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EELC

EUROPEAN EMPLOYMENT LAW CASES

February | 2011 | 5

Denmark: employers may discriminate against under 18s

France: Supreme Court disapplies law on mandatory retirement

Ireland: indirect discrimination asserted, direct discrimination found

Portugal: accepting compensation bars unfair dismissal claim

UK: employee barred from using information given "without prejudice"

Sdu UITGEVERS

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Sdu UITGEVERS

Introduction

The ECJ's rulings in the *Mangold* (2005) and *Kücükdevici* (2010) cases have intensified the debate on the (horizontal) direct effect of directives; the question of which principles qualify as "general principles of Community law"; and what (retroactive) effect those principles have. This edition of EELC carries articles on the subject by two eminent Italian professors.

Discrimination continues to be the number one topic in the cases reported in this edition. Working hours, times and patterns come in second place.

The ECJ Court Watch section has been expanded. Readers will see that the ECJ recently delivered some important judgments, attention being drawn especially to the two Belgian cases of *Briot* (non-renewal of fixed-term contract in view of impending transfer of undertaking) and *Test-Achats* (sex discrimination in connection with insurance premiums) as well as to the cases of *Georgiev* and *Kleist* which add new elements to the continuing debate on mandatory retirement.

Paul Diamond, a barrister in the UK, has agreed to report on European Court of Human Rights (ECtHR) cases that should be of interest to employment lawyers. This issue has his first case report and we hope many more will follow.

January 2011

Peter Vas Nunes, Editor

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2010/73

Czech Supreme Court accepts broad "transfer" definition

COUNTRY CZECH REPUBLIC

CONTRIBUTOR NATAŠA RANDLOVA, RANDL PARTNERS, PRAGUE

Summary
The Czech Supreme Court recently ended a long-standing controversy by ruling that any transfer of activities from one employer to another, even if it fails to qualify as a transfer of undertaking in the meaning of the Acquired Rights Directive, leads to a transfer of the relevant employees, along with all their rights and obligations, to the transferee.

Facts
The employee in this case was employed by FTV Prima ("Prima") as the editor of a magazine. Prima entered into an agreement under which it transferred the magazine's editorial rights as well as some of its employees, as listed in the agreement, to another company indirectly[1], namely Levity Investment ("Levity"). Accordingly, the employee was informed that she was now an employee of Levity, which offered her a new employment contract. The employee refused to sign this new contract, alleging that she had continued to be in Prima's employment. She demanded that Prima offer her work. Levity responded that if the employee did not perform her work for Levity, she would be sacked on the grounds of unlawful absence from work. The employee refused to work for Levity, which proceeded to fire her. The employee brought proceedings against Prima and Levity, claiming compensation.[2]

Both the court of first instance and, on appeal, the appellate court, agreed with the employee that she had not transferred into the employment of Levity. Prima was therefore ordered to pay her compensation. The courts rejected the employee's claim inasmuch as it was directed against Levity, reasoning that the agreement between Prima and (indirectly) Levity did not qualify as a "contract for the sale of a business" as provided in the Commercial Code.[3]

Prima appealed to the Supreme Court.

Judgment
The Supreme Court agreed with the Court of Appeal that the agreement between Prima and Levity did not qualify as a contract for the sale of a business. However, this fact did not prevent the agreement from qualifying as a "transfer of activities" under the provisions of the Labour Code that transposed the Acquired Rights Directive (currently Directive 2001/23/EC). Therefore, the Court of Appeal was in error in not examining whether there was such a transfer of activities. The Supreme Court remanded the case back to a court of first instance, which will now need to pursue the proceedings.

Commentary
Czech law has two separate and different sets of rules that can come into play whenever activities transfer from one company to another:

1 the Commercial Code has a set of rules that deal with a specific type of agreements relating to the sale or lease of an enterprise, whereby one company transfers a "business" to another company, in which case the relevant employees transfer along with the business;

2 the Labour Code has another set of rules, which were introduced by way of transposition of the ARD, according to which the transfer of "activities or duties" (a broad concept - see below) leads to the transfer of the relevant employees.

Prior to the judgment reported above, there were two schools of thought. One held that there is a transfer of the second type only if it qualifies as a transfer of undertaking in the meaning of the ARD. Thus, if a transaction is neither a contract for the transfer of a business (type 1) nor a transfer of undertaking in the meaning of the ARD, the employees remain in the employment of the transferor. The Supreme Court has now rejected this view in favour of the other school of thought, which holds that any transfer of "activities or duties" leads to the relevant employees going across to the transferee.

As noted above, the concept of a transfer of activities or duties is a broad one. It seems to resemble the United Kingdom's doctrine of "service provision change". In any event, it is broader than the concept of a transfer of undertaking under the ARD. Suppose – by way of example – that a company terminates its contract with cleaning company A for the cleaning of its premises and simultaneously awards a similar contract to cleaning company B, which refuses to employ any of the cleaners who were involved in executing the contract with A. Given that cleaning is, as a rule, a labour-intensive activity and that none of the cleaners go across "voluntarily", there is no transfer of undertaking as provided in the ARD. However, under the Czech Labour Code, there is a transfer of "activities or duties", as a result of which the relevant employees go across to the transferee.[4]

Comments from other jurisdictions
Germany (Henning Seel): Section 613a of the German Civil Code, which is based on Directive 2001/23/EC, governs the rights and obligations in the event of the transfer of a business. Where a business or a part of a business is transferred, the new owner assumes the rights and obligations arising from the employment relationship in existence at the time of transfer. "Business" within the meaning of this provision is defined, according to the ECJ's case law, as an organised grouping of persons and assets for the purpose of carrying out an economic activity with objectives of its own. The determining factor is whether the acquirer has taken over the activities underlying the business.
The sale of a business and the resulting transfer of the employment relationships belonging to the business does not require that the former owner of the business transfers all of the assets of the business to the transferee. Formerly, the Federal Labour Court (the "*BAG*") had decided that the **mere** transfer of, for instance, security or cleaning activities does **not** constitute a transfer of a business within the meaning of said section 613a (see the BAG's judgments dated 29 September 1988, 18 October, 1990 and 9 February 1994). This case law became moot in 1994, when the ECJ ruled, in the *Schmidt* case, that the activities of one single employee (in that case, a cleaning lady) can constitute a (part of a) business. Hence, if an employee's activity is transferred to a third party, there is a transfer of a business, with the result that his employment relationship will automatically be continued with the third party. Please note that a succession in the mere function ("*Funktionsnachfolge*") still does not constitute a transfer of business according to section 613a (see the BAG's judgment of 16 May 2007).

United Kingdom (Bethan Carney): This concept of a transfer of activities or duties seems quite similar to the concept of "service provision change" under the UK's Transfer of Undertakings (Protection of Employment) Regulations 2006, although possibly even broader. A

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service provision change occurs when activities cease to be carried out by one person and are instead carried out by someone else. For a service provision change to amount to a transfer of an undertaking under UK law, there must have been an organised grouping of employees immediately before the transfer whose principal purpose was carrying out the activities on behalf of the client.
So, for example, if cleaning company A had assigned five employees to clean the premises of a client and that client terminated the contract with A and awarded it to B, those five employees would transfer to B. However, if A had a pool of 100 employees who were randomly chosen to clean the premises of many different clients and A had not assigned a specific group of employees to clean that client's particular premises, there would not be a transfer of an undertaking when the client terminated the contract with A and awarded it to B.

(Footnotes)

1 Prima had contracted with a company which in turn contracted with Levity. The legal issue in the case reported here would have been identical had the agreement been directly between Prima and Levity.
2 Czech law provides that an employee who is prevented by his employer from performing his contractual duties, is not entitled to continued payment of salary but, instead, to compensation in lieu of salary, based on his average earnings. Usually the compensation exceeds his salary.
3 The Commercial Code provides that, in the event of a contract for the sale of a business, the employees associated with the business that has been transferred become employees of the transferee, with unchanged terms of employment.
4 In the present case the fact that Czech law has a broader "transfer" concept than the ARD was not decisive, given that the transfer of editorial rights as well as of a number of employees would most likely have qualified as a transfer of undertaking under the ARD in any event.

Subject: Transfer of activities
Parties: L.H. (employee) – v – FTV Prima, spol. s.r.o. and Levity Investment a.s.
Court: *Nejvyšší soud České republiky* (Supreme Court)
Date: 14 July 2010
Case number: 21 Cdo 2520/2009
Internet publication: http://novyweb.nsoud.cz

2010/74

A public employer can invoke the vertical direct effect of Directive 2001/23 to the detriment of its employees

COUNTRY BELGIUM

CONTRIBUTORS ISABEL PLETS AND ASTRID HERREMANS, LYDIAN, BRUSSELS

Summary
A public entity that transfers its waste collection activities to another public entity can rely directly on Article 3(1) of the Acquired Rights Directive 2001/23/EC to automatically transfer the employment contracts of the workers concerned, without their consent.

Facts
To provide waste collection, the municipal government of Andenne (a town in the South of Belgium) employed a number of workers. These workers were not civil servants, but were employed on the basis of an ordinary employment agreement. D was one of them.
In late 2007 the municipal government decided to transfer waste collection activities to the provincial *Bureau économique de la province de Namur (BEP)*, an inter-municipal utility company for environmental services. The decision was that seven workers were to be transferred to BEP, that their employment contracts would terminate by mutual agreement and that the employees renounced their right to a severance payment.
Five employees consented to the terms of the transaction. D refused the transaction terms, but nevertheless started working for BEP on 1 January 2008. He initiated proceedings against the city of Andenne and claimed a severance payment for wrongful termination of his employment agreement.
The city government argued that the transaction qualified as a transfer of undertaking as defined in Directive 2001/23/EC ("the ARD"). The ARD aims to maintain employees' acquired rights when there is a change of employer as a result of the transfer of (part of) the undertaking. Consequently, no severance pay is due because of the continuity of the employment contract. The city relied directly on the ARD because of the limited scope of the national collective bargaining agreement 32*bis ("CBA 32bis")*, the Directive's transposition in Belgian law (see: EELC 2009/1 No. 6). Whereas CBA32*bis* only applies to companies in the private sector, the Directive's scope extends to the public sector as well.

Judgment
The Labour Court began by confirming the ECJ's case law to the effect that individuals are entitled to rely on provisions of a directive that are unconditional and sufficiently precise. This means that individuals who are employed by a public entity may rely on the vertical direct effect of directives, so the court concluded. The court added that this applies to workers employed by a city.
Secondly, the Court declared CBA 32*bis* not to be applicable to contractual employees working for a public entity, given that Belgian law (by the Act of 5 December 1968 on CBAs) explicitly excludes the public sector from the scope of application of CBAs.
However, the court established that the ARD satisfies the conditions for direct effect. Workers employed by a public entity are thus entitled to invoke the ARD with direct effect.
The Court continued by qualifying the transaction between the City of Andenne and BEP as a transfer of undertaking. Consequently, there was an automatic transfer of the employment contracts of the workers concerned to BEP. Their employment contracts were therefore continued by BEP, which took over the obligation to employ them with the same employment conditions as before.
Thus, as there was no termination, let alone wrongful termination of employment, the Court ruled that there were no grounds for a severance payment.

Commentary
Even though a directive leaves the Member States with the opportunity to choose freely the means by which they implement it in national law, Belgium failed to fulfil its obligations when it transposed the ARD into

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CBA 32*bis*, because CBA 32*bis* excludes the public sector completely from its scope of application, whereas the ARD applies both to the private and the public sector. Workers with a public employer therefore lack protection in the case of a transfer of undertaking. This is why in Belgium the question arises as to whether or not workers with a public employer can invoke the principles of the ARD. This judgment is interesting in that respect, because for the first time this debate was brought before a court.

The theory of vertical direct effect of a directive means that workers with a public employer can indeed invoke the protection of the ARD. They can therefore claim an automatic transfer to the new employer, retaining their existing employment rights at the time of transfer.

Of course the transaction must qualify as a transfer in the meaning of the ARD. The scope of application of *ratione materiae* only excludes activities involving the exercise of a public authority. Public entities engaging in purely economic activities, such as waste collection, fall within the scope of the Directive.

Not all personnel working for a public employer will benefit from the protection. According to the ARD *"every person who, in the Member State concerned, is protected as an employee under national employment law"* is protected. This means that only contractual workers (i.e. those working on the basis of an employment contract) are included. Indeed, the concept of an employee under Belgian law is related to the existence of an employment contract. Civil servants remain out in the cold.

Another question is whether an employer – in this case a public employer – can invoke the ARD to claim the automatic and compulsory transfer of employees without their individual consent. We believe this is not the case: the principle of direct effect must protect the employee, not the employer, in this case the public authority. Furthermore, public authorities (whether a city, a region or any other public entity) cannot invoke their own failure to transpose EU law properly in their national legislation. As the ECJ stated in its ruling in *Faccini Dori*[1],"the case law on the possibility of relying on directives against State entities is based on the fact that under Article 189 a directive is binding only in relation to 'each Member State to which it is addressed'. That case law seeks to prevent 'a State from taking advantage of its own failure to comply with Community law'. It would be unacceptable if a State, when required by the Community legislature to adopt certain rules intended to govern the State's relations – or those of State entities – with individuals and to confer certain rights on individuals, were able to rely on its own failure to discharge its obligations so as to deprive individuals of the benefits of those rights".

The outcome of the judgment is therefore very surprising and leaves a bitter taste for the person who introduced the case, claiming a severance payment from the city of Andenne. The court applied the principles of the ARD stating that there is indeed an automatic transfer of the employment contract, hence there is no termination, and that therefore no severance pay is due. Coming to this conclusion, the court in fact accepted that not only the worker, but also the (public) employer is entitled to invoke the ARD for its convenience. By this, and contrary to ECJ case law, the court gave a reverse vertical (the court mistakenly uses the term horizontal) direct effect to the ARD.

Let us hope this is only the beginning of a case law debate in Belgium.

Comments from other jurisdictions

The Netherlands (Peter Vas Nunes): Isabel Plets and Astrid Herremans are taking a daring, but in my view erroneous position. If I understand them correctly, they argue (i) that Directive 2001/23/EC can only be invoked by employees, for whose benefit the directive was designed, and not by employers, and (ii) that a Member State that has failed to transpose a directive properly cannot make use of that failure to the detriment of its citizens.

It is true that the Acquired Rights Directive, which is a product of the 1970s, was designed to protect employees against losing their job in the event of a transfer of undertaking. However, as time went by and the ECJ's case law expanded the Directive's scope well beyond what its designers intended, the ARD increasingly became an instrument used by employers, not infrequently against the will of their staff. Germany has limited the possibility to do this, by allowing employees to remain in the employment of the transferor, but most other EU countries have not given employees this so-called *Widerspruch* right. If the ECJ were to follow Isabel Plets and Astrid Herremans, that would be no less than a revolution. It would also create enormous complications, for example where some employees wish to see a transaction as a transfer of undertaking and others do not.

I also take issue with Isabel Plets and Astrid Herremans on their reading of *Faccini Dori*, which they quote out of context and incompletely. That case concerned failure by Italy to transpose a directive that was designed to protect consumers against certain types of contracts. A consumer claimed protection under the directive. The ECJ reaffirmed its ruling in the *Marshall* case (C-152/84) to the effect that although directives lack direct horizontal effect, they do have direct vertical effect. They have direct vertical effect because "it would be unacceptable if a State [...] were able to rely on its own failure to discharge its obligations so as to deprive individuals of the benefits of those rights. Thus the Court has recognised that certain provisions of directives [...] may be relied on against the State (or State entities)". I do not read this passage as meaning that a State entity cannot invoke a directive that it has failed to implement.

Having said this, however, I must admit that it feels a bit strange that a State entity should benefit from a directive which it has failed to implement. But was the outcome unfair in this case? Is there not some hypocrisy in an employee arguing that his employer acts unfairly because it has not dismissed him? Isabel Plets and Astrid Herremans rightly point out that the Acquired Rights Directive was designed to protect employees, but is that not precisely what happened in this case? The plaintiffs kept their job.

United Kingdom (Bethan Carney): It does not appear that in this case the State benefited from its own wrongdoing as the employee's position would have been exactly the same if the EC Acquired Rights Directive had been properly implemented into national law. However, the State's failure to implement the Directive did result in a lack of clarity about the employee's legal position which was to his detriment in that he engaged in no doubt lengthy legal proceedings for a severance payment to which he was not entitled.

Incidentally, in the UK civil servants are employees, although I note from the report that this is not the case in Belgium.

(Footnote)

1 ECJ 14 July 1994, C-91/92, *Jur.* 1994, I-3325 (*FacciniDori*), §§ 22 and 23.

Subject: Transfer of undertaking
Parties: D - v - City of Andenne
Court: Labour Court of Namur (final judgment)
Date: 8 December 2009
Publication: *J.T.T.* 2010, 94

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2010/75

Not all collective terms cross over to Austrian transferee

COUNTRY AUSTRIA

CONTRIBUTOR KATHARINA KÖRBER-RISAK, VIENNA

Summary
Normally in Austria, following a transfer of undertaking, the transferee's CLA applies to the transferred employees. However, in the case of the railway privatisation, the transferors' CLA continues to apply with one exception. This case deals with that exception.

Facts
The plaintiff was formerly employed by the Austrian national railway company ÖBB (*Österreichische Bundesbahnen*). This company was privatised in the course of the 1990s. As a result, the plaintiff transferred into the employment of, first, one of ÖBB's legal successors and, then, the defendant. Both transfers qualified as transfers in the meaning of the Acquired Rights Directive 2001/23 and the Austrian law transposing this directive.

The employment agreements between the plaintiff and ÖBB and its successor were governed by a collective labour agreement (CLA). Among other things, this CLA providedthat "Workers who work between 10pm and 5am are credited with a full hour of working time for every 54 minutes of actual work" (Article 8 of the CLA; hereafter "the 60/54 minute rule"). The defendant's CLA lacked such a night shift privilege. Normally, in Austria, the transferee's CLA applies immediately after a transfer, except that remuneration for regular working time may not drop below what it was for one year following the transfer. Other terms of employment, including remuneration for overtime and shift allowances, may go down immediately following the transfer. However, at the time the railways were privatised, the relevant social parties concluded a special CLA, which effectively provided that all terms of employment existing before the privatisation would continue in force following a transfer of undertaking. This special CLA (the "special ÖBB-CLA") was binding on all potential transferees.

The special ÖBB-CLA contained one exception to the principle that the existing terms of employment could not deteriorate. This exception related to working time. Thus, the special ÖBB-CLA allowed transferees to apply less favourable working times. The defendant took the position that the 60/54 minute rule related to working time and that, therefore, this rule had ceased to exist. The plaintiff disputed this, arguing that the 60/54 minute rule was not a provision in respect of working time but one in respect of remuneration. Accordingly, he claimed compensation equal to six minutes of salary for every hour worked in the employment of the transferee.

Judgment
Both the Court of First Instance Graz (*Landesgericht Graz*) and the Appellate Court of Graz (*Oberlandesgericht Graz*) decided in favour of the transferee. The Supreme Court (*Oberster Gerichtshof*) upheld these decisions.
The Supreme Court found that the 60/54 minute rule related to working time and not to remuneration and that, therefore, the transferee was not under an obligation to apply said rule. The Court's reasoning was based on the Austrian legislator's intention. As already mentioned, Austrian law allows transferees to offer transferred staff terms of employment that are inferior to the terms they enjoyed prior to the transfer, with the sole exception that, for a period of one year, remuneration for regular working time may not be inferior. The fact that the employee now had to work more for the same amount of money did not violate the legislator's intention. The Court added that changes in working time and other working conditions occur regularly in the event of a change of collective agreement following the transfer of a business.

The Supreme Court was silent on whether this aspect of Austrian law is in compliance with the Acquired Rights Directive 2001/23/EC.

Commentary
This decision illustrates rather well how Austria deals with privatisations. Since, in the 1990s, not only the Austrian Railway Services (ÖBB) but several other major economic players (for example the Postal Services, Telekom etc) were privatised, the traditionally strong unions in these sectors have tried to attenuate the consequences of these privatisations for the workers involved, who, to all intents and purposes, were formerly government employees. In this case, the Austrian version of "Social Partnership" provided for a "general collective agreement", legally binding also on future employers of former ÖBB workers. Its sole purpose was to secure that the working conditions as regulated in the existing collective agreements were continued irrespective of what might happen to the former government-owned companies. This was especially important to the unions, as the respective ÖBB collective agreements were basically more favourable to workers and works representation (the latter's representatives generally being identical to those of the union) than most of the collective agreements in the private sector.

The fact that the unions had such a strong impact on the privatisations may seem surprising to some but is understandable when one considers the Austrian political context. The Austrian version of "social partnership" is very consent-oriented and provides for social harmony. The major players in social partnership: the Chamber of the Economy ("*Wirtschaftskammer*") and the Austrian Trade Union Federation ("*Österreichischer Gewerkschaftsbund*") are very well connected to the most influential political parties (the Conservatives and the Social Democrats, who together often form the so-called "grand coalition") and they therefore have a major impact on the political process. Although their views on labour conditions naturally differ, consent (in the form of collective agreements as well as legislative measures) is usually found quickly, avoiding strikes and thus perpetuating the influence of the social partners.
In light of this it is not surprising that the parties and the courts did not raise the question of compliance with European law. The fact that the Austrian provision protecting the collective minimum wage for standard working time exceeds the standards of Directive 2001/23/EC explains why the issue of the compliance of Austrian law with Directive 2001/23/EC was not discussed. It can however be seen as a reason why the Supreme Court interpreted the respective Austrian provisions rather strictly. The Austrian legislator apparently intended to protect workers' collective minimum wages in the case of transfers of businesses exceeding the scope of protection of the Directive for at least one year after the transfer. However the Austrian legislator seems to not have wanted to protect all working conditions in the case of transfers of businesses, in particular by not keeping a "balance" between working time and minimum wage.

