART-TIME DISCRIMINATION)Is legislation requiring employers to compile numerous social security documents compatible with the principle of non-discrimination between part-time and full-time workers as provided in Article 5(1)(a) of Directive 97/81/EC?

Case C-155-10 (*Williams and others – v – British Airways*), reference lodged by the Supreme Court of the UK on 2 April 2010 (SEX DISCRIMINATION)
Are the Member States free to determine the level of pay required to be made in respect of periods of paid annual leave? Must employees continue to receive their normal salary or is it sufficient for them to receive a payment that enables and encourages them to take and enjoy their annual leave? How is "normal" pay to be determined, particularly where the employee's remuneration does not consist entirely of a fixed basic salary?

Case C-158/10 (*Johan van Leendert Holding – v – Minister van Sociale Zaken en Werkgelegenheid*), reference lodged by the Dutch *Raad van State* on 6 April 2010 (POSTING OF WORKERS)
Must Articles 56 and 57 TFEU be interpreted as precluding national rules under which an employment permit is required for the posting of workers as referred to in Article 1(3)(b) of Directive 96/71/EC?

Cases C-159/10 and 160/10 (*Gerhard Fuchs respectively Peter Köhler – v – Land Hessen*), reference lodged by The German *Verwaltungsgericht Frankfurt am Main* on 2 April 2010 (AGE DISCRIMINATION).
The referring court asks an enormous number of questions relating to a provisional law on the compulsory retirement of civil servants. The first set of questions relate to the legitimacy of aims such as saving budgetary resources, enjoying a degree of planning certainty, obtaining a favourable age structure, creating opportunities for promotions, precluding individual legal disputes over fitness for service and creating jobs for new recruits. Are such aims "in the public interest"? The second set of questions relate to the suitability and reasonableness of the retirement age arrangement, including whether it would be more appropriate to give voluntary retirement preference over compulsory retirement and including demographic trends. The third set of questions relate to the coherence of the provincial and national legislation on retirement age.

Case C-177/10 (*Rosado Santana – v – Junta de Andalucía*), reference lodged by the Spanish *Juzgado de lo Contencioso-Administrativo No 12 de Sevilla* on 7 April 2010 (FIXED-TERM WORK).
The questions relate to the fact that in Spain temporary civil servants are treated less favourably than career civil servants. Does the fact that the Constitution allows this distinction exclude application of Directive 1999/70/EC to the civil service? Must previous periods of service as a temporary civil servant be taken into account for purposes such as remuneration, grading and career advancement?

Case C-206/10 (*Commission – v – Germany*), action brought by the Commission on 30 April 2010 (SOCIAL SECURITY).
The Commission seeks an order by the ECJ declaring that German legislation entitling only residents of Germany to special benefits for blind and disabled persons (*Blindengeld, Pflegegeld, etc.*) is incompatible with Regulation 1408/71 despite the fact that Annex II to that regulation lists these benefits as non-contributory benefits that are excluded from the regulation. A Member State may only exempt those benefits that satisfy the criteria of Article 42b of the regulation. Germany should have categorised the benefits in question as sickness benefits rather than as special benefits. Moreover, the residence requirement infringes Regulation1612/68 in so far as it prevents frontier workers from receiving the benefits.

Case C-214/10 (*KHS – v – Winfried Schulte*), reference lodged by the German *Landesarbeits- gericht Hamm* on 4 May 2010 (PAID ANNUAL LEAVE).
Does Directive 2003/88/EC preclude expiry of entitlement to paid annual leave at the end of the reference period and/or carry-over period, even in a situation where the worker was unfit for a prolonged period and that period has the result that the worker would have accumulated entitlement to minimum leave for several years if the possibility of carrying over such entitlement had not been limited in time? If not, must the possibility of carrying over leave entitlement exist for a period of at least 18 months?

C-225/10 (*García and others – v – Familienkasse Nürnberg*), reference lodged by the German *Socialgericht Nürnberg* on 10 May 2010 (SOCIAL SECURITY)
Is Regulation 1408/71 to be interpreted as meaning that family allowances need not be granted by the former State of employment to persons who receive pensions under the legislation of more than one Member State and whose pension entitlement is based on the former State of employment if provision is made in the State of residence for a comparable, higher benefit for which the person concerned has opted?