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The Supreme Courts' ruling that § 8 of the working time collective agreement relates strictly to working time (but not money) seems a bit apodictic. If workers have to work more for the same amount of money this is clearly money-related as well. The arguments in legal literature to the contrary (i.e. what is money-related is only that which reduces the actual amount of money paid to the employee) are a bit artificial as the intimate connection between working time and remuneration is undeniable. Given the background however, one can only agree with the Austrian Supreme Court's decision as it clearly follows the legislators' intentions.

Comments from other jurisdictions

United Kingdom (Bethan Carney): In the UK, it is very difficult to change any terms and conditions of employment after a transfer of an undertaking if the reason for the change is the transfer or a reason connected to the transfer. An employee cannot normally agree to such a change and it would be void. There is no time limit on this prohibition, so such a change would be void even if it happened many years after the transfer date. However, the more time that has elapsed since the transfer date the more likely a court is to deem that the change was not connected to the transfer.

The exception to this rule is where the change is for a reason connected with the transfer that is an economic, technical or organisational reason entailing changes in the workforce (an "ETO reason"). The phrase "entailing changes in the workforce" requires a change in the numbers or job functions of employees. For example, an employer who, following a transfer, is no longer selling the same products or services will not need employees to perform the same roles as they did before the transfer and may have to change employees' terms and conditions as a result. This would probably be for an ETO reason. In contrast, an employer who merely wanted to harmonise the terms and conditions of transferred staff with those of its original staff would probably not be able to establish an ETO reason for the change.

Subject: Transfer of undertaking (CLA)
Parties: Anton G*** – v – M***
Court: Austrian Supreme Court (*Oberster Gerichtshof*)
Date: 26 May 2010
Case number: 9 Ob A 8/10g
Hardcopy Publication: ZAS-Judikatur 2010/118; ecolex 2010/334
Internet publication: http://www.ris.bka.gv.at/Jus

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2010/76

Mandatory retirement of law firm partner at age 65 justified

COUNTRY UNITED KINGDOM

CONTRIBUTOR HENRIETTA CLARK, LEWIS SILKIN, LONDON

Summary

It was lawful for a law firm to operate a policy of mandatory retirement of partners at the age of 65 as this was a proportionate means of meeting various legitimate aims.

Facts

Mr Seldon was an equity partner at Clarkson Wright and Jakes, a small firm of solicitors. In the firm's partnership deed, to which Mr Seldon was a party, there was a clause providing for mandatory retirement of partners at the end of the year following their 65th birthday. By a later redraft and execution of the partnership deed, partners could be kept on beyond age 65 by agreement.

Through the application of the mandatory retirement clause, Mr Seldon was compulsorily retired against his wishes. The firm did not take him up on his offer to stay with the firm on a consultancy basis. Mr Seldon brought a claim in the Employment Tribunal for direct age discrimination under the Employment Equality (Age) Regulations 2006 (the "Age Regulations"), which is the UK legislation implementing the age discrimination provisions of the EC Framework Directive (2000/78/EC).

The Age Regulations and other relevant UK legislation currently permit employers to require *employees* to retire at the age of 65 or older without attracting liability for age discrimination or unfair dismissal liability. This is known as the "default retirement age" (DRA). To qualify for this exemption, an employer has to follow a statutory retirement procedure, including considering any request by the employee to continue working beyond retirement age. However, since Mr Seldon was a partner rather than an employee, the firm could not rely on the DRA regime in defending his claim.

The Employment Tribunal's Decision

Before the Employment Tribunal, the firm accepted that retiring Mr Seldon constituted direct age discrimination but contended that this was justifiable as a proportionate means of achieving a legitimate aim. The firm pointed to various specific aims that the imposition of a mandatory retirement age of 65 was intended to further, three of which were accepted by the Employment Tribunal as being justified:

1. ensuring associates were given the opportunity of partnership after a reasonable period;
2. facilitating planning of the partnership and workforce across individual departments by having a realistic long-term expectation as to when vacancies would arise; and
3. limiting the need to expel partners by way of performance management, thus contributing to the congenial and supportive culture in the firm.

Mr Seldon appealed to the Employment Appeal Tribunal (EAT).

The Employment Appeal Tribunal's Decision

The EAT upheld the Employment Tribunal's decision in respect of aims 1 and 2. However, the EAT decided that the firm had not been entitled to form the view that the specific cut-off age of 65 was justified by aim 3 because there was no evidence to support the supposition that quality of performance tails off around the age of 65. Whilst a cut-off age of 65 might be justified for some jobs, this had not been established in this case. The EAT decided to send the matter back to the Employment Tribunal for it to make further findings of fact on this point. Before the remitted hearing took place, Mr Seldon appealed to the Court of Appeal.

The Court of Appeal's Decision

The Court of Appeal concluded that all three aims identified by the Employment Tribunal were legitimate and there had been no need for them to have been consciously recognised at the time the firm's mandatory retirement age was introduced. A discriminatory measure could be justified by a legitimate aim other than that which was specified at the time when the measure was introduced.

The Court added that it was a legitimate consideration that the mandatory retirement rule had been agreed by parties of equal bargaining power. The Employment Tribunal and the EAT had been entitled to take that factor into account.

Referring to the *Age UK* case ([2009] IRLR 373), the Court of Appeal noted that the ECJ's judgment in that case concerned whether the DRA under the Age Regulations was valid by reference to social and employment policy aims, rather than whether a decision by a firm to have a retirement age and enforce it was justified. There was a "margin of appreciation" available to a national government which was not available to an employer or to parties entering into a partnership deed. Nonetheless, if a partnership was acting consistently with the social aim that justified a legislative provision, it would contradict that aim to render the partnership's provision unlawful if it was proportionate.

In the present case, the Court concluded that there were legitimate aims related to ensuring that associates had promotion prospects and the partnership had a collegiate culture. These were consistent with the Government's social policy justification for the Age Regulations. The Court said it might be thought better to have a cut-off age rather than force an assessment of a person's decline in performance as they got older. It was a justification for having a cut-off age that people would be allowed to retire with dignity.

Mr Seldon had argued that the firm's mandatory retirement age had to be justified both as a general measure (in the abstract) and also in its application to his case. He argued that the firm should not have applied the mandatory retirement rule to him because there were not necessarily associate solicitors in the wings, ready for partnership, waiting to replace him. The Court of Appeal rejected this, holding that the Employment Tribunal had been entitled to focus on the justification of the clause rather than its application. There could be exceptional cases where a justified rule could be unjustified in its application, but that did not arise in the present case.

Finally, the Court decided that the retirement age of 65 that the firm had designated was proportionate. The fact that the firm could have chosen a different (higher) age, which would have been less discriminatory to some individuals, did not automatically mean that 65 was not justified. Moreover, the fact that UK legislation currently provided for a DRA of 65 for employees supported the firm's choice of 65 as being a fair and proportionate cut-off point.

Commentary

This case is likely to be of significance in future because the UK's Coalition Government has published plans to phase out the DRA over a six-month period during 2011. The key proposals in the Government's consultation paper are:

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- Retirements using the DRA will cease completely in October 2011 and no new notices of intended retirement may be issued from April 2011.
- From October 2011, employers wanting to retain a retirement age for employees will need to demonstrate that it is objectively justified – i.e. a proportionate means of achieving a legitimate aim or aims.
- The procedural requirements for retirement dismissals will be abolished.

The arguments in *Seldon* will therefore be of particular interest to employers who may be looking to retain and justify their own retirement age for employees in the future.

UK employers' organisations, such as the Confederation of British Industry, have expressed concern that the demise of the UK's DRA regime will make managing the end of employees' careers much harder, with an increased risk of age-based litigation. Whilst *Seldon* indicates some of the justification arguments that employers may be able to run in support of compulsory retirement, the considerations applicable to law firm partners may not be so relevant for other industries, professions and occupations. In particular, the Court of Appeal took into account the equal bargaining power between partners in a law firm, the absence of which in most employer/employee relationships is bound to affect any analysis as to justification.

Whilst *Seldon* identifies a number of legitimate aims that may be capable of justification, cogent empirical evidence will be required 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. Furthermore, the Court of Appeal in *Seldon* placed reliance on the existence of the DRA itself in concluding that retirement at age 65, in particular, was proportionate. This argument will no longer be available once the DRA has been abolished.

Rather ironically for the UK, the European Court of Justice recently once again endorsed the broad discretion of EU Member States to adopt default retirement ages (*Rosenbladt* C-45/09, 12 October 2010, unreported). Whilst the ECJ helpfully recognised that avoiding humiliating capability dismissals for older workers and ensuring effective staff planning could amount to legitimate aims, this was in the context of the broad social and economic policy considerations for national governments when legislating on retirement age. Despite some of the Court's remarks in *Seldon*, employment tribunals in the UK are likely to demand a more rigorous, evidence-based analysis in determining whether justifications for mandatory retirement ages put forward by individual employers are valid.

A more prosaic issue for many employers will be how to broach 'retirement' discussions with older staff, once the statutory procedure has been abolished, without prompting allegations of age bias. The consultation document hinted that the Government may publish formal guidance on this issue or even a statutory code of practice.

Comments from other jurisdictions

Spain (Ana Campos): By Spanish Law, it is forbidden to establish compulsory retirement ages, unless set forth in a collective bargaining agreement and, even then, only as long as certain requirements have been met, namely (i) that the employee is entitled to a state retirement pension and (ii) that the measure is linked to other measures set forth in the CBA, such as the pursuit of employment stability, transformation of temporary employment contracts into indefinite term contracts or increases in recruitment.

However, in the case at hand, there was no employment relationship and retirement provisions between parties in such circumstances would not be considered age discriminatory.

Subject: Age discrimination
Parties: Seldon – v – Clarkson Wright & Jakes
Court: Court of Appeal (England and Wales)
Date: 28 July 2010
Case number: [2010] EWCA Civ 899
Hardcopy publication: [2010] IRLR 865
Internet publication: www.bailii.org

2010/77

Employee being openly gay affected harassment claim

COUNTRY UNITED KINGDOM

CONTRIBUTOR NANA DUODU, LEWIS SILKIN, LONDON

Summary

The Employment Appeal Tribunal (EAT) allowed an appeal against a finding that an employee was subjected to unlawful sexual orientation discrimination after his manager revealed to other employees that he was gay. The Employment Tribunal had failed properly to take into account, among other things, that the claimant had been open about his sexuality whilst working at a different office of the same organisation.

Facts

The claimant, Mr Grant, was an employee of Her Majesty's Land Registry who had revealed his homosexuality to his colleagues. He was later promoted and transferred to a new office in Coventry. A number of incidents subsequently occurred involving his new manager, Ms Kay, some of which related to Mr Grant's sexual orientation.

Prior to Mr Grant's transfer, Ms Kay had revealed to one of his new colleagues at the Coventry office that he was homosexual. At a dinner with colleagues, she asked Mr Grant about his partner, placing an emphasis on the word "he" and making clear to those present that Mr Grant was gay. Another incident concerned a lesbian/gay/bisexual and transgender focus group meeting that Mr Grant had been scheduled to attend. Ms Kay insisted on obtaining details of the nature of the focus group and it was found (by the Employment Tribunal) that she did so for the purpose of embarrassing him. On another occasion, Ms Kay made a "limp wrist" gesture towards Mr Grant whilst joking with colleagues, which he found offensive.

Mr Grant brought a claim against HM Land Registry asserting various acts of discrimination and harassment under the Employment Equality (Sexual Orientation) Regulations 2003. Direct discrimination is defined by the Regulations as less favourable treatment on grounds of sexual orientation. "Harassment" is defined as unwanted conduct on grounds of sexual orientation which has the purpose or effect of:

- violating an employee's dignity; or
- creating an intimidating, hostile, degrading, humiliating or offensive environment for the employee.

Conduct is regarded as having either of the above effects only if, having regard to all the circumstances – including in particular the employee's perception – it should *reasonably* be considered as having that effect.

(**Note:** Since this case, the 2003 Regulations have been repealed and replaced by substantively similar provisions concerning sexual

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orientation discrimination and harassment in the Equality Act 2010.)
In essence, Mr Grant alleged that he had suffered direct discrimination and harassment in various ways, stemming from the fact that his homosexuality had been revealed against his wishes. He claimed that he should have had the right to control whether and how his sexual orientation was revealed in his new workplace.

The Employment Tribunal's decision
The Employment Tribunal upheld Mr Grant's claims in respect of certain matters, finding that many of the incidents concerning Mr Grant's sexuality were interlinked. The Tribunal said that Mr Grant had been entitled to control whether or not information about his sexuality was divulged to his new colleagues. The effect of Ms Kay "outing" him was to create a humiliating environment in his new role. The Tribunal did not consider it relevant that he had revealed his sexuality to colleagues in his former office.
The Tribunal also found that the "limp wrist" gesture was an act of direct discrimination and harassment. Ms Kay had made this gesture because of Mr Grant's sexual orientation and she would not have made the same gesture to somebody of a different sexual orientation.
HM Land Registry appealed to the EAT contesting various aspects of the Tribunal's reasoning, including the finding that Mr Grant had suffered a detriment when his sexual orientation was revealed by Ms Kay. Amongst other things, HM Land Registry argued that the fact that Mr Grant's sexual orientation was widely known in his previous workplace should have been taken into account by the Tribunal.

The Employment Appeal Tribunal's decision
The EAT allowed the appeal and ordered that the case should be reheard by a different Employment Tribunal.
As a general proposition, the EAT accepted that the "outing" of a gay employee against his wishes to those whom he would rather not know of his orientation may, depending on the context, constitute an act of discrimination or harassment. However, in this case, the EAT identified two main errors of law in the Tribunal's decision.
Firstly, the Tribunal had failed to consider that Mr Grant had willingly disclosed his sexual orientation to colleagues in his previous office and that his sexuality was well known prior to his move to Coventry. The EAT said the Tribunal should have expressly recognised that Mr Grant had "come out" in his previous post and dealt with the implications of that and of Ms Kay's knowledge of it in its analysis of what took place. The EAT regarded this as a central issue in the case which the Tribunal had effectively ignored.
Secondly, the EAT said the Tribunal had not given an adequate explanation for its findings of harassment. The Tribunal had not investigated whether Ms Kay had been deliberately undermining Mr Grant because of his sexuality (perhaps because she was homophobic) with the purpose of creating a hostile working environment, or whether she had merely been indulging in office gossip such that the effect of her actions was to create a hostile working environment for Mr Grant. If creating a humiliating environment was not Ms Kay's purpose, then it was necessary to review whether her conduct should reasonably be regarded as having that effect. Mr Grant's perception and whether it was reasonable for him to react in the way he did was relevant to that question.
According to the EAT, none of the Tribunal's decisions as to discrimination or harassment would necessarily have been reached if it had properly considered these issues – except perhaps the "limp wrist" gesture, which was inherently and obviously discriminatory of itself.

Commentary
The EAT's criticisms of the Tribunal's decision are quite subtle and it might be considered harsh that Mr Grant must now fight his case from scratch before another Tribunal. He has, however, successfully applied for permission to appeal to the Court of Appeal against the EAT's judgment which may avoid the need to do so.
In terms of the precise way in which "harassment" is defined in the UK, it is submitted that the EAT was correct. Where conduct violates an employee's dignity or creates a humiliating working environment, it is important to evaluate whether this was in fact the perpetrator's *purpose* or merely the *effect* of the conduct. If the former, that is sufficient in itself to meet the statutory definition of harassment. If the latter, the question of whether it was *reasonable* for the employee to take offence comes into play.
The EAT was also undoubtedly correct in observing that revealing an employee's sexual orientation against his or her wishes may constitute an act of discrimination or harassment. Clearly, employers should put in place policies in respect of harassment and discrimination and ensure that employees are adequately trained on these issues. In general, employees should be discouraged from discussing the sexual orientation of their colleagues in the workplace in case such remarks cause offence.
The slightly disturbing aspect of the case is the EAT's implicit suggestion that an employee who has previously revealed his or her sexual orientation to employees within an organisation could potentially lose the right to retain confidentiality in relation to other colleagues. This does not seem to be a satisfactory position for employees who wish to control whether or when information about their sexuality is divulged, even if they have been previously open about it.

Comments from other jurisdictions
Germany (Paul Schreiner and Heidi Banse): Under German law the relevant question is not specifically whether a supervisor/employer may "out" someone who has come out in relation to other colleagues within the same organisation, but relates more generally to an employee's privacy. Employers/supervisors may only share their employee's personal data if the balancing of the employee's interests and the legitimate interests of other employees, as well as corporate interests, so requires. Revealing Mr Grant's sexual orientation to his new colleagues against his will was a violation of his privacy, even if he had revealed it himself to his former colleagues in his former office within the same organisation. It was his decision with whom to share this piece of information and it was a risk for him that someone in whom he confided might tell someone else whom he did not want to know. In "outing" him Ms Kay took this power away. Someone who has come out in another work environment may have reasons to prefer not to do so in a new workplace for the time being, e.g. because he or she initially is unsure whether to trust those in the group, or maybe even because they have given a homophobic first impression.
The wording of the anti-harassment-clause in the German Anti-Discrimination Act is slightly different from that in the UK. Harassment constitutes discrimination if an unwanted conduct, related to one of the non-discrimination strands (here: sexual orientation) has the purpose or the effect of violating the person's dignity *and* creates an environment that is *characterised* by intimidation, hostility degradation, humiliation or offence. The German Federal Employment Court shortens this and requires there to be a violation of dignity and a "hostile environment", i.e. cumulatively, and has ruled that the harassment must actually characterise the work-environment, so that – in general – a single discriminatory act will not suffice. Nevertheless, single very severe discriminatory acts may characterise the environment. Therefore the

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Federal Employment Court requires courts to evaluate the overall picture. In this case, one has to take into account that Ms Kay was the manager and had a supervisory role towards Mr Grant. When she made the "limp wrist" gesture in reference to Mr Grant whilst joking with colleagues; when she explicitly referred to Mr Grant's partner as "he" – whilst she knew (some of) those present did not know he was gay; and when she interrogated Mr Grant about the nature of the lesbian/gay/bisexual/transgender-focus group with the purpose of embarrassing him she reasonably interfered with his self-conception regarding his sexual orientation and therefore violated his dignity, which characterised the work-environment as intimidating, hostile, degrading, humiliating or offensive in relation to Mr Grant's sexual orientation. This would have constituted harassment under the German Anti-Discrimination Act.

Subject: Sexual orientation discrimination
Parties: H M Land Registry – v – Grant
Court: Employment Appeal Tribunal
Date: 15 April 2010
Case number: UKEAT/0232/09/DA
Hardcopy publication: [2010] IRLR 583
Internet publication: www.employmentappeals.gov.uk

2010/78

Rules prohibiting direct sex discrimination may be applied to a claim based on indirect sex discrimination (failure to provide part-time work)

COUNTRY IRELAND

CONTRIBUTOR GEORGINA KABEMBA, MATHESON ORMSBY PRENTICE, SOLICITORS, DUBLIN

Summary
An employee alleged that her employer had indirectly discriminated against her on the grounds of gender and family status when it failed to provide her with part-time work in 2005. At the hearing, the Equality Officer decided to address the issue of direct discrimination, even though the employee had not made any allegations in this regard. The Equality Officer concluded that the employee had established a prima facie case of direct discrimination on the grounds of gender only and awarded her € 45,000 in compensation.

Facts
Ms Higgins (the complainant) commenced employment with the respondent financial services company as a Programmer/Analyst within the employer's IT department in 1986. Following the birth of her fifth child in 2004, the complainant experienced significant health difficulties and requested that she be allowed to work permanently on a part-time basis. She was informed, however, that no applications were being accepted at that time as there was an Alternative Working Pattern Policy which only granted part-time work on a temporary basis for a period of one year.

Whilst on parental leave, the complainant then made an application in December 2004 under the Alternative Working Pattern Policy. Among the criteria to be assessed were the operational requirements of the area concerned, the numbers of staff already availing of alternative working arrangements in the unit/team or area, the job performance of the applicant and the length of service of the applicant.
In January 2005, whilst other members of the IT staff including a male colleague were granted part-time work for a year, the complainant's application was refused. The employer claimed that this had been based on the large volume of applications received as against the continuing business needs of the bank and that not all applications could be granted. The employer informed the complainant that further applications would be sought the following year.
The complainant subsequently contacted the HR department in January 2005 stating that she wished to appeal this decision[1]. She returned to work from parental leave at the employer's request, to 'resolve' matters. However, she had extreme difficulty in achieving a balance between her work and family life, stating that she found such responsibilities extremely stressful and debilitating. It was at this stage that she made a further (second) request that she be allowed to permanently work on a part-time basis and also offered to return to complete her work in the evenings, if necessary. Her request for part-time work was denied and her additional request to work after-hours was refused on security, supervision and health and safety grounds. The complainant was subsequently diagnosed with an illness and certified unfit for work.
In November 2005, while the complainant was on sick leave, she submitted a third application for permanent part-time working. She had decided not to make any further applications under the Alternative Working Pattern Policy since she felt that the temporary provision would undermine rather than support the stability of her family and that a permanent part-time arrangement would be most suited to her needs. This application was refused without reason. She failed to appeal through the internal grievance procedure as she felt it would be futile.
The complainant was granted a further period of parental leave in June 2006, following requests from the employer to return to work on a full-time basis. She subsequently took a career break[2] during which time she applied to the Equality Tribunal, claiming that her employer's conduct constituted indirect sex discrimination[3].

Judgment
The Equality Officer who handled the case on behalf of the Equality Tribunal began by noting that, with regard to part-time working, the Equality Tribunal had previously stated that *"there is no statutory entitlement for an employee on full-time hours to be accommodated with part-time work, or vice versa."*[4] The Equality Officer also placed emphasis on the dicta of the Labour Court in *Bank of Ireland v Morgan*[5] where it was stated: *"...it would be manifestly unreasonable to hold that an employer must provide a woman with a facility to job-share in every case in which such a facility is requested and such a result could not have been intended. It is self evident that such facilities can only be made available within the exigencies of the business."*
However, the Equality Officer also examined Paragraph 8 of the Code of Practice on Access to Part-Time Working[6] which states: *"Best practice indicates that employers should treat such requests seriously and where possible discuss with their employees if and how such requests can be accommodated."* The Code lists a number of relevant factors in arriving at this conclusion, including: *"the personal and family needs of the applicant; the number of employees already availing of part-time work; the urgency of the request and the effect, if any, on the staffing needs of the organisation."* Although the Code is not legally binding, it is generally

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relied upon both by the Equality Tribunal and by the courts.

Notwithstanding the fact that the complainant made only a claim of indirect gender discrimination,[7] the Equality Officer ruled that she had jurisdiction to examine the issue of direct discrimination on gender grounds.[8] This was on the basis of previous case law[9] in which the High Court, on a judicial review, ruled that the Labour Court decision to uphold the Equality Officer's stance that she had no jurisdiction to consider an allegation of indirect discrimination, as the claim was only for direct discrimination, was null and void.

In relation to the applications for permanent part-time work, the Equality Officer concluded that the complainant had not demonstrated that she had been directly discriminated against on gender or family status grounds. However, in relation to the application for temporary work in December 2004/January 2005, the Equality Officer found that the complainant had established a *prima facie* case of direct gender discrimination, reasoning as follows.

The criteria to be assessed under the Alternate Working Pattern Policy included job performance and operative requirements. The employer argued that its decision to grant temporary part-time work to a male colleague and not to the complainant was in line with the Policy, given that (i) the male colleague had a better performance record and (ii) the male colleague's suggested work pattern (4 days per week) was better suited to the company's needs than that suggested by the complainant (5 half days per week).

As for the first argument, it was noted that the male applicant and the complainant were awarded the same level of performance in 2003. The employer failed to submit the appraisal for 2002. In respect of 2004, the male employee's appraisal was submitted but the complainant's was not. Indeed, it was determined by the Equality Officer that, at the time the decision was made in December 2004/January 2005, no appraisal for the complainant even existed, as she had been on maternity leave and parental leave for a considerable portion of that year.

The second criteria to be applied where there was a tie in the performance scores of applicants, was the pattern of attendance applied for. The complainant requested to work a part-day every day. The male applicant requested to work a four-day week. This criteria was not listed in the original invitation for applications. In fact, both patterns were listed as equally valid in the Policy. The Equality Officer determined that a deciding selection criteria had been applied by the employer after it was in possession of the relevant applications. The Equality Officer held that there was no evidence presented by the employer as to why the comparator's suggested work pattern should be selected over the complainant's in relation to business needs. This was manifestly unfair and *"created a situation decidedly lacking in transparency and fairness."* The Equality Officer also concluded: "*'Where…there is unfairness in a selection process which disadvantages a woman candidate and operates to the advantage of a man, an inference of discrimination on the gender ground will properly follow*".

In summary, the Equality Officer held that, given the unfair and non-transparent decision making process which operated to the advantage of a man, the complainant had established a *prima facie* case of direct discrimination on the gender ground in relation to the selection process used to assess and grant alternate working patterns for 2005. Under the Employment Equality Act 1998, where a complainant establishes facts which may indicate discrimination, it is for the respondent to prove to the contrary.[10] The employer failed to provide such evidence and was ordered to pay the complainant € 45,000 in compensation.

Commentary

First and foremost it should be outlined that this case has been appealed by the employer. It is understandable why this is so for a number of reasons. First, the policy for part-time work, albeit on temporary offer, was available to all employees. The employer was in a position where it had been unable to accommodate the large number of requests for part-time work. Therefore, in order to facilitate as many people as possible, this one-year scheme was brought in. The policy had been put in place on foot of employee surveys and had been agreed with the trade union representing the employees. Secondly, the complainant only applied under the policy once. Thereafter, any requests by her were outside of the policy. Thirdly, the complainant did not go through the employer's formal grievance procedure. As all lines were not exhausted, the employer was not given an opportunity by the complainant to resolve the issue at local level.

Finally, the Equality Officer's decision that there was direct discrimination on gender grounds does not necessarily follow. The Equality Officer outlined that *"the decision making process in selecting candidates for the award of an alternative working pattern was unfair and lacking in transparency. The process operated to the advantage of a man in that the man was granted an alternative attendance pattern."* Whilst the feedback and discussions with the complainant may well have been unfair and lacking in transparency, it has to be noted that other women were granted alternative working patterns where the complainant was not. The real concern for employment lawyers is the assertion that an Equality Officer is entitled to change the nature of a complaint, as such deviation made by the Equality Officer may be seen as a bias towards a positive outcome for the complainant.

This case can be compared to *De Belin – v – Eversheds Legal Services Ltd*[11] which was recently before the English Employment Tribunal. Mr De Belin claimed that he had been unfairly selected for redundancy and brought a case for unfair dismissal and sex discrimination. Eversheds was held to have discriminated against him on grounds of gender when he was made redundant rather than a female colleague whose score had been inflated to reflect the fact that she was on maternity leave. The Tribunal outlined that, since this issue was going to be decisive in deciding who would be made redundant, the employer should have ignored this particular aspect of the marking criteria or used an alternative reference period. Eversheds contended that they had taken a fair approach, in that had they acted any other way, they would have been discriminating against Mr De Belin's female colleague on the grounds of her pregnancy. The Tribunal awarded Mr De Belin £123,300. This decision is also under appeal.

When comparing the two cases, it seems to be a case of damned if you do and damned if you don't. There is a fine line within which employers can operate. Employers must juggle the business needs with the needs of its employees and, where business needs come first, it would appear that Tribunals are willing to view that discrimination, whether indirect or direct, is part of the employer's decision making process. We will be keeping an eye on both cases and will revisit the appeals when they are published.[12]

Comments from other jurisdictions

Germany (Paul Schreiner and Christian Busch): The German Part-Time and Limited-Term Employment Act (TzBfG) gives employees the right to reduce or to increase their contractual working hours. In contrast to The Netherlands (see below), an employee who wishes to exercise this right merely needs to have been employed for a period of at least six months, following which he must inform his employer of his preferred working schedule.

As in The Netherlands, the employer must discuss the employee's wishes and the employer needs to have very convincing reasons to decline the request, namely important operational reasons. Such reasons would be acceptable if the reduction considerably hampers

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the organisation, operational procedures or safety, or if they would cause disproportional expense. In a case such as that reported above, an employer wishing to decline a request for working time reduction must prove the existence of operational reasons, and an employee whose application has been declined may bring an action against the employer for a reduction in working hours.
Under the German General Treatment Act (AGG), direct discrimination (paragraph 3(1) AGG) as well as indirect discrimination (paragraph 3(2) AGG) constitute breaches of the law. Therefore the question of the actual character of the discrimination is not essential to entitlement to 'compensation' (i.e. a form of immaterial damages) or 'damages' in accordance with paragraph 15 AGG. It is sufficient that a case of discrimination has been made.
Independently of this, there is some doubt as to whether there would have been direct discrimination in this case, because the employer based its decision on the better job performance of the male employee and on operational requirements, whereas discrimination on the grounds of gender was barely found.

Czech Republic (Nataša Randlova): According to the Czech Labour Code, the employer is obliged in assigning employees to shifts to take into consideration the needs of female and male employees taking care of children. Moreover, if a female or male employee taking care of a child under 15, a pregnant employee or an employee taking care of a person dependent on his or her assistance, requests reduced working hours or a suitable modification of his or her full-time weekly working hours, the employer is obliged to satisfy the request unless this is prevented by serious operational reasons.

Therefore the employer may not give priority to employees (male or female but not fulfilling the conditions above) against the interests of an employee taking care of a child under 15 (or pregnant) when deciding on a request for reduced working hours.

The Netherlands (Peter Vas Nunes): Dutch law gives employees who have been employed for no less than one year the right to reduce or expand the number of hours they work per week. This right is not unconditional, but the employer needs very convincing arguments to turn down an application for work reduction. For this reason alone, a discrimination claim such as the one reported above would not arise under Dutch law. Another difference with Ireland is that a plaintiff need only allege discrimination on a certain ground, such as gender, but need not specify whether the claim is based on direct or indirect discrimination. In fact, it is not uncommon for a plaintiff to claim direct discrimination, with indirect discrimination in the alternative, in which case it is up to the court to determine which type of discrimination, if any, applies. In the event a plaintiff were nevertheless to allege exclusively direct or exclusively indirect discrimination, I expect a court would reject the claim if it determined that there was discrimination of the type not alleged, but this is not certain.
In the case reported above, it is unclear to me what caused the Equality Officer to believe there was direct gender discrimination. The employer argued that his decision to reject the complainant's application for part-time work was fair on the basis of two criteria, neither of which were directly related to the complainant's gender: job performance and operational requirements. If I had been the complainant, I would have based my claim on indirect discrimination.

United Kingdom (Hester Briant): The commentary cites the UK case of *De Belin – v – Eversheds Services Ltd* (ET case no.1804069/2009, 24.3.10, unreported), which has attracted significant interest. It is the first case to look at the exemption from UK sex discrimination law for "special treatment" afforded to women in connection with pregnancy or childbirth. The Employment Tribunal ruled that special treatment could not mean "blanket" protection for any beneficial treatment which employers may choose to provide to employees who are pregnant or on maternity leave. On the facts of *De Belin*, this meant that the exemption did not apply to the employer's adjustment of its redundancy selection criteria to accommodate a woman on maternity leave. The Tribunal therefore ruled in favour of the male claimant who had been selected for redundancy as a result.
The Tribunal did not clarify whether "special treatment" could only be with respect to treatment afforded by statute (for example, the right to statutory maternity leave and pay) or whether the exemption might potentially cover additional benefits provided by the employer. The case has been appealed and was due to be heard by the UK Employment Appeal Tribunal in December 2010. The EAT's judgment will hopefully provide further clarification.

(Footnotes)
1 The judgment does not reveal whether the complainant actually appealed.
2 A career break is a period of unpaid leave. There is no statutory right to such a break, but it was a common benefit in the financial sector in 2006.
3 It is not known what relief she sought or would have sought. It may have been financial compensation.
4 Equality Tribunal: An Employee – v - A Hotel DEC-E2009-109.
5 Labour Court Determination No EDA096.
6 Statutory Instrument No 8 of 2006; www.lrc.ie/documents/publications/codes/9parttimeworking.pdf.
7 Section 22(1)(a) of the Employment Equality Act 1998 (as amended) provides: *"Indirect discrimination occurs where an apparently neutral provision puts persons of a particular gender (...) at a particular disadvantage in respect of any matter other than remuneration compared with other employees of their employer."*
8 Section 6(2)(a) of the Employment Equality Act 1998 (as amended) provides: *"a person is treated less favourably than another person is, has been or would be treated in a comparable situation on any of the 'discriminatory grounds' . . . As between any 2 persons, the discriminatory grounds. . . that one is a woman and the other is a man (in this Act referred to as 'the gender ground') . . ."*
9 *Siobhan Long – v - Powers Supermarkets Ltd t/a Quinnsworth* Labour Court Decision *DEE901; Siobhan Long – v - The Labour Court, Mairead Blackhall and Powers Supermarkets Ltd t/a Quinnsworth,* 1990 No 58 Judicial Review, Johnson J, High Court, 25 May 1990.
10 Section 85A of the Employment Equality Act 1998 (as inserted by section 36 of the Equality Act 2004).
11 ET/1804069/09.
12 The appellate court is not expected to rule on the case until mid 2011.

Subject: Discrimination on grounds of gender and family status in an application for part-time work
Parties: Ms Higgins (complainant – employee) – v – Irish Life & Permanent (respondent – employer)
Court: The Equality Tribunal
Date: 28 May 2010
Case number: DEC-E2010-084
Hardcopy publication: Not yet available
Internet publication: www.equalitytribunal.ie

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2010/79

Employers may discriminate against under-18s

COUNTRY DENMARK

CONTRIBUTOR MARIANN NORRBOM, NORRBOM VINDING, COPENHAGEN

Summary
Provisions in a collective labour agreement that allow the practice of paying employees under 18 years less than older employees and that allow termination of employees' contracts when they turn 18, do not violate the Danish Employment Equality Directive.

Facts
The case concerned a young service assistant, A, who – in accordance with the applicable collective agreement between his employer, B, and the trade union HK – was paid less than his adult colleagues due to the fact that he was under 18. Further, in line with common practice in this area, the service assistant was given notice just before he turned 18.

HK claimed that the lower pay as well as the termination were in breach of the Employment Equality Directive.

There was agreement on the fact that the employer's actions were fully in line with the particular derogation in section 5a(5) of the Danish Anti-Discrimination Act, under which the prohibition of discrimination on the basis of age does not apply to under-18s if the employer is covered by a collective agreement containing specific provisions on under-18s in relation to recruitment, payment and termination.

Therefore, the issue was whether section 5a(5) of the Anti-Discrimination Act could be deemed to be in violation of Employment Equality Directive 2000/78/EC. In the light of this, HK took legal action against both B and the Danish Ministry of Employment.

Judgment
The Eastern High Court pointed to the fact that, according to the interpretive notes of the Anti-Discrimination Act, the aim of the derogation in section 5a(5) is to support young people's integration into the labour market by giving them the opportunity to gain work experience. The Court found this to be a legitimate aim.

With reference to, among other things, case law from the European Court of Justice, the Eastern High Court found that section 5a(5) of the Anti-Discrimination Act and the practice of terminating the contract of employees before they reach the age of 18 must be deemed both appropriate and necessary as part of the efforts to achieve the legitimate aim.

On this basis, the Court dismissed the claim against both B and the Ministry of Employment.

During the proceedings, B claimed that the Employment Equality Directive cannot be relied upon in the relations between two private parties. However, in consequence of the Court's ruling that the Directive had not been violated, the Court did not have to take a stand on this issue.

Commentary
Article 6(1) of the Employment Equality Directive 2000/78/EC provides:

"that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim [...] and if the means of achieving that aim are appropriate and necessary.

Such differences of treatment may include, among others: (a) the setting of special conditions on access to employment [...], employment [...], including dismissal and remuneration conditions, for young people, older people [...] in order to promote their vocational integration or ensure their protection.
[...]"

The Eastern High Court found that the specific Danish provision in section 5a(5) of the Anti-Discrimination Act fulfils the requirements of this Article 6(1) of the Directive.

The ruling has been appealed to the Danish Supreme Court.

Comments from other jurisdictions
The Netherlands (Peter Vas Nunes): This Danish case involves two aspects of discrimination against young employees: lower pay and dismissal, both on account of age. In 2006, the Dutch Equal Treatment Commission (the "ET Commission") presented a position paper on two other aspects of the same phenomenon: hiring only youngsters and non-extension of their temporary contracts. The position paper is limited to unskilled work in supermarkets, which openly discriminate for reasons of cost, but is applicable to other sectors as well.

The reason Dutch supermarkets discriminate against persons over a certain age (in respect of unskilled work) has to do with the Dutch legislation on the minimum wage. The statutory minimum wage for an "adult" (which refers to persons aged 23 and over) is currently just over € 18,000 gross per year. The statutory minimum wage for persons aged 15-22 is considerably lower. For 22-year olds it is 85% of said sum, for 15-year olds it is no more than 30% (with intermediate percentages on a sliding scale for 16-22 year olds). This makes it attractive for supermarkets to employ youngsters and to get rid of them before they reach the age of 23 (and usually much sooner than that). The collective labour agreement for supermarkets includes pay scales that are slightly above the level of the statutory minimum wages, but it adopts the same lower percentages for 15-22 year olds.

The reason for the lower statutory minimum wage for youngsters is twofold. First, it aims to combat youthful unemployment by making it attractive for employers to hire young people, who can then gain work experience and so enhance their employability. Secondly, by making it unattractive for youngsters to have a paid job, they are less likely to leave school early and more likely to see paid work as no more than a means to supplement their pocket money and to work exclusively outside of their school hours (mainly in the evenings and on Saturdays).

When the Dutch Parliament debated what was to become of the Age Discrimination Act (in 2001/2002), the question came up as to whether the legislation allowing lower statutory minimum wages for youngsters is compatible with Directive 2000/78/EC, of which the Age Discrimination Act is a (partial) transposition. Parliament concluded that that legislation is indeed compatible. The ET Commission observes that it lacks the authority to find otherwise (but it cannot

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resist remarking, as an aside, and citing *Mangold* in a footnote, that the ECJ could have a different view). Given the fact that lower wages for youngsters must therefore be deemed to be legitimate, hiring youngsters to the detriment of older individuals on account of them costing less, must likewise be deemed to be objectively justified.

Conclusion 1: a policy of preferentially hiring youngsters for unskilled work in supermarkets is objectively justified age discrimination, provided the policy is suitable for meeting Parliament's objectives. This means, for example, that the policy must be such as to encourage the employees concerned to continue attending school.

Does this mean that a policy not to extend young employees' contracts beyond a certain age is also objectively justified? One might be forgiven for thinking that if hiring them preferentially is justified, then firing them "preferentially" is a logical and therefore justifiable consequence. This is not the case, however.

As already noted, the idea behind allowing lower minimum wages for youngsters is to help them find jobs. Dismissing them after a short while runs counter to this objective. Also, both the ECJ (in the *Roks* case, C-343/92) and the Dutch Supreme Court have held that financial considerations (alone) cannot justify discrimination. Admittedly, the Dutch ET Commission has held (in a case involving an age-discriminatory social plan) that financial considerations can justify discrimination if treating the relevant groups of individuals equally would be disproportionately costly for the employer. However, this situation does not as a rule exist in the supermarket sector.

Conclusion 2: a policy of not extending temporary contracts for reasons of age/cost is not objectively justified, except perhaps in very special circumstances.

What applies to the non-extension of a temporary contract surely applies - even more so – to dismissal on the grounds of age/cost. Therefore, I doubt whether a Dutch court would be as lenient with the employer as the Danish court was in the case reported above. In fact, it is questionable whether Article 5a(5) of the Danish Anti-Discrimination Act, which seems to give social partners a blank cheque to discriminate against under-18s regardless of whether that is objectively justified, is compatible with EU law.

On 10 November 2006 the Dutch Supreme Court ruled on the legality of the Dutch Minimum Wage Act inasmuch as employees aged under 15 are not covered by the Act, and can therefore be paid even less than 15 year olds, despite the fact that the law allows 13 and 14 year olds to perform (very limited types and amounts of) paid work. Two unions challenged the compatibility of the exemption of under 15s with (i) the International Convention on Political and Civil Rights ("BUPO"), (ii) the European Social Charter, (iii) the International Convention on Economic, Social and Cultural Rights ("ECOSOC") and (iv) domestic law. The courts of first and second instance found the age discrimination to be unjustified, but the Supreme Court held that it was objectively justified by a legitimate aim (namely to prevent paid work becoming an attractive alternative to school and other educationally sound activities) and that the means to achieve that aim were effective, in that establishing minimum wage levels for 13 and 14 year olds might create the impression that it is acceptable to integrate them into the regular labour market. The question as to whether the means to achieve the stated aim were necessary remained. One alternative, for example, could have been to outlaw work by 13 and 14 year olds. Another alternative would be to establish lower minimum wage levels for these youngsters, so low as to deter them from taking paid work seriously. The Supreme Court weighed two alternatives, both aimed at protecting 13 and 14 year olds: protecting them against themselves (i.e. not going to school) versus protecting them against underpayment. On balance, the Supreme Court allowed the government sufficient margin of discretion and held the discrimination to be justified.

As of 9 July 2010 Dutch law allows employers to hire under 27s for a maximum of four rather than three fixed terms of one year each, thereby lowering their level of protection against losing their job. The law is a temporary measure aimed at combating youth unemployment. In Parliament there was some, but conspicuously mild, debate on whether this change of law is compatible with the anti-discrimination legislation, including Directive 2000/78. In the light of *Mangold, Kücükdeveci*, etc. I am not certain that the discrimination of young employees will meet the compatibility test if challenged in court.

United Kingdom (Hester Briant): In the UK, it would be unfair dismissal and age discrimination to dismiss employees under 18 – whether or not a collective agreement applied to their employment – because of their age. With the exception of national minimum wage (NMW) laws, it would also normally be discriminatory to pay employees under the age of 18 less because of their age (although, in practice, they are often paid less than older workers as they have fewer qualifications and less experience). There are specific provisions in the National Minimum Wage Act regarding under-18s (and other younger workers such as those aged 18-21), whereby these groups are entitled to lower NMW rates than employees aged 22 and above. UK age discrimination legislation contains specific exceptions for the NMW as applied to younger workers, which have not yet been the subject of any legal challenge. The UK Government considers that these exceptions can be justified on social policy grounds, to encourage participation and employment of younger employees in the workforce.

Subject: Age discrimination
Parties: The Danish Union of Commercial and Clerical Employees in Denmark acting for A – v – B and the Danish Ministry of Employment
Court: The Eastern High Court of Denmark
Date: 30 June 2010
Case number: B-2644-08 and B-2486-09
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2010/80

Supreme Court disapplies statutory mandatory retirement (at age 60) provisions

COUNTRY FRANCE

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Summary
In May 2010, the French Supreme Court ruled in favour of strict judicial control of compulsory retirement provisions, holding that national provisions of law are to be disapplied if differential treatment on grounds of age is not demonstrably justified by a legitimate aim and the means of achieving that aim are not appropriate and necessary.