Case C-230/10 (*Sáenz Morales – v – Consejería para la Igualdad y Bienestar Social de la Junta de Andalucía*), reference lodged by the Spanish *Juzgado de lo Contencioso-Administrativo No 3 de Almería* on 11 May 2010 (FIXED-TERM WORK).
Is Directive 1999/70/EC on fixed-term work applicable to the civil service and, if so, are civil servants entitled to receive periodic increments corresponding to periods when they were working as temporary civil servants?

Cases C-235/10 through C-239/10 (*several former employees – v – Landsbanki Luxembourg*), reference lodged by the Luxembourg *Cour de cassation* on 12 May 2010 (COLLECTIVE REDUNDANCIES)
Essentially: does Directive 98/59/EC apply to insolvencies?

Cases C-256/10 and C-261/10 (respectively *Fernández and Lozano – v – García*), reference lodged by the Spanish *Tribunal Superior de Justitia de Castilla-León* on 25 May 2010 (HEALTH AND SAFETY)
Is it sufficient for a company in which the daily noise exposure exceeds 85 dbA to provide the workers with hearing protectors that reduce the exposure to below 80 dbA?

Case C-258/10 (*Grigore – v – Regia Nationala a Padurilor Romsilva*), reference lodged by the Romanian *Tribunalul Dambovita* on 25 May 2010 (WORKING TIME)
This case concerns the definition of "working time". A forester's employment contract requires him to work eight hours per day. However, as he is criminally and civilly liable for any damage to that part of the forest that is entrusted to his responsibility, he is more or less obliged to spend more time on behalf of his employer. Does that additional time constitute "working time" and, if so, is the forester entitled to additional pay?

Case C-272/10 (*Verkizi-Nikolakaki – v – ASEP and University of Thessaloniki*), reference lodged by the Greek *Diikitiko Efetio Thessalonikis* on 31 May 2010 (FIXED TERM WORK)
Greek law requires employees to submit an application to a certain body within two months as a precondition for conversion of a fixed-term contract into a contract of indefinite duration. Is this compatible with Directive 1999/70/EC? Does the relevant presidential decree 164/2004 breach the principle of non-regression by reducing the general level of protection?

Case C-273/10 (*Medina – v – Fondo de Garantía Salarial* and *Universidad de Alicante*), reference lodged by the Spanish *Tribunal Superior de Justicia de la Comunidad Valenciana* on 1 June 2010 (FIXED-TERM WORK)
In Valencia, postdoctoral assistant lecturers on fixed-term contracts do not receive three-yearly salary increases, whereas post-doctoral lecturers on permanent contracts do. Is this compatible with Directive 1999/70/EC?

Case C-282/10 (*Dominguez – v – Centre informatique du Centre Ouest Atlantique*), reference lodged by the French *Cour de cassation* on 7 June 2010 (PAID ANNUAL LEAVE).
Does Directive 2003/88/EC preclude national provisions which make entitlement to paid annual leave conditional on a minimum of ten days' (or one month's) actual work during the reference period? If so, must a national court disregard a conflicting provision of domestic law? May national law distinguish between workers, as regards their entitlement to accrual of paid annual leave during sickness, according to whether their absence from work is due to a work-related accident or not, given that French law provides in certain circumstances for paid annual leave in excess of the minimum of four weeks per year provided in the Directive?

Case C-310/10 (*Ministerul Justitiei – v – Stefan Agafitei and other*s), reference lodged by the Romanian *Curtea de Apel Bacauon* 29 June 2010 (RACIAL DISCRIMINATION).
In December 2008 and in February 2010 the Constitutional Court of Romania prohibited the national judicial authorities from awarding to claimants who have been discriminated against compensation which is considered appropriate in cases in which the compensation relates to salary rights provided for by law and granted to a socio-professional category other than that to which the claimants belong. Do Directives 2000/43 and 2000/78 preclude such legislation or such a judgment? If so, must the national courts disapply such legislation and such a judgment?