Facts
The first case[1] concerns the age limit imposed on airline pilots by Article L.421-9 of the Code of Civil Aviation. This article provides that *"[...]navigation staff cannot take part in piloting or co-piloting activities in the public air transportation beyond the age of 60".* After 60, pilots must be reallocated to other jobs amongst the ground staff within the airline group.
Here, a pilot of Brit Air Company was terminated because he had reached the age of 60 and could not be reclassified amongst the ground staff within the group. The pilot brought an action before the Industrial Tribunal seeking damages and annulment of his dismissal on the grounds that such a measure was discriminatory and contrary to European Directive 2000/78/EC of 27 November 2000.
The second case[2] involved the special retirement scheme for employees of the Paris Opera. Here, an employee of the Paris Opera was notified of her compulsory retirement at the age of 60 in compliance with executive order No 68-382 of 5 April 1968, which establishes a specific retirement scheme for employees of the Opera and national theatres. The employee brought an action before the Industrial Tribunal against this measure, arguing that under legal provisions which prevail over the executive order, she could only be forced to retire at the age of 65[3], and that her forced retirement at 60 constituted discrimination on grounds of age, amounting to dismissal without real and serious cause.

Court of Appeal
In the case of the pilot, the Court of Appeal of Paris dismissed the pilot's claim, ruling that the age limit was lawful under Directive 2000/78/EC, on the basis that Article 6 provides that *"Member States may provide that differences of treatment on grounds of age"* and that that *"shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary".* Therefore, the age limit imposed on pilots was perfectly legitimate, having as its purpose the smooth functioning of the air navigation and the safety of passengers and crew in a reasonable and proportionate way.

In the Opera case, the Court of Appeal dismissed the employee's claim on the grounds that retirement of Paris Opera employees was exclusively governed by executive order No 68-382 of 5 April 1968 and that the employee met the age and seniority requirements set by the said executive order for such retirement.

Supreme Court
In both cases, the decisions were overruled by the French Supreme Court for violation of Article 6 § 1 of Directive 2000/78/EC.

In the pilot case, the Supreme Court did recognise that the age limit imposed by the Code of Civil Aviation was justified by a legitimate aim, namely that of ensuring the smooth functioning of air travel and the safety of passengers and crew. Even so, the Court of Appeal's decision has been overruled, as the appeal judges had failed to examine, pursuant to Article 6 § 1 of said Directive, whether termination of piloting at 60 was a necessary and appropriate means to achieve such aim.
In the Opera case, the Supreme Court overruled the Court of Appeal's decision on the grounds that the appeal judges had not conducted the twofold control provided by article 6 § 1 of said Directive. In other words, by not verifying whether the difference in treatment based on age was objectively and reasonably justified by a legitimate aim and that the means of achieving such aim was appropriate and necessary, they had disregarded article 6 § 1 of the European Directive.

Commentary
In both cases, the Supreme Court applied Article 6 § 1 of Directive 2000/78/EC directly in order to override, in the first case, an Act of Parliament (the Code of Civil Aviation) and, in the second case, an executive order. The direct application of a European directive by French judges is rather remarkable. As we all know, directives have no direct horizontal effect. Non-transposed directives cannot, by themselves, create any rights or obligations on individuals. Although national courts must interpret their domestic law in the light of European directives, such interpretation may not contradict national statutory provisions. In the cases reported above, differential treatment on grounds of age was specifically allowed under French law (by a statutory provision in the pilot case and by an executive order in the Opera case). Nevertheless, the court subjected that differential treatment to the objective justification test.
However, by ruling as it did, the French Supreme Court is putting into practice the ECJ's case law on differential treatment related to age as promulgated in its *Mangold*[4] and *Kücükdeveci*[5] rulings, by which the ECJ held that the principle of non-discrimination on grounds of age as formulated in Directive 2000/78/EC is a general principle of EU law and that it is the duty of national courts to give full effect to it by declining to apply any incompatible national legislation.
Here, the French Supreme Court has followed the ECJ by acknowledging the principle of non-discrimination on grounds of age as a general principle of the EU law and by directly applying it.
In doing so, the Supreme Court shows a popular pro-European attitude, whilst reinforcing its powers over the French Parliament and the government.

Comments from other jurisdictions
United Kingdom (Hester Briant): UK age discrimination laws currently allow for a default retirement age (DRA) of 65. If an employer requires an employee to retire on or after his or her 65th birthday and correctly follows the UK's statutory retirement procedure, the dismissal will be fair and not unlawfully age discriminatory. The Government has been consulting about the removal of the DRA with effect from October 2011, focusing not on "if" the DRA should be removed but rather the consequences of doing so. Once the DRA has been abolished, employers will need to consider whether to impose company normal retirement ages, in which case they would have to rely on an objective justification to defeat any claim of age discrimination. The alternative would be to consider how to manage without compulsory retirement altogether. We expect that in future, UK courts and tribunals are likely to have to deal with many more cases on whether company normal retirement ages can be objectively justified as a proportionate means of achieving a legitimate aim.

(Footnotes)
1 Vlimant c/ SA Brit air.
2 Crosnier c/ EPIC Opéra national de Paris.
3 The compulsory retirement age was raised to 70 in 2010.
4 ECJ case C-144/04 (*Mangold – v - Helm*).
5 ECJ case C-555/07 *(Kücükdeveci - v - Swedex).*

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Subject: Age discrimination
Parties: Vlimant – v – Brit Air and Crosnier – v – Opéra national de Paris
Court: *Cour de cassation* (Supreme Court)
Date : 11 May 2010
Case numbers : respectively, 08-45.307 and 08-43.681
Internet publication : www.legifrance.gouv.fr

2010/81

Employee compensated for religious harassment because his manager referred to his church as a "sect"

COUNTRY DENMARK

CONTRIBUTOR MARIANN NORRBOM, NORRBOM VINDING, COPENHAGEN

Summary
An employee was awarded approximately € 3,350 in compensation because his manager called his church a "sect".

Facts
Employers must provide a harassment-free working environment for their employees. Therefore, it is important that employers and managers set a good example, as shown in this case.

A security guard at a supermarket was a minister in the Apostolic Church in his spare time. This led to a number of remarks from his manager, who on several occasions referred to the church as a "sect". The guard did not like people speaking disparagingly about his church, although he did not say so openly. After being dismissed for an unrelated reason, he sued his employer for, among other things, discrimination on the basis of belief.

Judgment
Based on oral evidence, the Court held that the manager had on three occasions referred to the apostolic community as a "sect" and that on at least one of these occasions his remarks could not be held to have been made in fun.

The Court said that the term "sect" is usually used in a derogatory sense and that the manager could be assumed to have known that the term would be offensive to the security guard, not least because the remarks came from him as the security guard's manager. On these grounds, the Court held that the remarks constituted harassment on the basis of belief. Accordingly, the Court ordered the employer to pay approximately € 3,350 in compensation.

It is not yet known whether the case will be appealed.

Commentary
This case shows that, when applying the test of harassment, the courts will consider the defendant's conduct in detail and will take into account the claimant's subjective perception of the defendant's conduct.

The case also shows that an employee is not always required to say openly that he or she finds a remark offensive in order for such a remark to be held to constitute harassment within the meaning of the Danish Anti-Discrimination Act.

Comments from other jurisdictions
Germany (Paul Schreiner and Heidi Banse): In Germany the case would presumably also have been considered to constitute harassment on the basis of belief, namely as unwanted conduct which has the purpose or effect of violating an employee's dignity under Article 3(3) of the Anti-Discrimination Act. German law does not require the employee to have warned the harasser that he or she feels being harassed. On the contrary, a previously existing statutory requirement for the victim actively to identify the conduct to which he or she objects was declared to be undesirable and was therefore repealed and not transferred into the Anti-Discrimination Act. The conduct must be harassing, not in the employee's subjective perception, but from the point of view of a neutral third party. Though the term "sect" may be technically correct with regards to the Apostolic Church, in the sense of a schism from another religious community, in this case (according to the information at hand) there is little doubt that the manager used the word "sect" in a derogatory sense with the purpose or with the reasonable effect of hurting the employee's dignity by putting down his belief and respectively the religious community of which he was a member.

The Anti-Discrimination Act requires the unwanted conduct to violate the employee's dignity and to create an environment that is characterised by intimidation, hostility, degradation, humiliation or offence. Therefore, a German employment court would have examined whether, in addition to the one remark clearly not made in fun, the other two occasions characterised the environment as being intimidating, hostile, etc. A German court would have had to evaluate the overall picture, e.g. whether the employer/manager had taken into consideration the employee's belief on other occasions (e.g. religious holidays and Sunday services). The fact that the remarks came from the manager and not just a colleague would also be factored in.

In German law the compensation would not have been awarded solely on the basis of the Anti-Discrimination Act, but also as damages for the violation of secondary obligations under the employment contract and for violation of the employee's personal rights. It should, however, be noted that German courts do not award high amounts in damages.

The Netherlands (Peter Vas Nunes): Is subjective perception relevant when determining whether behaviour qualifies as harassment? Last year in the Dutch *Hoge Raad* case, the Supreme Court ruled on this question (10 July 2009 JAR 2009/24). The judgment concerned the Dutch transposition of Article 2(1)(d) of Directive 2006/54/EC (equal opportunities for men and women in employment), which defines sexual harassment as "where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment". Dutch law includes an identical definition except that "unwanted" has been omitted, because this word introduces a subjective element, which the legislator wished to avoid.

The Supreme Court case involved a 59 year old PR Manager and his boss, the Managing Director. They had collaborated closely for 17 years and had a habit of making fun, which included exchanging frequent "male" jokes. At a Christmas party in 2002, while the Managing Director was in a light-hearted mood, he jokingly slapped the PR Manager on

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his bottom, pinched it and mentioned the words "dark room". The PR Manager laughed and said nothing of the incident.

Five days later, however, the Managing Director found a formal note in his pigeon hole, written by the PR Manager, in which the latter accused the Managing Director of sexual harassment. The Managing Director was shocked and went to see the PR Manager. In the course of the conversation that ensued, the PR Manager mentioned that he had been sexually molested by a priest as a twelve year old, which had caused him to be more sensitive than average to such matters. Upon hearing this, the Managing Director offered an apology and explained that he had absolutely not intended to have any sexual contact.

The PR Manager did not accept the apology and instead – following dismissal proceedings in which he was awarded severance compensation in the amount of € 63,500 – sued both his employer and the Managing Director personally, claiming damages of over € 270,000 (mostly for loss of early retirement benefits, but also partly for emotional suffering). Both the court of first instance and the Court of Appeal dismissed the claim inasmuch as it was directed against the Managing Director, ruling that his behaviour did not qualify as sexual harassment because (1) he had no sexual intention; (2) his behaviour was part of a pattern of mutually jocular interaction (dirty jokes, etc.); (3) the PR Manager did not belong to one of the groups of people who are more than normally vulnerable to sexual harassment and (4) the PR Manager's dignity was not violated and no intimidating, hostile, degrading, humiliating or offensive environment had been created, the seriousness of the behaviour merely being rooted in the PR Manager's childhood experience. The fact that he had perceived the incident as being sexually motivated was not considered to be relevant.

The Supreme Court upheld the Court of Appeal's judgment, reasoning, *inter alia,* that the Managing Director's lack of sexual interest was a relevant factor. This reasoning has met with criticism. If the PR Manager's perception was irrelevant (rightly so), why was the Managing Director's intention not equally irrelevant?

United Kingdom (Tom Heys): The UK provisions protecting employees from discriminatory harassment are now contained in the Equality Act 2010. In order for conduct to amount to unlawful harassment, the conduct must have the purpose or effect of violating the employee's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him or her. Where it is claimed that the conduct had this effect (although this was not the perpetrator's purpose), the Employment Tribunal must consider whether the conduct should reasonably be considered as having that effect. Reasonableness is assessed subjectively for these purposes, by reference to the employee's "perception". Given this legal framework and the same set of facts, a UK Tribunal would most likely have reached the same result as the Danish court. Clearly, disparaging remarks about someone's religion could reasonably be regarded as creating an "offensive environment" for them.

Subject: The Danish Anti-Discrimination Act, which implements Directive 2000/78/EC
Parties: The Danish Christian Trade Union acting for A – v – B
Court: Horsens District Court
Date: 9 July 2010
Case number: BS 150-1747/2009
Hard Copy publication: Not yet available
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2010/82

Employer succeeds in discriminatory dismissal of employee who lacked work permit

COUNTRY AUSTRIA

CONTRIBUTOR ANDREAS TINHOFER, MOSATI RECHTSANWÄLTE, VIENNA

Summary
Dismissal of an illegal worker (i.e. a worker lacking a work permit) could not be sex discriminatory according to Austrian law as it stood before being amended in 2008.

Facts
A Turkish woman ("the plaintiff") moved to Austria in 2002. In March 2008, she applied for a job as a cleaner. At that time she had a residence permit, but no work permit. She filled in a form in which she confirmed that she did have a work permit and was not pregnant.

The plaintiff started her work on 1 April 2008. On 6 May 2008, her gynaecologist informed her that she was in her 10th week of pregnancy. On 14 May 2008, she informed her employer that she was pregnant. She was dismissed summarily (termination without notice) on the grounds that she had not disclosed her pregnancy during the recruitment process. Nevertheless, an administrative fine was imposed on the employer for having employed a foreigner without a valid work permit. On 12 June 2008, the plaintiff had an abortion. A causal link with the termination of employment could not be established in the ensuing court proceedings.

The plaintiff sued her employer, claiming both a termination indemnity and immaterial damages. Her claim in respect of the termination indemnity was based on the Austrian Maternity Protection Act, which provides that a dismissal during pregnancy is invalid. Given that the dismissal prohibition continued until the date of the abortion and that the applicable notice period was two weeks, she argued that the employment contract did not terminate until 27 June 2008. Therefore, the claim for a termination indemnity equalled her salary for the six-week period of 14 May to 27 June 2008. The claim for immaterial damages, in the amount of € 1,500, was based on the argument that the termination was sex-discriminatory.

The defendant based its position on an Austrian law, which provides that the employment contract of a person who needs but lacks a work permit is invalid, i.e. is deemed never to have existed. Any salary paid for work actually performed need not be refunded. Therefore, no salary was owed beyond 14 May 2008, so the defendant argued.

Judgment
The court of first instance found in favour of the plaintiff as regards the termination indemnity, but her claim for immaterial damages was turned down. Both parties appealed.

The Court of Appeal ("*Oberlandesgericht Innsbruck*") overturned the judgment inasmuch as it awarded a termination indemnity. It held that, pursuant to the Employment of Foreigners Act, a termination indemnity

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is not owed in the event the employee lied about having a work permit. The case was remanded back to the court of first instance, which was instructed to examine whether the plaintiff had lied that she held a work permit or whether the information she had provided at the time of her application for the job was the result of a misunderstanding.

As for the immaterial damages, the Court of Appeal rejected the plaintiff's claim. It confirmed that the termination of the plaintiff's employment because of her pregnancy constituted sex discrimination outlawed by the Equal Treatment Act (*Gleichbehandlungsgesetz*, "*GlBG*"). It even accepted that the Equal Treatment Act, if construed in compliance with Directive 76/207/EC (as amended by Directive 2002/73/EC), would cover situations where the employment contract was null and void under the Employment of Foreigners Act. However, before being amended in August 2008, the Equal Treatment Act did not provide for damages in cases of discriminatory termination of employment. Instead, the employee could challenge the termination and apply for re-instatement. The Court of Appeal held that under the Equal Treatment Act, as it stood at the relevant time, there was neither the need nor the possibility to read an immaterial damages remedy into the Act.

The plaintiff applied for judicial review by the Supreme Court. This court held that the clear wording of the Equal Treatment Act, as it stood prior to its amendment in 2008, excluded any further remedy in case of a discriminatory termination of employment, other than a challenge to the termination's validity. On this basis the Supreme Court felt no need to investigate whether that situation was in compliance with European equal treatment legislation.

On the issue of the termination indemnity, the Supreme Court corrected the Court of Appeal's decision. It held that the Maternity Protection Act cannot be invoked by an illegal worker. Therefore, the fact that the plaintiff's employment was discriminatory was not considered relevant.

Commentary

It must be noted that in August 2008, three months after the plaintiff's dismissal, the Austrian Equal Treatment Act was amended so that employees whose employment is terminated because of their sex can now choose between challenging the termination (seeking re-instatement) and claiming material and immaterial damages (section 12(7) GlBG). Prior to that amendment, the lack of a provision in the Equal Treatment Act explicitly enabling employees to claim damages in the event of a discriminatory termination of employment was criticised on the ground that it failed to comply with European Equal Treatment law.

The Supreme Court's approach to the issue of immaterial damages, as claimed by the plaintiff, may seem rather restrictive. However, in view of the number of provisions in the (old) Equal Treatment Act explicitly enabling the employee to claim immaterial damages for sex discrimination, it must be assumed that the Austrian Parliament had deliberately chosen the challenge of the discriminatory termination to be the sole legal remedy in that case. On the basis of the principles of interpretation in compliance with European law as applied in Austria, the Supreme Court seems to have had no choice but to deny the award of immaterial damages.

It remains to be added that on the basis of the "*Francovich*" doctrine the plaintiff could claim damages from the Austrian State for the delay in fully implementing Directive 76/207/EC (as amended by Directive 2002/73/EC). Legal scholars had already pointed out that not providing for immaterial damages in relation to termination of employment (as opposed to other forms of sex discrimination) falls short of the Directive.

Comments from other jurisdictions

Germany (Paul Schreiner and Christian Busch): Under German law a missing work permit does not invalidate an employment contract, although an employer is under an obligation to terminate such a contract. However, doing so can conflict with paragraph 9 of the German Maternity Protection Act ("MuSchG"), which provides that termination during pregnancy is invalid. Although there is, as far as can be seen, no decision of the Federal Labour Court concerning this, in view of the enormous relevance of the MuSchG for pregnant employees and their interest in not having their contracts terminated during pregnancy, its protection should take precedence over the employer's right to terminate.

The employer in the reported case therefore could only have challenged the employment contract with the argument of having been illegally misled by the plaintiff. This of course cannot be based on the plaintiff's lie about her pregnancy. It is established case law in Germany that an employer may not ask a job applicant whether she is pregnant and that an employee who is nevertheless asked such a question has the right to lie.

Concerning an entitlement to immaterial damages, in contrast to the situation in Austria, there has been a provision in Germany since August 2006 that provides a right to compensation and indemnity in paragraph 15 of the German General Equal Treatment Act ("AGG") in the case of discriminatory behaviour by the employer. Although § 2(4) AGG suggests that a termination of employment does not fall within the scope of the AGG, the Federal Labour Court ruled in 2009 that compensation or an indemnity according to paragraph 15 AGG owing to a discriminatory termination are nevertheless possible. Therefore, under German law the claimant would have been entitled to compensation on the grounds of sex discrimination.

Ireland (Georgina Kabemba): In Ireland it is illegal to employ someone without a valid employment permit. Therefore the plaintiff's employment would have been terminated solely for this reason. Issues in relation to her pregnancy should not have been referred to as the Employment Equality Acts, 1998 and 2004 prohibit discrimination on grounds of gender. In addition, it is not illegal in Ireland to dismiss an employee during her pregnancy, with the exception of when the employee is on protective leave provided for under the Irish Maternity Protection Acts, 1994 and 2004, which generally commences 2 to 4 weeks prior to the birth of the child and lasts for a maximum period of 42 weeks.

United Kingdom (Hester Briant): In the UK, the outcome of this case would depend on the Employment Tribunal's finding as to the reason for the dismissal: was it because of the plaintiff's pregnancy or her immigration status? Any dismissal where the principal reason is connected to an employee's pregnancy or maternity leave is automatically unfair (and would also constitute direct sex discrimination). In contrast, termination by reason of "illegality", which would include not having the right to work in the UK, is potentially a fair reason to dismiss. However, employers are likely to be found to have acted unfairly if they terminate employment for this reason without first allowing the employee an opportunity to clarify or appeal their immigration status with the UK Border Agency.

Employers in the UK are therefore currently in the unfortunate position of trying to combine their strict obligations under immigration law, including potentially severe penalties for employing illegal workers, with their duties to employees under unfair dismissal law. One

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practical solution is to: (1) terminate the individual's employment on grounds of illegality; (2) offer them an extended time period to appeal their dismissal and support them in their application or appeal to the UK Border Agency during this time; and (3) depending on the outcome of that process, reinstate them if appropriate.

Subject: Sex discrimination and work permit
Parties: *Z Ö – v – S GmbH &Co KG*
Court: *Oberster Gerichtshof* (Austrian Supreme Court)
Date: 22 April 2010
Case number: 8 Ob A 58/09a
Hardcopy Publication: not yet available
Internet publication: http://www.ris.bka.gv.at/Jus/

2010/83

Employee barred from using, in discrimination case, information provided in "without prejudice" discussions

COUNTRY UNITED KINGDOM

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Summary
The Employment Appeal Tribunal (EAT) has ruled that employers can legitimately have "without prejudice" discussions with employees who have alleged unlawful discrimination, with a view to settling the dispute. Such discussions cannot later be used as evidence in court.

Background
Under the law of privilege in the UK, written or oral communications which are made "without prejudice", during negotiations which are genuinely aimed at settlement of an existing legal dispute, cannot subsequently be referred to in the court proceedings. The policy behind the rule is to encourage parties to try to settle their disputes without resorting to litigation. It allows them to talk more freely, without being excessively cautious about what they say for fear that their words could be used in evidence.
However, a case six years ago raised the possibility that discrimination cases might be an exception to the principle (*BNP Paribas – v – Mezzotero* [2004] IRLR 508). The EAT held that the content of a "without prejudice" conversation between an employer and an employee could be used by the latter in support of her subsequent sex discrimination claim. This ruling was partly based on the established exception to the without prejudice rule for "unambiguous impropriety". The EAT suggested that, in the context of a genuine complaint of discrimination, the employer's conduct would fall within this concept.
In the latest case on this issue, the EAT has interpreted its earlier decision in *Mezzotero* narrowly and confirmed that employers are generally permitted to have "without prejudice" discussions with employees where discrimination is alleged.

Facts
The claimant, Diana Woodward, was employed by Abbey National plc (now Santander UK plc) in the early 1990s. She was dismissed in November 1994 and brought proceedings alleging unfair dismissal and sex discrimination. After "without prejudice" negotiations, these proceedings were settled without admission of liability in November 1996.
Under the terms of the settlement, the company was not required to provide a reference for Ms Woodward and she struggled to find new employment. She later wrote to her former employer on several occasions asking for work but was eventually told that there were no suitable positions available. She issued Employment Tribunal proceedings contending that the company had victimised her, by either not providing a reference or providing a poor reference, and discriminated against her on the ground of sex in the way it had dealt with her application for work.

The Employment Tribunal's Decision
In support of her claims, Ms Woodward sought to use evidence of discussions which had taken place in the course of the negotiations concerning the settlement of her original dispute in 1996. She claimed that she had requested that the terms of the settlement include provision for her to be given a reference, but this had been refused. She alleged that this provided cogent evidence in backing up her current claims for victimisation and sex discrimination.
The company made a successful application to the Employment Tribunal to exclude such evidence, on the basis that the discussions about a reference formed part of negotiations that had been carried out on a "without prejudice" basis. Ms Woodward appealed to the EAT, relying on the *Mezzotero* decision.

The Employment Appeal Tribunal's Decision
The EAT closely examined the decision in *Mezzotero*, which concerned an employee who had returned from maternity leave and was asked to attend a meeting in which she was told, in a discussion said to be without prejudice, that there was no role for her and it would be best if she accepted a redundancy package. The EAT in *Mezzotero* had emphasised that for the without prejudice rule to apply there must be a dispute between the parties that the communications in question were genuinely seeking to compromise. On the facts of *Mezzotero,* there had been no existing dispute between the parties before the relevant conversation took place, with the result that the principle did not apply.
The EAT in *Woodward – v – Santander* reiterated the exception to the without prejudice rule for cases of "unambiguous impropriety", where evidence of the discussions may still be admitted in evidence. However, the EAT said that this exception should only be applied in the clearest of cases, regardless of the nature of the dispute, such as where its application to negotiations would act as a cloak for perjury or blackmail. Another example, the EAT said, would be unambiguously discriminatory words or conduct by an employer in a "without prejudice" exchange.
The EAT said that *Mezzotero* had not, as Ms Woodward had argued, established any new general exception relating to discrimination cases. Any such wider exception would be inconsistent with the policy behind the without prejudice rule, that parties to negotiations should not be discouraged from communicating freely in their attempts to reach a settlement. The EAT emphasised that the policy underlying the rule applies with as much force to cases where discrimination has been alleged as it applies to any other form of dispute.
The EAT observed that it would have a substantial inhibiting effect on the ability of parties to speak freely in conducting negotiations if subsequently one or other could comb through the content of

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correspondence or discussions – which may have been lengthy or contentious – in order to point to equivocal words or actions in support of or in order to defend an inference of discrimination. Parties should be able to approach negotiations free from any concern that they will be used for evidence-gathering or scrutinised afterwards for that purpose. The EAT concluded that the Employment Tribunal had been plainly correct to conclude that the evidence which Ms Woodward sought to adduce was barred by the without prejudice rule and there was no basis for contending that it fell within the exception for unambiguous impropriety.

Commentary

While this decision does not establish any new legal principles, it is a sensible reaffirmation of the scope of the general "without prejudice" principle which will be reassuring for employers seeking to resolve discrimination allegations and claims. The *Mezzotero* decision had raised the spectre that there might be a broad and generally applicable exception to the rule in discrimination cases.

The EAT's robust analysis of the policy underlying the rule is especially welcome. It went so far as to say that the principle might be said to apply "with particular force" to discrimination cases, which often place heavy emotional and financial burdens on claimants and respondents alike: "It is idle to suppose that parties, when they participate in negotiation or mediation, will always be calm and dispassionate. They should be able to argue their case and speak their mind, within limits."

On the other hand, employers should still be mindful of the limits to the extent of the without prejudice principle. In particular, any overtly discriminatory communications are likely to fall within the "unambiguous impropriety" exception to the principle.

Comments from other jurisdictions

Austria (Martin E. Risak): This case is a welcome opportunity to point out the impact on the different procedural rules of evidence to successful pre-trial negotiations and mediation. Whereas UK law (and other common law systems) make evidence inadmissible in court that came to be known to the parties during negotiations that have been conducted "without prejudice", the Austrian rules of civil procedure hardly ever make evidence inadmissible even if improperly obtained. It is argued that the court should be able to use everything available to help it find out the truth: considerations of fairness are therefore put in the background. Whereas some efficiency may be achieved using "without prejudice" clauses, for instance, by agreeing on penalties for breach of contract, clients in Austria are usually advised by their lawyers never to speak too freely during negotiations, as that might put them in an unfavourable position in a later legal procedure if no settlement is reached. That this approach does not help with the early resolution of employment relationship problems is evident to many but there is also a widespread belief that to introduce the common law notion of privilege would alter some important underlying principles of Austrian procedural law - and should therefore be avoided.

Germany (Martin Reufels and Helena I. Maier):

1. The decision of the Employment Appeal Tribunal (EAT) is of particular interest for civil law jurisdictions, as it illustrates the risks of settlement negotiations in discrimination claims. The UK "without prejudice" rule tends to make inadmissible in any subsequent litigation, evidence of communications taken from negotiations conducted in a genuine attempt to settle the dispute. It aims at allowing parties to speak freely for the purpose of settlement without fear that if negotiations are unsuccessful, evidence will be deduced from statements made during these settlement negotiations. As the EAT decision points out, this underlying principle applies to discrimination claims just as much as to any other claim. However, this legal privilege rule is not without limits. An exception for statements which are unambiguously discriminatory was first laid down by the EAT in its decision in *BNP Paribas – v – Mezzotero* and reiterated, albeit in a more restrictive way, in the present case.
2. The "without prejudice" rule and concept is unknown to German private law. As a general rule, parties intending to terminate their dispute by means of a settlement in order to avoid further litigation do not benefit from any comparable legal privilege. Thus, evidence can be deduced from statements made within settlement negotiations, just as it can from statements made at any other stage of the dispute. Under the German Code of Civil Procedure (ZPO), the only occasions when parties to a dispute might have evidence excluded in a subsequent trial are when concluding a "procedural contract" on the inadmissibility of certain types of evidence or where there is a shift in the burden of proof. The validity of procedural contracts, however, is subject to judicial control with regard to the requirements, *inter alia,* of those provisions of the German Civil Code (BGB) which transpose Directive 93/13/EEC on unfair terms in consumer contracts. Furthermore, under German private law, statements made in the course of settlement negotiations accompanying pending court proceedings are only binding if (1) both parties act with the intention to be legally bound and if (2) the formal requirements for a procedural settlement are met. According to § 127a BGB, a procedural settlement requires notarisation in order to be binding upon the parties. For this reason, the problem the EAT had to deal with in the present case is much less common and also less necessary under German law than it is under UK law.
3. Furthermore, the German General Act on Equal Treatment (AGG) serves to enhance the gathering of evidence from prior communications between the parties. This Act transposes Directives 2004/113/EC, 2002/73/EC, 2000/78/EC and 2000/43/EC. Of particular importance is § 22 AGG, which transposes Article 4 of Directive 97/80/EC on the burden of proof in cases of discrimination based on sex; Article 10 of Directives 2004/113/EC and 2000/78/EC; and Article 8 of Directive 2000/43/EC and provides for a partial shift of the burden of proof as soon as facts have been established from which it may be presumed that there has been a discriminatory act. The absence of a general "without prejudice" rule under German law along with the shift of the burden of proof laid down in § 22 AGG for cases involving the principle of equal treatment, clearly invite claimants to gather evidence in the course of settlement negotiations. Explicit discriminatory statements, which would fall within the "unambiguous impropriety" exception under UK law, are obviously admissible evidence in later court proceedings under German law as well. Within the scope of the AGG, however, the mere establishment of facts from which it may be deduced that there has been discrimination, would already be sufficient and admissible evidence such that the burden of proof would shift to the respondent. As a consequence, in the German legal system particular care must be taken in conducting settlement negotiations.

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Subject: Sex discrimination; Admissibility of evidence
Parties: Woodward –v – Santander UK plc
Court: Employment Appeal Tribunal
Date: 25 May 2010
Case number: UKEAT/0250/09/ZT
Hardcopy publication: [2010] IRLR 834
Internet publication: www.employmentappeals.gov.uk

2010/84

Does a rejected job applicant have the right to know who got the job and why?

COUNTRY GERMANY

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Summary
A German court has referred to the ECJ the following question for a preliminary ruling: must national courts interpret EU law as meaning that an applicant who demonstrates that he or she complies with the requirements of a job advertisement but was not invited for a job interview, has the right to know whether someone else was engaged and, if so, on which criteria that engagement was based? If the answer is yes, does the fact that the employer does not give such information lead to a presumption of discrimination?

Facts
In 1961 a Russian-born woman – the plaintiff – applied for a job as a software-developer with the respondent. She had completed her studies in Russia, where she had received a Russian certificate attesting to the fact that she was a qualified systems engineer. The certificate had been accepted in Germany as being equivalent to a German informatics degree. Nevertheless, her application was rejected. She was not informed whether the respondent had engaged another person and, if so, on which criteria such engagement was based. A short time afterwards, the respondent again published the same job advertisement and the plaintiff again applied for the job. However, her application was again turned down without any further comment.

The plaintiff argued that she fit perfectly into the published job profile and was able to fulfil all the duties associated with the position advertised. In her opinion, she was obviously the person who was best qualified for the job, therefore the only explanation for not being invited to a job interview was discrimination on the basis of gender, age and/or nationality. She sued the respondent for breach of the *Allgemeine Gleichbehandlungsgesetz* (AGG), which is the German transposition of Directive 2000/78/EC. She claimed compensation pursuant to section 15(2) AGG (a form of immaterial damages) as well as information about the person engaged.

The respondent argued that the plaintiff had failed to show adequate facts to substantiate her discrimination claim. However, German law provides that a claimant merely needs to demonstrate facts from which it may be presumed that there has been discrimination, in which case it is for the respondent to prove the contrary. Furthermore, the respondent took the position that a claim for information does not exist under the AGG.

The plaintiff's claim was dismissed in the lower courts. She took the case to the German Federal Court for employment matters, the BAG.

Judgment
The BAG held that the plaintiff was not entitled to compensation in accordance with section 15(2) AGG since she had failed to provide sufficient evidence to justify presumptive discrimination. The BAG clarified that the fact that she had not been invited to a job interview could, in principle, in itself constitute a violation of the AGG, but that in this case it did not. It is for the plaintiff to provide evidence that a rejection was discriminatory. Such evidence cannot be found solely in the fact that the plaintiff belonged to a number of protected categories (gender, age. nationality). In addition, the mere fact that there are statistically fewer women employed in IT industries than men, does not specifically relate to the employer in this case – the respondent – and therefore does not constitute sufficient evidence.
On this basis, the plaintiff was not able to substantiate her claim for compensation. Therefore, the question arose as to whether or not she was also entitled to more information about the application procedure and the successful applicant, in essence, to substantiate her claim.
The BAG held that the AGG does not allow for such a claim. Indeed, German law in general does not provide for such a claim, since as a general rule the plaintiff bears the burden of proof that he is entitled to a certain benefit and the defendant is under no obligation to help him to substantiate his claim. An exemption is made insofar as there is a right to information in the event a claim has been awarded, but the quantum thereof is in dispute. On the basis of these general rules there would be no right to information and, as a consequence, the plaintiff would probably not be able to show further evidence of discrimination.
However, as the BAG was uncertain whether this was compatible with EU law, it referred to the ECJ an application for a preliminary ruling on the question of whether community law requires such a right to information.

Commentary
From my perspective the conclusions of the BAG regarding the national law are accurate and there is no right to information under German law in cases such as this. Therefore, such a right to information could only be founded on European law. Given that the respective directives do not contain explicit provisions, a right to information could only be drawn from general principles.

Such a right could possibly be extracted from the principle of effectiveness, if one assumes that an applicant such as the plaintiff in this case is prevented from enjoying rights guaranteed under EU law. This, however, seems not to be the case. Both German law and the relevant directives provide for a shift in the burden of proof, with the result that a plaintiff need only to bring evidence indicating discrimination. With this rule the lawmaker acknowledged that the plaintiff typically cannot provide evidence to prove the discriminatory intent behind a given measure since he has no knowledge about the intent itself, but only of the facts through which the intention is manifested.
From my perspective the legal position provided by this rule is sufficient to give individuals a simple and effective remedy against discrimination,

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and I see no need to ease plaintiffs' position even further. In addition, the practical consequences of a right to information regarding other candidates seem problematic. Such a right could not only be used in trials, but also in pre-court situations. An employer that rejects an applicant might face many information requests by different applicants, even where there is no evidence that the application procedure was discriminatory in any way.

Subject: Discrimination in hiring
Parties: Galina Meister – v – Speech Design Carrier Systems
Court: *Bundesarbeitsgericht, Achter Senat* (German Federal Employment Court, Eighth Chamber)
Date: 20 May 2010
Case number: 8 AZR 287/08
Hardcopy publication: –
Internet publication:
www.bundesarbeitsgericht.de ➔ Entscheidungen ➔ case number

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2010/85

The fact that an activity is continuous (24/24) does not necessarily mean that a worker who oversees the activity on his own cannot take (unpaid) rest breaks

COUNTRY CZECH REPUBLIC

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Summary

A worker who does not take rest breaks because he mistakenly believes his job does not permit his work to be interrupted cannot claim compensation for the time during which he could have rested.

Facts

The plaintiff was an engineer at a local sewerage plant. The operation was determined by the employer to be a continuous (uninterrupted) operation requiring work twenty-four hours a day, seven days a week. There were always two workers present during the day shift; during the night shift there was only one employee (the plaintiff). During the twelve-hour shifts the employer scheduled two thirty-minute rest breaks, which were not considered as working time. Thus, the employees were always paid for only eleven hours per shift.

The plaintiff worked the night shift and claimed that since he was the only employee present on the night shift, he had no replacement and was therefore unable to take his rest breaks. The employee claimed wages for one hour for each night shift that he worked, corresponding to the two thirty-minute rest breaks which he could not take. His claim was denied by the court of first instance and, on appeal, by the Court of Appeal. The employee considered this denial to constitute a breach of his constitutional right to a fair wage and a violation of his right to a fair trial.[1]

The law

Article 4 of Directive 2003/88/EC requires the Member States 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 at the national level. Article 17(3)(c) allows the Member States to derogate from Article 4 in the case of certain activities involving the need for continuity of service or production. The Czech Labour Code has utilised this right to derogate. Article 88 obligates employers to provide workers with a rest break of 30 minutes after (at most) six hours of uninterrupted work, unless the work cannot be interrupted, in which case the worker must be granted "a necessary period for rest and food". Rest breaks do not qualify as working time and are therefore not paid. A necessary period for rest and food does qualify as working time and is therefore paid. In principle, employees must be granted a rest break, which means that they can, for example, leave the employer's premises and do what they want. Only if a rest break cannot be taken because the operation does not allow this, may employees be provided with a "necessary period for rest and food" instead, during which they may rest but may not leave their place of work unattended.

Judgment

In its judgment the Constitutional Court ruled in favour of the employer and confirmed the decision of the appeal court. According to the Constitutional Court it is the employer's obligation to provide a rest break after six hours of uninterrupted work even in a continuous operation, provided that the particular work allows for it. The provision of a necessary period for rest and food instead of a rest break is the only exemption from this rule, and may only be applied if the work cannot be interrupted. Whether or not the work cannot be interrupted depends on the type of work, not on the type of operation: the mere fact that an operation is continuous is insufficient.

In the given case the employee's job was to check and supervise machines which did not require constant attention or continuous work performance. As such, the employer correctly scheduled rest breaks during the shift. The employee was thus given the possibility to take a rest break. If he failed to do so it was his fault and he therefore could not require the employer to pay him for such periods.

As regards the alleged breach of the plaintiff's constitutional right to a fair trial, the Constitutional Court found that the circumstances of the given case were different from those of the relevant Supreme Court case.

Commentary

In our view the decision of the Constitutional Court is reasonable, most importantly because it emphasises the importance of the particular type of work rather than the type of operation. Any other conclusion would lead to the situation where employers would automatically not be obliged (or even allowed) to grant employees rest breaks during a continuous operation, even if the particular work allowed for a rest break. In our view such an interpretation would not comply with the intention of the working time regulation of the Labour Code and Directive 2003/88/EC.

Comments from other jurisdictions

Austria (Martin E. Risak): The Austrian Working Time Act (*Arbeitszeitgesetz*) includes a provision that is very similar to the reported one in Czech law: in the case of work that demands continuous attention, employees working in rotating shifts must be granted short breaks of adequate duration instead of the otherwise prescribed daily 30-minute rest break. Whereas the "normal" daily rest break does not constitute working time and is therefore unpaid, the short breaks are deemed to be (paid) working time.

I assume that an Austrian court would have dismissed the employee's claim for payment for the self-prescribed short breaks that he deemed to be necessary, as his subjective appraisal of their necessity is not relevant. Any exception to the rule must be proven on an objective basis, and if the employer who organised the production did not see any need for continuous work but in fact scheduled 30-minute rest breaks, this would indicate, *prima facie*, that these breaks could be observed without any loss of production. The case would look different if the employer had knowingly accepted the employee's work during the scheduled rest breaks or if the employee had informed the employer of the impracticality of the half-hour rest breaks and had worked during those breaks in order to avoid real harm to the employer.

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United Kingdom (Richard Lister): Coincidentally, the Employment Appeal Tribunal (EAT) has recently considered the provisions governing rest breaks under the UK's Working Time Regulations 1998 (WTR). Under regulation 12 of the WTR, workers are entitled to a daily rest break of 20 minutes, during which they can do as they please and are not at the disposal of the employer, if their daily working time exceeds six hours. There are, however, certain "special cases" where the right to a rest break does not apply – e.g. workers engaged in "security and surveillance activities requiring a permanent presence". Where such workers are not given a rest break, regulation 24(a) provides that the employer must if possible allow them to take an equivalent period of "compensatory rest". In exceptional circumstances where it is not possible to grant such a period of rest, the employer must afford "such protection as may be appropriate in order to safeguard the worker's health and safety" (regulation 24(b)).
In *Hughes v Corps of Commissionaires Management Ltd* (EAT/0173/10, 22.11.10, unreported), the EAT interpreted the "compensatory rest" requirements in a way that affords employers a degree of flexibility. It held that, whilst daily rest under regulation 12 must be uninterrupted and workers must know in advance that they are taking their break, the same does not apply to compensatory rest. The employer merely has to provide something as close to that as possible and there are many possible ways of providing compensatory rest, depending on the circumstances.

(Footnote)
1 The plaintiff argued that his right to a fair trial had been violated because the Court of Appeal failed to apply Supreme Court precedent in respect of rest breaks.

Subject: Working time
Parties: J.M. – v – *Městské vodovody a kanalizace Vrchlabí* (water and sewerage provider of Vrchlabí city)
Court: Constitutional Court of the Czech Republic
Case number: III. ÚS 2387/10
Hard copy publication: Not yet published
Internet publication:
http://nalus.usoud.cz/Search/Word.aspx?id=67457

2010/86

The need to protect one employee's interests can justify unilaterally changing a colleague's working times

COUNTRY PORTUGAL

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Summary
An employer may unilaterally change an employee's working times (from fixed hours to a shift schedule) if that is necessary to avoid harming another employee's interests.

Facts
The employee in this case was hired in 1999. She worked in one of the defendant's shops ("shop 1"). Since at least 2005 her working times were compatible with the opening hours of her daughter's nursery.[1] In February 2008 she was transferred to another shop.[2] This other shop ("shop 2") had different business hours, namely 9:30-20:48. For this reason the employees in shop 2 worked according to a two-shift schedule: an early shift from 9:30-13:00 and 14:00-18:18 hours (morning and afternoon) and a late shift from 13:00-20:48 hours (afternoon and evening). This schedule called for the plaintiff and another employee (the "colleague") to work on alternating shifts on a weekly basis, i.e. the plaintiff in an early shift and the colleague in a late shift in week 1, vice-versa in week 2, etc.

In view of her daughter's nursery schedule, the plaintiff asked her employer to exempt her from these alternating shifts and to allow her to work at fixed times compatible with the nursery schedule, as she had done in shop 1. The employer agreed to let her work exclusively on the early shift (mornings and afternoons), starting in March 2008, on two conditions: (i) that this exemption from the normal two-shift schedule would not last longer than two years and (ii) that the plaintiff would not apply under the provisions in Portuguese law that entitle mothers of children under 12 to work part-time and/or on a flexible basis. The plaintiff agreed with these conditions, thereby creating an unconditional agreement between the parties. Accordingly, the colleague was informed that she would henceforth not work on alternating early/late shifts but would work, for the time being at least, exclusively late shifts (until 20:48 hours). The colleague objected, pointing out that she also had a young child and that it would be unfair to grant the plaintiff more favourable working times than herself. This objection obligated the employer to cancel the agreement he had made with the plaintiff and to require her to work alternating shifts after all.

The plaintiff brought legal proceedings. She asked the court to order her employer to establish working times compatible with her daughter's nursery schedule. She based this application on Article 173 of the Portuguese Labour Code in combination with the fact that, besides herself, there was nobody to take care of her daughter when the nursery closed in the evening. Article 173 (now Article 217(4)) of the Portuguese Labour Code prohibits employers from making unilateral changes to working times that have been agreed individually.

The court of first instance turned down the application, whereupon the plaintiff appealed. She took the position that her working times had been agreed individually with the defendant in February 2008, precisely to enable her to collect her daughter from nursery every day. The employer's unilateral decision to amend this agreement, so she argued, was in breach of said Article 173.

Judgment
The court of first instance found in favour of the employer and the Court of Appeal confirmed the lower court's decision. The Court of Appeal held, on the one hand, that although the Labour Code provides for protective measures for maternity, such as part-time work and flexible working hours for parents with children under the age of 12, the plaintiff had never requested any of those specific benefits. Thus, there was an unconditional and straightforward agreement between the parties on working time, namely that the plaintiff could work exclusively mornings and afternoons.

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On the other hand, however, the prohibition of the employer to make unilateral changes to a working time individually agreed with the employee cannot be applied automatically without taking the employer's and third parties' situations into consideration. A third party in this case was the colleague. The employer was obliged to take account of the fact that she found herself in a similar position to that of the plaintiff, also having to collect her child from nursery. It would not be acceptable, so the Court reasoned, to favour one employee to the detriment of the other. In the Court's analysis, this was a typical case of "conflicting rights" as provided in Article 335 of the Portuguese Civil Code. This provision deals with the situation where two (or more) parties have equally strong rights. Where such rights collide, the parties have an obligation to waive them proportionately, in this case equally. This is precisely what the employer had achieved by requiring the plaintiff and her colleague to working late on alternate weeks.

Commentary

In our view the decision reported above is in accordance with the basic principles of Portuguese law and reflects a great sense of equity. We share the Court's observation that the statutory right of parents of children aged under 12 to demand part-time work and/or flexible working hours were not at issue, for two reasons. First, one of the conditions to the agreement between the parties that the plaintiff could work mornings and afternoons was that she would not invoke this statutory right. Secondly, she had not followed the procedure for claiming under that right. In addition, even if the plaintiff had been able to invoke said statutory right, it would still have been impossible to grant it to her without discriminating against her colleague.

The same logic must be applied to the interpretation of Article 173 of the Labour Code. The fact that the employer was prohibited from making unilateral changes to the working time individually agreed with the employee cannot be used to condone prejudice to other employees' rights, otherwise this might lead to an issue of discrimination or inequity.

Nevertheless, reference must be made to the fact that the Portuguese legal framework provides remarkable benefits for maternity and paternity. In fact, the Portuguese Labour Code goes way beyond the Pregnant Workers Directive[3] in providing that parents of children under the age of 12 are entitled to work on a part-time or flexible working time basis. The Pregnant Workers Directive, on the other hand, only grants benefits – such as the possibility to refuse night work (Article 7) – to pregnant workers and workers who have recently given birth or are breastfeeding.

Comments from other jurisdictions

Austria (Martin E. Risak): In Austria the Working Time Act (*Arbeitszeitgesetz*) states in s19(c) that the beginning and end of work on particular days of the week, as well as the timing of breaks, must be agreed, if no provisions exist in collective or work agreements. The employer may only change these provisions unilaterally if he has been granted such a right, has observed a notice period of at least two weeks and there are no significant opposing interests of the employee. Without such contractual provision an employer cannot therefore change individually agreed working times unilaterally under Austrian law, even if this would be necessary to avoid discrimination against another employee. There is also no provision in the Austrian General Civil Code (*Allgemeines Bürgerliches Gesetzbuch*) that deals with "conflicting rights" or could provide a legal basis for balancing the opposing interests of two employees, in the way provided by the Portuguese Civil Code. As a last resort an Austrian employer could issue a notice of termination pending a change of contract (*Änderungskündigung*). The termination would become effective in the event that the employee does not agree to the intended change of working time. However, the employee may contest his dismissal in court, where the reasonableness of the change of contract would be taken into account.

Ireland (Georgina Kabemba): In Ireland there is no specific statutory law that prohibits employers from making unilateral changes to working times that have been agreed individually. However, employees could argue that such changes are a material variation to their contract of employment without consent and, as such, bring a claim in relation to same. In many cases, contracts of employment are drafted to allow for some reasonable change to working hours where required by an employer.

Parents in the Irish workforce are not automatically entitled to part-time or flexible working where requested. However, employers must act reasonably with regard to such requests. As outlined in Paragraph 8 of the Code of Practice on Access to Part Time Working, best practice indicates that employers should treat such requests seriously and where possible, discuss with their employees if and how they can be accommodated. The Code advises looking at relevant factors in arriving at the conclusion to grant part-time working including "the personal and family needs of the applicant; the number of employees already availing of part-time work; the urgency of the request and the effect, if any, on the staffing needs of the organisation." On this basis, such an employee would not have automatic rights to part-time work.

The Netherlands (Peter Vas Nunes): In this case three questions of law, none of which is regulated concretely at the European level, converge:

- may an employer make changes to an employee's terms or conditions of work unilaterally and, if so, under what conditions and to which extent may he do so?
- does an employee have the right to an adjustment of his or her working hours, times or patterns in order to accommodate his or her family needs, other than pursuant to the right to parental leave?
- may an employer treat employees differently from one another if the difference is not based on one of the expressly forbidden characteristics (gender, age, disability, race, etc.)?

Although EU law does not deal expressly with any of these issues, it is worth noting that Clause 6(1) of the Framework Agreement on Parental Leave, implemented through Directive 2010/18 (repealing Directive 96/34), provides:

"In order to promote better reconciliation, Member States and/or social partners shall take the necessary measures to ensure that workers, when returning from parental leave, may request changes to their working hours and/or patterns for a set period of time. Employers shall consider and respond to such requests, taking into account both employers' and workers' needs."

Spain (Ana Campos): According to Spanish Law, employees enjoying working time reductions because they are taking care of a small child (under 8 years of age) are entitled to distribute their working time in whatever way would suit that purpose. Any conflicts arising from the employee's decision on working time may be subject to a special urgent judicial procedure. In this case, where neither of the employees had asked for a reduction of working time, it would be questionable whether they would have been entitled to such a determination. It is

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noticeable here that although the Court's decision was equitable, it nevertheless left both employees dissatisfied.

(Footnotes)

1 The judgment does not specify her working times in shop 1.
2 It is not known whether this was a unilateral decision by the employer and, if so, whether the plaintiff protested, nor whether her other terms and conditions were amended.
3 Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding.

Parties: Unnamed plaintiffs (employee and employer)
Court: Oporto Court of Appeal (*Tribunal da Relação do Porto*)
Date: 26 April 2010
Case number: JTRP00043850
Internet publication: www.dgsi.pt

2010/87
Standby periods do not qualify as (paid) "work"

COUNTRY BELGIUM

CONTRIBUTORS ISABEL PLETS AND ASTRID HERREMANS, LYDIAN, BRUSSELS

Summary
During stand-by periods, when an employee is simply asked to be available by phone in order to answer urgent calls, only the effectively performed hours of work are to be considered working time.

Facts
B worked as a Senior Field Engineer for Storage Technology Belgium plc, a company active in the computer hardware industry. Stand-by periods during which B had to be available to answer urgent calls were part of the job. During these stand-by periods, B was free to go wherever he wanted, as long as he could be reached by (mobile) phone so that, if necessary, he could react within two hours after the call. As compensation for the stand-by periods, he received a fixed standby allowance on top of his monthly wage as well as payment for work performed during the stand-by periods.
After his dismissal, B claimed overtime pay (150 to 200% of his base salary) as compensation for the stand-by periods during which he did not actually perform work, basing his claim on the Belgian Working Time Act. He deducted from this claim the standby allowance and the compensation for actual standby work that he had been paid.
The Labour Court rejected his claim, reasoning that the hours during which he did not effectively work failed to qualify as "working time" in the meaning of the Working Time Act. B appealed.

Judgment
The Court of Appeal confirmed the Labour Court's decision. The Court came to this conclusion by examining the notion of "working time", first in the light of "Working Time Directive" 93/104/EC, which aims at improving the level of protection of workers' safety and health, then in the light of the Belgian Working Time Act.
Article 2(1) of the Directive describes working time as *"any period during which the worker is working, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practice"*. According to ECJ case law, the main criterion to determine whether a stand-by period is to be considered working time is the employee's physical presence at a certain place, as determined by the employer, where he is at the latter's disposal to immediately carry out duties if necessary (See *Vorel* (C-437/05), paragraph 28). The stand-by periods in the case at hand are, according to the Court, not working time under Community law.
The Belgian Working Time Act of 16 March 1971 defines working time as *"the time during which personnel are at the disposal of the employer"*. This means that Belgian law also does not see stand-by periods as working time, given that the employee is not "at the disposal" of the employer.
Neither the Directive nor the Belgian Working Time Act regulate, or even attempt to regulate the level of compensation for stand-by periods. The Court of Appeal referred to the ECJ's rulings in *Vorel* (C-437/05, paragraph 32) and *Dellas* (C-14/04, paragraph 38), where the ECJ held that "the directive is limited to regulating certain aspects of the organisation of working time so that, generally, it does not apply to the remuneration of workers". It is perfectly legal to provide for arrangements that compensate stand-by periods during which no work is actually performed differently from effectively performed hours of work. The Court argued that if such arrangements are allowed for stand-by periods that are considered to be working time (e.g. a doctor who is on call in a hospital), a difference in compensation is *a fortiori* allowed in the present situation.
Consequently, the Court approved the compensation arrangement and rejected B's claim.

Commentary
In this judgment, the Labour Court presents a clear overview of the key principles according to which stand-by periods may qualify as working time. Based upon a scrutiny of Belgian as well as EC law and case law, one criterion applies to all, namely: physical constraint on the freedom of an employee. Being at the disposal of the employer is to be interpreted strictly, so that being available by phone to answer urgent calls is not enough for the stand-by period to qualify fully as working time. Only the hours actually worked as the result of calls received, are working time. This principle is widely accepted in Belgian case law.
The Court also emphasised the independence between the definition of working time and any compensation for this time. The fact that stand-by periods are not considered to be working time does not imply that compensation is not permitted. On the other hand, compensation for stand-by periods does not mean they qualify as working time. As a result, an employee cannot claim compensation for stand-by periods at the rate paid for hours actually worked.

Comments from other jurisdictions
Austria (Martin E. Risak): Both the Austrian Working Time Act (*Arbeitszeitgesetz*) and the Hours of Rest Act (*Arbeitsruhegesetz*) include provisions for stand-by periods which these acts do not consider to be working time. Under s20(a) of the Working Time Act stand-by periods may only be agreed upon for ten days per month (or, if a collective agreement permits, for 30 days within a three-month period). If an employee does actually perform work during the stand-by period the daily working time may be increased to up to 12 hours (normally 10 hours), provided this is compensated by time off work within two weeks. In addition, the daily rest period may be interrupted by this

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work, provided that one part of it lasts at least eight hours and that another daily rest period within two weeks is extended by an additional four hours.
Despite this rather extensive and complicated treatment of stand-by time, the Working Time Act remains silent on its definition and on the issue of compensation. The courts consider stand-by periods as periods during which the employee must be available to the employer to take up work within an agreed timeframe. The employee must be able to move freely and to decide himself how to spend his time, though certain restrictions may apply (e.g. no consumption of alcohol, limited areas of movement if the employee has to come to his workplace within 30 minutes). If compensation is not provided for in a collective or individual agreement and the lack of compensation has not been agreed explicitly, "fair and appropriate remuneration" must be paid for stand-by periods as provided in s1152 General Civil Code (*Allgemeines Bürgerliches Gesetzbuch*). In deciding what is fair and appropriate, the courts usually apply provisions in similar but non-applicable collective agreements as guidelines and grant amounts that are significantly lower than the compensation for effectively performed "normal" work.

Czech Republic (Nataša Randlova): The Czech Labour Code expressly regulates the difference between working time and being on call. **Working time** includes (i) the time during which an employee is obliged to perform work for the employer and (ii) the time during which an employee is physically present in the workplace and prepared to perform work according to the employer's instructions. On the other hand, being **on call** is when an employee is prepared for potential performance of work beyond the scope of his work shifts and in a location that is different from one of the employer´s workplaces.
Moreover, the Czech Labour Code regulates the remuneration for being on call, according to which the employee is entitled to remuneration of at least 10% of his average earnings (higher remuneration may be agreed in an individual or collective agreement or in internal regulations). If work is performed during on-call time, the employee is entitled to his or her normal wage plus appropriate extra pay (for overtime work, night work, and work on Saturday and Sunday) where applicable.

Ireland (Georgina Kabemba): In 2006 there was a similar case before the Labour Court pursuant to the Organisation of Working Time Act 1997 *HSE Mid-west Area – v – Gerard Byrnes DWT068/2006.* The Claimant was employed as a consultant surgeon under the terms and conditions set out in a "consultants common contract". He had been rostered to provide an on-call service for patients at a regional hospital on St. Patrick's Day which is a public holiday in Ireland. Mr Byrnes attended the hospital to deal with an emergency and remained there for one hour. The Claimant contended that by attending for work on a public holiday he was entitled to an extra full day's pay or a full day off irrespective of the number of hours worked. It was submitted that his working time should be measured from the time he received the call requiring his attendance rather than the time he commenced work at the hospital.
The Health Authority contended that the Claimant was adequately compensated under the terms of his contract in that he was paid a duty allowance fee in respect of patients seen by him and the appropriate travel allowance as well as a full day's salary for the day. The Labour Court, in its determination on appeal from the Rights Commissioner, found that the Claimant was not entitled to an additional day's pay or an additional day off and that the on-call arrangements for consultant was adequate for the purposes of the Act. The Court concluded that the package of benefits available to the Claimant in respect of attendance at work during a public holiday on which he was on call adequately met the requirements of the Act. The Court was of the view that the legislator could never have intended that a person who attends work for one hour in a day is entitled to an additional full day's pay or an additional full day off in lieu of the time worked.

Subject: Working time
Parties: B – v – Sun Microsystems Belgium plc
Court: Labour Court of Appeal of Brussels
Date: 27 October 2009
Publication: *J.T.T.* 2010, 154-156

2010/88

Shared liability of employer and employee for breach of European road transportation rules

COUNTRY HUNGARY

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Summary
Regulation 561/2006 makes the employer of a truck driver liable for failure by the latter to observe the rules provided therein. However, the Regulation allows Member States to exempt from such liability those employers who have done all they reasonably could have to prevent their drivers from breaking the rules. This makes it possible for Hungarian courts to fine drivers and their employers in proportion to their respective share of responsibility for an offence.

Facts
This case concerns a truck, the company that owned it (the "plaintiff") and the driver of the truck (the "driver"). While en route in Hungary, the truck was inspected by customs officials. They imposed a fine of approximately € 2,000 on the plaintiff for failure to comply with EU Regulation 561/2006, such failure being punishable under Hungarian national law. The regulation requires truck drivers to observe certain minimum periods of rest. The plaintiff appealed, first in an administrative procedure, then to the county court and finally to the Supreme Court.

The relevant provision of Regulation 56/2006, Article 10, provides in paragraphs 1 and 2 that drivers shall not be paid in a manner that encourages infringement of the rules (e.g. by means of mileage-based bonuses), that their employers ("undertakings") shall organise their work in such a way as to enable them to comply with the rules, that employers shall instruct their drivers properly and that employers shall make regular checks to ensure compliance with the rules. Paragraph 3 provides two things. One is that employers are liable for infringements committed by their drivers. The other is that "Member States may make this liability conditional on the undertaking's infringement of paragraphs 1 and 2. Member States may consider any evidence that the transport undertaking cannot reasonably be held responsible for the infringement".

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The plaintiff argued that it had complied fully with paragraphs 1 and 2, having instructed the driver to take regular periods of rest, etc, and that therefore the driver was personally responsible for the offence. This being the case, the plaintiff invoked a provision of Hungarian law according to which, if an offence has been committed by more than one person, the fine imposed for that offence is split between the offenders in proportion to their respective share of responsibility.

Judgment
The Supreme Court, although upholding the lower court's finding that the plaintiff was liable under said paragraph 3, found that the lower court should have examined how responsibility should be apportioned between the plaintiff and the driver. It remitted the case back to the lower court to examine this and then to assess liability for the fine in proportion to the plaintiff's and the driver's level of responsibility.

Commentary
Hungarian law provides that an employer is liable for any damage caused by its employees in the course of their work. This case is a unique example of a court departing from this basic principle by considering the employee's responsibility as well.

Comments from other jurisdictions
Austria (Martin E. Risak): Under Austrian working time law only employers (and never employees) are criminally liable for breach of an obligation to take minimum periods of rest. Infringement results in the imposition of (administrative) fines. Though employers may be exempted when they have done all they reasonably could have to prevent breaches of working time law, the Austrian Supreme Administrative Court (*Verwaltungsgerichtshof*) takes a tough stance and only lets employers off the hook if they have really and truly exhausted all options to monitor their employees and to discipline them in the case of infringement.

If the employer is fined for infringements committed by the employee, it cannot deduct the fine from salary, as it is deemed that the employer has breached its legal obligation to ensure that the employee observes working time law. The courts have held that it would even contravene the fundamental principles of criminal law if an employer were able to shift the payment of a fine to the employee, as this would remove its incentive to act in accordance with the law and therefore frustrate the (pecuniary) aim of the legislation.

The Netherlands (Peter Vas Nunes): Dutch law also provides that employers are liable for damage caused by their employees, either to their employer or to third parties. But how does this relate to liability for traffic fines? Suppose, for example, that a truck driver, in the course of his work, incurs a speeding fine, a parking fine or a fine for driving through a red light. If the driver himself is fined, can he seek compensation from his employer? Conversely, if the employer is fined, can it deduct the fine from the employee's salary? Until 2008 these were hotly debated questions. In that year the Supreme Court held that employees who commit such traffic offences should themselves bear the cost of any fine imposed themselves. This judgment has met with considerable criticism.

Subject: Employee liability
Parties: not known
Court: Supreme Court *(Legfelsőbb Bíróság)*
Date: 2009 (date not known)
Case number: Lgf, Bír. Kuf. VI. 35.080/2009
Hard copy: BH 2010/137
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2010/89
Accepting compensation without protest causes employee to lose right to claim unfair dismissal

COUNTRY PORTUGAL

CONTRIBUTORS CARMO SOUSA MACHADO AND MATILDE DE BRITO EUGÉNIO, ABREU & ASSOCIATES, LISBON

Summary
An employee who has been made redundant and who accepts severance compensation without protest, loses the right to claim for unfair dismissal.

Facts
This case deals with a new provision of the Portuguese Labour Code, introduced in February 2009 (Law no. 7/2009). The new provision relates to the compensation payable in the event of an individual dismissal or a collective redundancy. It constitutes an important legislative amendment in respect of an issue that for many years has been debated by authors and in the courts. The judgment reported below clarifies the issue even further.

The judgment concerns the payment of compensation for the termination of an employment agreement on grounds of individual dismissal, but also applies to cases of collective dismissal. The Court invoked section 401(4) of the Portuguese Labour Code (now section 366(4)), according to which there is a presumption that an employee who has been made redundant has accepted his "dismissal" in the event that he receives and retains severance compensation.

In the present case an employee who had been made redundant, having been paid statutory severance compensation through a deposit of the corresponding amount in his bank account, did not return this amount to his former employer. For this reason, the Court concluded that the employee, who claimed additional compensation under the doctrine of unfair dismissal, had failed to provide evidence that he had protested against his "dismissal", which is a requirement under Portuguese law for bringing an unfair dismissal claim.

The Defendant (former employer) not only argued that the dismissal was fair, as all legal requirements foreseen by the Portuguese Labour Code had been complied with, but also that the Plaintiff had accepted his dismissal, given that he had failed to reimburse the severance compensation that had been paid to him.

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Judgment
The Court of First Instance decided in favour of the Defendant, accepting its arguments. On appeal the Plaintiff fared no better. Indeed, the Court of Appeal held that, in accordance with section 401(4) of the Portuguese Labour Code, the payment/receipt of compensation in the terms described above is deemed to constitute acceptance of the dismissal by the employee.

Thus, both Courts concluded that a claim for unfair dismissal is not sufficient evidence to rebut the presumption of acceptance of the dismissal, where the dismissed employee had previously accepted the corresponding compensation.

Commentary
This case was decided under the 2003 Portuguese Labour Code. According to that code, an employee who kept a statutory severance payment (basically one month of salary for each year of service, or more in the event the dismissal is "unlawful") without returning it was presumed to have accepted (the fairness of) his dismissal. However, there was some debate as to the nature of this presumption. One thing was clear, however, namely that such a presumption was *juris tantum*, i.e. refutable. The same applies under the current 2009 Labour Code, except that the 2009 Labour Code adds a paragraph to the provision in question. This new paragraph provides that the employee can only rebut said presumption if he returns or puts at the disposal of the employer the total amount of the compensation received immediately after receiving it. This means that the employee must return the total amount of compensation in case he intends to contest in Court the legality of the dismissal, as his acceptance of the compensation qualifies as acceptance of the dismissal itself and of its compliance with the law.

The new rule has seen certain criticism. Indeed, there are some authors who consider that it breaches the fundamental right of access to justice provided by the Portuguese Constitution, as it tends to preclude employees from claiming unfair dismissal or from contesting their dismissal. They argue that only wealthy employees might have the means of subsistence necessary after a dismissal to enable them to refuse the compensation, whilst others would have to waive their right to claim unfair dismissal before a Court.

From this perspective, one might also say that this new rule is in breach of the European Convention on Human Rights and of the EU Charter of Fundamental Rights (now legally binding). Both these instruments postulate a fundamental right of access to justice, which right is prejudiced if a person who was made redundant but accepted statutory compensation, is prevented from successfully claiming unfair dismissal. In fact, the new statutory provision legitimises an unfair dismissal as long as the statutory compensation is paid.

From our point of view, although the above arguments have some validity and there is a danger that the provision under analysis might indeed legitimise unfair dismissal by means of a payment of compensation, equally, by not returning the compensation, the employee has no means of rebutting the statutory presumption and one might be forced to conclude that he has thereby accepted his dismissal. Any different understanding would be considered a malicious use of the legal process, given that an unfair dismissal claim made whilst in receipt of mandatory compensation would imply a *venire contra factum proprium* conclusion (i.e. a contradiction in terms).

Comments from other jurisdictions
Germany (Paul Schreiner and Simona Markert): The German legal situation is not comparable to the situation in Portugal. Indeed, the majority of disputes brought before the German labour courts (over 85 percent) end in a settlement and payment of a severance sum, even though German labour law does not confer any right to severance compensation in the case of redundancy. The Employment Protection Act (abbreviated "KSchG") contains only two provisions (§1a and §9 KSchG) which provide for severance compensation.

With regard to § 9 KSchG the situation is as follows. An employee who has been made redundant must first successfully challenge his dismissal and ask for a dissolution of his employment contract. The Court may then decide that the continuation of the employment contract is no longer acceptable for the employee. Following that, the employee will have a claim for compensation, which rises in relation to seniority.

Since 2004 German labour law has contained a further provision which provides for compensation, namely § 1 a KSchG. This provision was introduced with a view to reducing the number of disputes and the high cost of litigation. It entitles employees to severance compensation in the case of enforced redundancy. However, a claim for severance compensation only exists if the employer has advised the employee that his dismissal is based on operational reasons and that he has a claim for severance compensation if he does not take action against the dismissal within three weeks of receiving notice of termination. In this context it is important to note that German labour law assumes the legal effectiveness of a termination if the employee does not take action against the dismissal within the said period of three weeks. Provided that these conditions are fulfilled, the employee can bring a claim for severance compensation in the amount of half a month's salary for each year of seniority.

As the above should make clear, the German situation is totally different to that in Portugal. In Germany the employee does not have a choice between accepting severance compensation and taking action against the dismissal.

Ireland (Georgina Kabemba): This is a very interesting case. Under Portuguese law, it appears that by accepting a statutory redundancy payment from an employer, there is a presumption that the employee has accepted that the dismissal was fair and he or she is thus precluded from claiming unfair dismissal. In Ireland, the situation is treated very differently. All employers are obliged to pay a statutory redundancy payment provided that it is a genuine redundancy. (This is defined in the Redundancy Payments Acts, 1967-2007). Such a payment does not raise any presumption that the employee has accepted that the redundancy was genuine or that the procedures followed were fair. An employee would still be entitled to bring a claim under the Irish Unfair Dismissals Acts, 1977-2007. In order for an employee to be precluded from challenging the dismissal, the employee must expressly waive his or her claim in a separate agreement and compensation must be paid over and above an employee's statutory or contractual entitlements, i.e. an ex gratia payment. The agreement must be signed by both parties and the employee given the opportunity to take independent legal advice on the waiver and release agreement. Unlike Portugal, in Ireland an employee could accept a statutory redundancy payment and still challenge unfair dismissal if he or she wishes to do so.

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Spain (Ana Campos): In Spain, the Workers Statute requires that, simultaneously with the notification ("at the time") of the termination based on objective reasons, the employer must offer ("put at the disposal" of) the employee the legal severance compensation set forth for this kind of termination, namely 20 days' salary per year worked. The employee may or may not take the amount, but neither action precludes him from bringing an action in court for unfair dismissal. If the termination should be deemed unfair, the employee would be entitled to 45 days' (– that is, 25 days more –) salary per year worked plus all accrued salary since the date of termination.

Until our very recent labour law reform (in September 2010), the omission by the employer of this requirement – i.e. putting severance compensation at the disposal of the employee – rendered the termination void. Since the reform, it renders the termination unfair, unless the employer is in genuine financial difficulties.
It is certainly arguable that the Portuguese decision and law may violate the fundamental right of access to a court or tribunal.

United Kingdom (Richard Lister): In the UK, the fact that employees have accepted a statutory redundancy payment from their employer does not preclude them from pursuing a claim of unfair dismissal. A legal regime providing for that to happen seems somewhat harsh, although it should be noted that statutory severance payments are significantly more generous in Portugal than in the UK. The main situation in the UK in which an employee terminated by reason of redundancy would have no right to claim unfair dismissal would be if he or she had waived that right in a valid "compromise agreement". There are stringent legal criteria for such agreements, including a requirement for the employee to have received independent legal advice.

Parties: Not known
Court: Oporto Court of Appeal *(Tribunal da Relação do Porto)*
Date: 12 April 2010
Case number: 160/09.5TTVNG.P1
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2010/90

Case law of the European Court of Justice on the Horizontal Effects of EU Directives: Recent Developments

COUNTRY ITALY

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Introduction

Directives were originally intended in the text of the Treaty of Rome as an *indirect* source of law, as guidelines indicating a goal to Member States while respecting their discretion as to the forms and methods to be used in order to achieve it: a sort of "*loi cadre*", to be used primarily in the context of the harmonisation of national laws aimed at facilitating the functioning of the internal market[1].

In practice, however, things have developed in a different way. The delays in the adoption of implementing legislation at the national level provoked two distinct but converging reactions. The first of these, at the legislative level, was the adoption by EU institutions of legal texts providing (at least in part) for a comprehensive framework for a particular field of law. In practice, many directives leave little or no discretionary choice to the Member States. The second reaction was the recognition by the European Court of Justice (ECJ) of the direct normative effect of provisions in EU directives, on two conditions: the provisions must be clear, unambiguous and unconditional and can only be invoked in so-called "vertical relations".

The very nature of EU directives as a *complete* instrument of regulation was confirmed by some further important developments. In the first place, by the amendment of Treaty rules concerning publication in the Official Journal: most directives are now subject to the same regime as applies to directly applicable EU acts, such as regulations and decisions, even though directives do not enter into force until notification to Member States[2]. Further, limitation periods for lodging claims at the national level can begin even before a directive has been correctly implemented[3], hence individuals must be informed of the existence of any rights bestowed upon them by EU directives. In the second place, EU directives have acquired the status of *parameter of legality* of national measures, including legislative acts, thus giving rise, under some conditions, to the duty to *set aside* such measures even in cases involving private parties[4].

It is well known that, in cases where a provision set out in a directive is invoked in a dispute between a private party and a Member State, that provision can be regarded as a parameter of legality of the national law in question, in the usual framework of "vertical effect"[5]. It is obviously more difficult to impose the same solution in disputes involving individuals, given that unimplemented directives do not produce direct effects *vis-à-vis* private parties.

Limitations

Notwithstanding the developments in the direction of extending the *indirect* effects of unimplemented directives, their horizontal effects are still denied by the European Court of Justice (ECJ) when invoked by an individual against another individual. While it is true that, in a series of rulings, the Court has considerably reduced the number of situations in which an unimplemented directive cannot produce effects in relations between private individuals, a distinction can still be drawn between vertical effects (admitted) and horizontal effects (not admitted) of directive provisions. Recent case law demonstrates that resorting to the so-called "alternative" remedies[6] suggested by the ECJ[7] – namely "consistent interpretation", "State liability" and a broad interpretation of the notion of "State" – are not entirely satisfactory for an effective and complete protection of individuals within the EU legal system.

First, the obligation for national courts and administrative authorities to interpret a national rule, whether enacted before or after the adoption of a directive[8], in the way that most closely matches the provisions of a directive, is of little worth if no national rule is applicable in the case at hand or if that provision is irreconcilably at odds with the relevant directive provision(s). It is indeed well-established that *contra legem* interpretation of national law is inadmissible[9], in particular where it could result in the application of a criminal sanction against an individual[10].

Secondly, the principle of State liability, recognised under particularly restrictive conditions[11], may at times be a "consolation" remedy for individuals whose rights are denied, but does not eliminate problems linked to the non-uniform application of the directive within the entire Union territory, nor those arising from the selective (and often discriminatory) application of provisions which were intended to be applied generally. Furthermore, it is obvious that, from the perspective of individuals, obtaining compensation for damages suffered as a result of non-implementation is not tantamount to obtaining full recognition of the rights conferred upon them by an unimplemented directive[12]. This holds true in particular in the context of labour relations, where compensation for damages suffered is often an ancillary remedy, and, at least in some legal systems, does not replace other, more efficient remedies (for example, re-employment in a job).

Finally, as to the third type of remedy, concerning the definition of "vertical" relations, the concept of "State" cannot be extended infinitely beyond the broad view already adopted by the Court's decisions: an unimplemented directive can be invoked against a regional or local authority[13], tax authorities[14], constitutionally-independent authorities of the State appointed to maintain public order[15], an authority providing services in the field of public health, regardless of whether it acts as a public authority or as an employer[16], or bodies assigned to perform services in the public interest[17].

Difficulties stemming from the refusal to recognise the direct horizontal effects of directives are also clearly apparent in some rulings of national courts, in which the problem of horizontal direct effect has been resolved in a manner different from that indicated by the ECJ[18]. Moreover, the inevitably random nature of these different solutions makes the overall legal picture even more intricate and confused, thus substantially undermining the principle of legal certainty.

Mangold, Kücükdeveci

In this scenario the *Mangold* judgment and, more recently, the *Kücükdeveci* judgment suggest a relatively new or, at least, additional "alternative" solution to the problem of the lack of horizontal effect of unimplemented directives between private parties[19]. In both cases the ECJ, in fact, recognised the rights of the claimants, although not on the

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basis of the horizontal effect of directives, but by giving direct effect to the corresponding general principle of law, in particular the principle of non-discrimination on grounds of age. The two decisions deal with the application of Directive 2000/78 establishing a general framework for equal treatment in employment and occupation[20]. Leaving aside the substantial problem connected with the impact of this jurisprudence on domestic labour laws[21], these preliminary rulings have been crucial for the development of the institutional issue of the direct effect of directives[22]. However, although they are very similar, there are some slight differences between the two cases.

In *Mangold* [23] the ECJ had to rule i) on the compatibility of the national law with Directive 2000/78 when its implementation deadline had not yet expired and ii) in an EU legal framework in which "the source of the actual principle underlying the prohibition of those forms of discrimination [was] found (...) in various international instruments and in the constitutional traditions common to the Member States"[24].

Under German labour law, employment contracts have either an unlimited duration (permanent contract) or a fixed duration (temporary contract). A permanent contract can only be terminated under certain specific conditions. A temporary contract, on the other hand, expires automatically. Given the lower level of protection that fixed-term contracts afford, they are only allowed in exceptional circumstances. One such circumstance was that national law permitted employers to hire employees older than fifty-two by means of a fixed-term employment contract without reason, on the assumption that this measure would facilitate the integration of older unemployed persons into the job market. Mr Mangold lodged a complaint with the Munich Labour Court, asserting that this national measure was contrary to Directive 2000/78, which provides for protection in the case of discrimination on the grounds of age. The national court referred the matter to the ECJ for a preliminary ruling considering that within that time period Germany had passed the contested legislation introducing age-based non-discrimination during the directive's transposition period. The answer provided by the ECJ relied on Directive 2000/78 (which was already in force but untransposed), read in conjunction with the general principle of equal treatment, which outlaws, *inter alia,* arbitrary discrimination on grounds of age. The Court held that national measures such as the ones at issue in the main proceedings could not be applied so that "It is the responsibility of the national court to guarantee the full effectiveness of the general principle of non-discrimination in respect of age, setting aside any provision of national law which may conflict with Community law, even where the period prescribed for transposition of that directive has not yet expired"[25]. The wording of this formula is rather ambiguous, making unclear what parameter national courts have to use to review compliance of domestic provisions with EU law. In *Mangold*, in fact, the legality of the national provision was assessed on the basis of Article 6 of Directive 2000/78, yet the national court was required to disapply that provision by virtue of the general principle of non-discrimination.

In *Kücükdeveci* the Court cleared up this ambiguity even though, as matter of fact, in this ruling the period for implementing Directive 2000/78 had already expired[26]. The question once again concerned Directive 2000/78, but the national measure at stake was a provision of the German Civil Code (the "BGB") according to which the length of dismissal notices had to be determined on the basis of the duration of the employment relationship. In particular – as per the second sentence of paragraph 622 BGB – employment periods predating the age of 25 cannot be taken into account in the calculation of the notice period.

Ms Kücükdeveci, who had worked for her employer for a period of ten years, was dismissed with a dismissal notice whose duration was calculated as if she had been employed for three years only, since, at the time of the dismissal, she was 28 years old. Accordingly, the claimant challenged her dismissal before the Higher Labour Court, arguing that the second sentence of paragraph 622 BGB constituted discrimination on grounds of age contrary to EU Law. The national court recalled the *Mangold* judgment but nonetheless deemed it necessary to refer the matter to the ECJ for a preliminary ruling. In this case, in fact, the directive had already been implemented and it was plain to see that the relevant national provision was at odds with the anti-discrimination principle. Hence, the Appellate Court asked, first, if it was possible to disapply domestic law on the grounds that it was contrary to primary EU law – specifically the non-discrimination principle – or to the directive; and in addition, if the national provision was a proportionate and suitable means to pursue social policy aims[27]. Secondly, the German court inquired whether national courts were under an obligation to refer the matter to the ECJ as per Article 267 TFUE in order to disapply national provisions contrary to EU law in cases concerning private parties.

As to the first question, the Court ruled that "European Union law, more particularly the principle of non-discrimination on grounds of age *as given expression by Directive 2000/78*, must be interpreted as precluding national legislation, such as that at issue in the main proceedings" and that the national measure at issue could not be justified[28].Turning to the second question, the Court stated that "it is for the national court, hearing proceedings between individuals, to ensure that the principle of non-discrimination on grounds of age, *as given expression in Directive 2000/78*, is complied with, disapplying if need be any contrary provision of national legislation, independently of whether it makes use of its entitlement, in the cases referred to in the second paragraph of Article 267 TFEU, to ask the Court for a preliminary ruling on the interpretation of that principle"[29] .

Both findings appear neither surprising nor new if regard is given to the *Mangold* judgment and, more broadly, to the classic EU jurisprudence on direct effect and primacy[30]. Therefore, it is necessary to read the arguments used by the Court in reaching those conclusions to grasp the relevance of the ECJ judgment in *Kücükdeveci*.

Importance of *Kücükdeveci*

First, the ECJ here has finally been able to make a clear and express reference to Article 21 of the EU Charter of Fundamental Rights, which prohibits any discrimination, *inter alia,* on the grounds of age. After the entry in force of the Lisbon Treaty on 1 December 2009 the Charter acquired binding force and, even if the ECJ has referred to it in previous judgments[31], the existence of a formal and written recognition of that principle is certainly noteworthy.

Secondly, the Court has taken the opportunity to explain and expand the outer limits of EU law[32]. In particular, it stressed that because the period for the implementation of the Directive had expired at the time of the dismissal, German law on conditions of dismissal fell within the scope of EU law[33]. Hence, infringement of specific directive provisions is not required to trigger the application of EU law, as long as the contested national measure falls within the scope of EU law[34].

Thirdly, stating that national courts have a general duty to disapply national provisions contrary to EU law, irrespective of whether the matter has been referred to the ECJ as per Article 267 TFEU, the Court reaffirmed the absolute *primauté* of EU law. It also clarified that the duty to disapply national provisions is not constrained by any domestic provision which does not permit the disapplication of national legislation that is contrary to the Constitution.

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Conclusion

To sum up, the Court still refuses to recognise the horizontal direct effect of directives in stating that national legislation must be set aside by virtue of the principle of non-discrimination, even if a particular directive "gives expression" to that principle. That reference to the directive does not appear to change matters since, according to the case law examined above, the directive only serves the purpose of completing and strengthening the right not to be discriminated against – a right that is already enshrined in EU principles. In other words, utilising the direct effect of general EU principles is merely a different way to reach the same goal, by-passing (again) the more awkward path of horizontal effect of directives. Obviously, the goal in question is the effective application of EU law, by means of the power vested in individuals directly to invoke EU rights.

In effect, one might wonder whether the solution found by the ECJ in this case could also extend to directives granting rights which are *not* also recognised by a general principle of EU law. The conclusions reached in *Mangold* and confirmed in *Kücükdeveci*, in fact, were particularly appropriate where the alleged illegal conduct consisted in discrimination on the grounds of age. However, looking at Article 6 TUE and at the broad and different rights enshrined in the Charter of Fundamental Rights, it seems unlikely that these two rulings will not have far-reaching consequences. Most, but not all, of the rights provided in EU directives are *de facto* an expression of general principles of EU law. As has been well documented in legal literature, since the very beginning, the general principles of EU law have constituted an authoritative and reliable source of law[35]. They represent a parameter always taken into account by EU judges and the EU legislator in the course of their activities[36]. The progressive clarification of the specific content of these principles by means of reference to the "constitutional traditions common to the Member States", to the ECHR or, ultimately, to the Nice Charter, eliminates any doubt as to the extent of these principles. For example, they surely encompass all the principles of social law, such as those now specifically listed in Chapter IV of the Charter named "solidarity" and, of course, the principle of equality (however jeopardised, e.g. on the grounds of sex, origin, religion or disability). Considering the broad legal positions protected by EU principles, following *Kücükdeveci* it appears to be more convenient for individuals seeking protection in private disputes first to argue that the right concerned flows from a general principle of EU law and, only to address the issues connected to the direct effect of directives as a second step.

In conclusion, the recent judgments of the ECJ still exclude the horizontal effect of directives, while highlighting the key role played by EU principles in rebalancing the negative consequences arising from incorrect or late implementation of directives in disputes between individuals. We believe that the ECJ will not go much beyond this position, which admittedly constitutes an important step forward from that taken in previous case law.

The Lisbon Treaty that recently entered into force has introduced nothing new on the specific issue of the direct effect of directives, albeit that it has strengthened the role of EU principles expressly codified by the Charter. The solution provided by the ECJ in *Kücükdeveci* (a post-Lisbon judgment) has confirmed *Mangold* (a pre-Lisbon judgment) using the tools provided by the Lisbon Treaty, namely the binding force of Article 21 of the EU Charter of Fundamental Rights. In this sense, in *Kücükdeveci*, the judges in Luxembourg correctly applied the tools at their disposal when intervening in an area as difficult as the effective judicial protection of private parties in the EU legal context. However, the same judges did not push their power so far as to overrule the Treaty provisions on directives. One could argue that the ambiguity of *Mangold* might have represented an *ouverture* toward the horizontal direct effect of directives, but the Treaty of Lisbon did not take the chance and, obviously, deliberately so. In *Kücükdeveci* the ECJ seems to have considered and respected this "constitutional" choice, focusing instead on the direct effect of EU principles as opposed to the directives. The reference to "giving expression" to the principle seems to be made because of the need to consider in some way a legal parameter invoked by the parties. The additional existence of a directive concerning a specific principle is clearly important but it is not essential to the recognition of the subjective position at stake, as that appears to be fully protected by the direct effect of the non-discrimination principle.

(Footnotes)

1 S. Prechal, *Directives in EU Law*, OUP, 2006.

2 According to the text of Article 297 TFEU, Directives adopted jointly by the Council and the Parliament pursuant to the ordinary legislative procedure enshrined in Article 294 TFEU, as well as Directives addressed to all the Member States, enter into force on the date specified in them or, in the absence thereof, on the twentieth day following that of their publication in the Official Journal.

3 See for example Case C-228/96, *Aprile,* [1998] ECR I-7141; Case C-212/04, *Adelener*. [2006] ECR I-6057.

4 Case C-77/97 *Unilever* [1999] ECR I-431; Case C-240/98, *Oceano Grupo Editorial*, [2000] ECR I4941.

5 See the recent case C-429/09 *Fuß*, reported on in this issue of EELC, and, on unilateral vertical effect, case C-277/09 *Accardo*, reported in EELC 2010 No 4.

6 See F Emmert, M Pereira de Avezedo, *Les jeux sont faits: rien ne va plus, ou une nouvelle occasion perdue par la CJCE*, in *Rev. trim. dr. eur.,* 1995, p. 18, who point out that "les palliatifs offerts par la jurisprudence de la CICE, effect direct vertical, interprétation du droit national conforme au droit communautaire, et droit à la réparation, ne suffisent pas à assurer pleinement l'efficacité du système". For a different view, see HG Schermers, *No Direct Effect for Directives*, in *E.P.L.*, 1997, p. 527, who in the light of "alternative" remedies suggests that the idea that unimplemented directives can produce direct effects should be excluded. It is submitted that this conclusion seems too radical to be upheld after years of case law moving in the opposite direction.

7 Case C-91/92, *Faccini Dori,* [1994] ECR I-3325: this also applies in the few cases in which the Court denies direct effects in vertical relations, owing to the asserted lack of precision of the rules invoked *vis-à-vis* public bodies: see for example case C-131/97, *Carbonari*, [1999] ECR I-1103.

8 Case C-131/97, C*arbonari*, cited above.

9 Case C-168/95, *Arcaro*, [1996] ECR I-4705. See G. Betlem, *The Principle of Indirect Effect of Community Law,* in *Eur. Rev. Priv. L.* p 1.

10 As to other kinds of liability see Opinion of Advocate General Jacobs in Case C-456/98, *Centrosteel*, [2000] ECR I-6007.

11 See A Tizzano, *La tutela dei privati nei confronti degli Stati membri, dell'Unione europea,* in *Foro it.*, 1995, IV, 13 , at 26.

12 See W Van Gerven, *The Horizontal Effect of Directive Provisions Revisited: The Reality of Catchwords*, in *Essays in Honour of HG Schermers*, vol. II, Dordrecht/Boston, 1994, p. 335 , at 349-351

13 Case C-103/88, *Fratelli Costanzo,* [1989] ECR, I-1839.

14 Case C-8/81, *Becker*, [1982] ECR, 53.

15 Case C-222/84, *Johnston*, [1986] ECR, 1651.

16 Case C-152/86, *Marshall,* [1986] ECR, 723.

17 See Case C-188/89, *British Gas,* [1990] ECR 3133; case C-343/98,

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Collino, [2000] ECR I-6659; V. Kviatkovsky, *What is an Emanation of the State? An Educated Guess*, in *E.P.L.*, 1997, p 329,

18 E.g. *Tribunale di Trani*, case 4369/A/2009, *Villani v. Poste Italiane*, not reported, where the judge stated that national law does not apply if it is in contradiction with a clause of the Framework Agreement on fixed-term contracts as put into effect by Directive 1999/70. This judgment is not in line with the indication subsequently provided by the ECJ in a preliminary ruling in case 98/09, *Sorge* [2010], where on the same question the Court ruled that "because clause 8(3) of that framework agreement has no direct effect, it is for the national court, if it should be led to conclude that the national legislation at issue in the main proceedings is incompatible with European Union law, not to disapply that provision but, so far as possible, to give it an interpretation in conformity with Directive 1999/70 and with the objective pursued by that framework agreement". See V De Michele, *Sul contratto a termine la Corte di Giustizia supera la prima "disfida postale" di Barletta/Trani*, in Il lavoro nella giurisprudenza, 9/2010, p 865 et seq. On the same question there have also been consequences at the constitutional level: see M Rosano, *Effetti e "miraggi" provocati dalla sentenza della Corte Costituzionale n. 44/2008 sulla tenuta della legislazione italiana in tema di contratto a termine"*, in Riv. It . Dir. Lav., 2009, 1, p65. The role of national judges in this context is emphasised by F Schockweiler, in *"Les effets des directives dans les ordres juridiques nationaux,* in *Rev. marché un. eur."*, 1995, p 23.

19 Case C-144/04, [2005] ECR I-9981 and case C-555/07, reported in EELC 2010, No. 2.

20 OJ L303, p16.

21 See JJA Shaw and H J Shaw, *Recent Advancement in European Employment Law: Towards a Transformative Legal Formula for Preventing Workplace Ageism*, in The Intern. Jour. Comparat. Labour Law, 26, 3, 2010, p273 ss. Cf. Also Case C-45/09, *Gisela Rosenbladt*; case C-98/09, *Sorge*, both reported in EELC 2010, No. 3; case C-499/08, *Ingeniørforeningen i Danmark*, reported in EELC 2010 No. 4.

22 See L. Galantino, *Le fonti extralegislative nell'esperienza giurisprudenziale*, in Riv. It. Dir. Lav., 2009, 4, p.447, in particular p453 et seq.

23 Among the comments to this decision, see R Mastroianni, *Efficacia "orizzontale" del principio di eguaglianza e mancata attuazione nazionale delle direttive comunitarie*, in Diritti, Lavori, Mercati, 2006, p 407; E Muir, *"Mangold"*, in Revue du droit de l'Union europèenne, 2006, 2, p 466; D Schiek, *The ECJ Decision in Mangold: A Further Twist on Effects of Directives and Constitutional Relevance of Community Equality Legislation*, in Industrial Law Journal, 2006, p329; E Dubout, *L'invocabilité d'eviction des directives dans les litiges horizontaux*, in RTD eur., 2010, p 277 et seq.

24 *Mangold* judgment, paragraph74.

25 Paragraph 78. On this issue it is noteworthy that recently the German Constitutional Court held that the ECJ's jurisprudence requiring disapplication of national law that is in contrast with a general EU principle, cannot constitute an *ultra vires* conduct of ECJ. The court's decision, dated 6 July 2010, is available on line at http://www.bverfg.de/entscheidungen/rs20100706_2bvr266106en.html. It shows that even Member States such as Germany, that tend to be concerned by such bold positions, cannot deny their full conformity with the principle of conferral. See J Kokott, *The Basic Law at 60 - From 1949 to 2009: The Basic Law and Supranational Integration*, German Law Journal, vol 11, 1/2010, p99 et seq.

26 See G Thüsing – S Horler,in CMLR, 47, 2010, p1161; S Lorenzon, *La Corte di giustizia e il riconoscimento degli effetti diretti orizzontali delle direttive: il caso Kucukdeveci*, in Quaderni Costituzionali, 2, 2010, p430; V. Sciarrabba, *La sentenza Kucukdeveci e le prospettive della giustizia costituzionale europea*, in Diritto pubblico comparato ed europeo, 2010, forthcoming; N Lazzarini, *Effetti diretti orizzontali dei principi generali... ma non delle direttive che li esprimono? La sentenza della Corte di giustizia nel caso Kucukdeveci*, in Rivista di Diritto internazionale, 2, 2010, p443; C. Murphy, *Arrêt «Kucukdeveci»*, in Revue du Droit de l'Union Européenne, 2, 2010, p379; G Di Federico, *La sentenza Kucukdeveci e la* vexata quaestio *degli effetti diretti (orizzontali) delle direttive,* in Riv. It. Dir. Lav., II, 2010, p1001.

27 On the question of evaluation of the proportionality of a national measure in contrast with EU Law see case C-411/05, *Palacios de la Villa*, [2007] ECR I-8531and the comment of L Imberti, in Rivista Italiana Diritto del Lavoro, 2008, 2, p301. More recently, cf., joined cases C-250/09 and C-268/09, *Georgiev*, and the Opinion of AG Bot of 2 September 2010, not yet reported.

28 Judgment, paragraph 43, italics added. This conclusion is in direct contrast with the AG's Opinion of 7 July 2009, proposing to recognise the horizontal direct effects of directives.

29 Judgment, paragraph 56, italics added.

30 In this sense see G Thüsing – S Horler, p1167.

31 See case C-385/05, *Confederation general du travail*, 2007 ECR I-611; case C-432/05, *Unibet*, 2007, ECR I-2271; case C-275/06, *Productores de musica de Espana*, 2008 ECR I-271.

32 *Amplius* on this specific issue see, Editorial comment, *The scope of application of the general principles of Union law: An ever expanding Union?*, CMLR, 47, 2010, p1589.

33 In contrast to case C-427/06, see *Bartsch*, [2008] ECR I-7245.

34 Cf. judgment, paragraph 24 et seq.

35 A Von Bogdandy - J Bast (ed.), *Principles of European Constitutional Law*, Oxford, 2006; T Tridimas, *The General Principles of EC Law*, Oxford, 2006.

36 K Lenaerts – JA Gutiérrez – Fons, *The Constitutional Allocation of Powers and General Principles of EU Law*, CMLR, 47, 2010, p1629.

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ECJ Court Watch

SUMMARIES BY PETER VAS NUNES

RULINGS

ECJ 15 September 2001, case C-386/09 *(Johnny Briot – v – Randstad Interim, Sodexho SA and Council of the European Union)* (**"Briot"**), Belgian case (TRANSFER OF UNDERTAKINGS)

Facts
Mr Briot was employed by a temporary employment agency, Randstad. It assigned him to work in the restaurant of the EU Council in Brussels. Although he had performed this work since 1998, his temporary contract was not extended when it expired pursuant to Belgian law on 20 December 2002. This was a mere 11 days before 1 January 2003, the date on which the Council terminated its contract with Randstad and awarded the contract for running its restaurant to a catering company, Sodexho.

National proceedings
Apparently (this is not quite clear from the judgment), Mr Briot claimed that the non-extension of his temporary contract amounted to a dismissal as prohibited by Article 4 of Directive 2001/23 ("the transfer of the [...] business shall not in itself constitute grounds for dismissal ..."), that he should therefore be deemed as having continued to be a Randstad employee until 1 January 2003, that the switch from Randstad to Sodexho constituted a transfer of undertaking and that he had therefore become an employee of Sodexho. The court of first instance held, *inter alia*, that, as there was no contract of employment between Mr Briot and the Council, the rights and obligations arising from his contract of employment (with Randstad) could not have been transferred to Sodexho. Mr Briot appealed. The Court of Appeal referred three questions to the ECJ for a preliminary ruling.

ECJ's ruling
1. The ECJ addressed only one of the three questions (No. 2). It asked "whether the non-renewal of the fixed-term contracts of employment of the temporary workers attributable to the transfer of the activity to which they were assigned disregards the prohibition laid down in Article 4(1) of Directive 2001/23 in such a way that those temporary workers must be regarded as still being available to the user business on the date of the transfer". The ECJ points out that the protection that Directive 2001/23 is intended to provide only concerns workers who have an employment contract existing at the date of the transfer. Whether or not this is the case is for the national court to determine (§ 26-28).

2. Workers who are dismissed because of an impending transfer of undertaking (i.e. contrary to Article 4(1) of Directive 2001/23) must be regarded as still being employed by the transferor on the date of the transfer and they therefore go across to the transferee (§ 29-30).

3. A worker who concludes a fixed-term contract is fully aware that the contract will end on the agreed date and that he or she is not entitled to a renewal of the contract. The fact that the expiry date of such a contract precedes the date laid down for the transfer of the activity to which the worker was assigned cannot create such a right (§ 31-33).

4. The non-renewal of a fixed-term contract cannot be regarded as a dismissal in the meaning of Article 4(1) of Directive 2001/23 (§ 34).

5. Given that the referring court has only asked questions on Directive 2001/23, the ECJ merely notes that Mr Briot could perhaps be eligible to receive protection against the misuse of successive fixed-term contracts under Directive 1999/70.

6. Ruling: Mr Briot must not be regarded as still being employed on the date of the transfer.

ECJ 14 October 2010, case C-243/09 (*Günter Fuss – v – Stadt Halle*) (**"Fuss"**), German case (WORKING TIME)

Facts
Fuss was a Fire Officer employed by the city of Halle in the German province of Sachsen-Anhalt. On the roster he was scheduled to work on average 54 hours per week. This was in accordance with the provincial rules but in excess of the 48 hour per week maximum provided in Article 6 of the Working Time Directive 2003/88 ("the Directive"). In early 2006, Fuss and his colleagues were informed that, if any one of them insisted on compliance with the Directive, they would be transferred to a desk job. In December 2006, Fuss requested (i) a reduction of his weekly working time to 48 hours per week and (ii) compensation for overtime unlawfully performed between 2004 and 2006. A few days later, management announced that a vacancy for a non-shift 40 hour per week position would arise on 1 April 2007, and shortly afterwards Fuss was transferred to that position "for organisational reasons". His base salary remained unchanged but his hardship allowance was reduced. Fuss objected, stating that he wished to retain his position of Fire Officer, including shift work, but for no more than 48 hours per week. His objection was turned down and he brought legal proceedings before the local administrative court.

National proceedings
Fuss claimed that he had been transferred solely because he had requested compliance with the Directive. The city of Halle replied that its decision to transfer Fuss to another position was in no way intended to punish him but was merely designed to accommodate his request for reduced working hours without having to amend its shift-roster for Fuss' sole benefit. The court, finding that the transfer was in accordance with German and provincial law as it stood at the time of the transfer (the law was replaced in 2008), referred to the ECJ a question regarding Article 22 of the Directive. Subsection (a) of this Article allows Member States not to apply Article 6 providing they take the necessary measures to ensure that no employer requires a worker to work on average more than 48 hours per week "unless he has first obtained the worker's agreement to perform such work". Subsection (b) provides that "no worker is subjected to any detriment by his employer because he is not willing to give his agreement to perform such work". The referring court wished to know whether the concept of "detriment" in Article 22(1)(b) of the Directive is to be interpreted subjectively (Fuss perceives his transfer as a punishment) or objectively (despite his reduced headship allowance, Fuss did not, on balance, suffer any detriment since his new post was less dangerous than his previous one, it involved less hardship and it offered him career advancement opportunities).

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ECJ's ruling

1. Article 22 of the Directive is not relevant, because neither Germany nor the province of Sachsen-Anhalt had made use of the possibility afforded in Article 22 to derogate from Article 6 (see case C-151/02, *Jaeger*) (§ 32-38).

2. Given the irrelevance of Article 22 and the fact that the referring court limited its questions to the interpretation of Article 22, that court has in effect asked the wrong question, which the ECJ therefore reformulates as asking whether Article 6 is to be interpreted as precluding national rules that allow a public-sector employer to transfer compulsorily to another service a worker employed as a fire fighter in operational service on the ground that that worker has requested compliance, within the latter service, with the maximum average working week laid down in Article 6(b), in a situation in which that worker suffers no detriment by reason of such a transfer (§ 39-43).

3. In order to reply to this question it is necessary (1) to examine whether Article 6 is infringed only when a worker suffers detriment and (2) to determine the consequences of an infringement of Article 6 (§ 44-46).

4. Article 6(b) of the Directive constitutes "a particularly important rule of EU social Law". There is no provision in the Directive that allows derogation from Article 6 other than Article 22 (which, as mentioned above, is not applicable in this case). Therefore, exceeding the maximum of 48 hours of work per week constitutes, in itself, an infringement of Article 6, without it being necessary to show that a specific detriment has been suffered. In fact, the EU legislature took the view that infringement of Article 6 in itself causes workers to suffer a detriment (§ 47-55).

5. Article 6(b) of the Directive is unconditional and sufficiently precise to allow it to have (vertical) direct effect notwithstanding the fact that Article 22 allows Member States to derogate from it. Given that the period for transposing the Directive has expired and that the province of Sachsen-Anhalt had not transposed it on the date Fuss was transferred, he was entitled to rely directly on Article 6(b) against the city of Halle (§ 56-61).

6. The city of Halle takes the view that its decision to transfer Fuss to a position that respected the upper limit of 48 hours per week ensured the implementation of Article 6. The ECJ disagrees, since the effect of his involuntary transfer is "to deprive of all substance" the right to a maximum working week of 48 hours. In addition, Article 47 of the Charter of Fundamental Freedoms of the EU, which guarantees the fundamental right to effective judicial protection, would be substantially affected if an employer, in reaction to a request for compliance with a directive, were allowed to adopt a measure such as transferring the employee to another position (§ 62-66).

7. **Ruling**: Article 6 of Directive 2003/88 precludes national rules, which allow a public-sector employer to transfer a worker compulsorily to another service on the ground that the worker has requested compliance with that provision, even if he or she suffers no specific detriment other than that resulting from the infringement of that provision.

ECJ 14 October 2010, case C-345/09 *(J.A. van Delft et al. – v – College van Zorgverzekeringen)* (**"Van Delft"**), Dutch case (SOCIAL INSURANCE)

Facts

Van Delft and five others ("the plaintiffs") were pensioners. They had Dutch nationality but resided in other EU States, namely Spain, France, Malta and Belgium. They were affected by a change of Dutch law effective as of 1 January 2006. Prior to this date, persons with an income below a certain threshold were publicly insured against medical expenses (national health) and persons with an income above that threshold, such as the plaintiffs, had to insure themselves privately. The right of a privately insured individual to receive health care at the expense of his or her insurer is not a benefit as provided in Regulation 1408/71. As a result, the plaintiffs were not insured in their country of residence and continued to be privately insured in The Netherlands. This was as they wished it to be. On 1 January 2006, Dutch law changed. The distinction between publicly and privately insured persons was abolished. Under the new legislation every resident of The Netherlands must be privately insured and is covered by the Health Care Act *("Zorgverzekeringswet")*, regardless of age and health. One result of this is that everyone's entitlement to health care at the expense of their insurer is a benefit within the meaning of Regulation 1408/71.

Articles 28 and 28(a) of Regulation 1408/71 provide that a person who receives a pension under the laws of one Member State (in this case, The Netherlands) but resides in another Member State is eligible to receive health care from the health care institutions of his or her country of residence, regardless of whether that country's legal system does not entitle that person thereto (Article 28) or whether all residents are entitled to free health care (Article 28(a)). Such a person may apply for the right to receive health care in his or her country of residence by registering with its health care authorities. If such a person elects to register, he or she must do so by completing a Form E121. Dutch law provides that, regardless of whether or not a pensioner has filed a Form E121, the Dutch authority in charge of coordinating health care insurance, "the CVZ", may deduct a certain contribution from those pensioners' monthly old-age pension payments, as allowed by Article 33 of Regulation 1408/71. Accordingly, the Dutch health care insurers notified their Dutch pensioner customers living elsewhere in the EU that, as from 1 January 2006, they would cease to be insured in The Netherlands. The CVZ sent them E121 Forms, instructing them to register with their local health care authorities. Approximately 230,000 pensioners complied with this instruction and 18,000 did not. In all cases, the CVZ proceeded to make deductions from their monthly old-age pension payments.

National proceedings

The facts of this case are complicated. For the sake of simplicity, this summary leaves out certain facts and assumes (contrary to the actual facts) that all of the plaintiffs were Dutch old-age pensioners living in Spain and that they advanced identical arguments.

The plaintiffs objected against the deductions that CVZ made from their pensions and, when CVZ dismissed their objections, brought proceedings. The court of first instance found in favour of CVZ. The plaintiffs appealed. They argued, briefly stated, that neither Spanish nor Dutch law, nor any provision of EU law, contained an obligation to register with the Spanish health care authorities, and that they were therefore free not to register, thereby causing them to continue to be privately insured, with the result that the CVZ had no right to make deductions from their pensions. The CVZ took the position that,

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although Regulation 1408/71 leaves Dutch pensioners residing in Spain free to register with the Spanish health care authorities, they must in any case pay the CVZ pursuant to Article 33 of Regulation 1408/71. The appellate court referred two questions to the ECJ. The first question concerned the interpretation of Regulations 1408/71 and 574/72. The second question concerned the compatibility of the Dutch legislation in question with the right of free movement.

ECJ's ruling

1. Regulation 1408/71 establishes a complete system of conflict rules, the effect of which is to divest the national legislatures of the power to determine the ambit and the conditions for the application of their national legislation on the subject. "Since the conflict rules laid down by Regulation 1408/71 are thus mandatory for the Member States, *a fortiori*, it cannot be accepted that insured persons falling within the scope of those rules can counteract their effects by being able to withdraw from their application". The ECJ had previously ruled (case C-160/96, *Molenaar*) that neither the EC Treaty nor Regulation 1408/71 gives migrant workers the option to waive in advance the benefits of the mechanism introduced by *(inter alia)* Article 28 of Regulation 1408/71. On the contrary, the clear wording of Articles 28 and 28(a) requires, without offering any alternative, the Member State responsible for the payment of the pension to bear the cost of the health care benefits (§ 51-57).

2. The ECJ went on to deal with the plaintiffs' argument that, in order to receive benefits in Spain, they had to register with the Spanish health care authorities, which implies that by not registering, they could waive the right to receive Spanish health care. The ECJ rejected this argument because a Form E121 is purely declaratory, a mere administrative formality (§ 58-65).

3. Next, the ECJ tackled the plaintiffs' argument that the application of Articles 28 and 28(a) of Regulation 1408/71 cannot justify their being required to contribute to the Dutch sickness insurance scheme since, as non-residents, they are not entitled to benefits under that scheme. This argument disregards the fact that Regulation 1408/71 lays down a mandatory conflict rule and that, if the plaintiffs had resided in The Netherlands, they would have been entitled to Dutch health care benefits (§ 66-72).

4. It is true that, in the absence of registration with the Spanish health care institution, the plaintiffs cannot actually receive Spanish health care benefits and consequently do not generate any expenditure that the CVZ would be required to refund to the Spanish institution. However, that does not affect the existence of the right to those benefits, and the existence of that right lays the financial risk on the CVZ, even if those benefits are not (yet) actually received. The obligation of the pensioners in question to contribute is inherent in the principle of solidarity, since in the absence of such an obligation the persons concerned might be induced to wait for the risk to materialise before contributing to the financing of the system (§ 73-79).

5. The fact that the Dutch legislation at issue (allowing for deductions to be made from old age pensions) is in conformity with secondary EU law, in this case Regulation 1408/71, does not have the effect of removing it from the scope of the provisions of the EU Treaties (§ 81-87).

6. Articles 21 and 45 TFEU (formerly Articles 18 and 39 EC) deal with, respectively, the right of every citizen to move and reside freely within the EU and the right of freedom of movement for workers within the EU. Article 45(3)(d) allows workers to remain in the territory of a Member State after having been employed there. This provision does not apply to a person who has worked in one Member State all his life (e.g. The Netherlands) and exercises his or her right to reside in another Member State (e.g. Spain) only after retirement. Thus, Article 45 (free movement of workers) does not apply in the present case (§ 88-93).

7. As for Article 21 TFEU, the plaintiffs argue that the benefits under the Spanish national health system are less advantageous to them than those afforded under the Dutch system. Thus, they are in a situation that is less favourable than they would have been in had they resided in The Netherlands, a fact that impedes the right to move freely within the EU *(crudely put: they pay (high) Dutch contributions and get (low) Spanish public health care, PCVN* (§ 94-98)).

8. The ECJ begins by recalling that Article 21 TFEU calls for the coordination, not the harmonisation, of the Member States' social security legislation. In these circumstances, Article 21 TFEU "cannot guarantee to an insured person that a move to another Member State will be neutral in terms of social security, in particular as regards sickness benefits. [...] It follows that, even where its application is less favourable, national social security legislation is compatible with Article 21 TFEU as long as it does not simply result in the payment of social security contributions on which there is no return". It is clear that, in so far as Dutch legislation provides that non-resident pensioners are entitled to sickness benefits under the legislation of their country of residence, that legislation is more likely to promote the free movement of EU-citizens than to restrict it, since it gives those citizens access to care in their country of residence on the same conditions as persons insured under that country's social security scheme (§ 99-102).

9. This is all the more the case as the CVZ must calculate the deductions by using a coefficient reflecting the cost of health care in the country of residence, as a result of which Dutch pensioners living in Spain now contribute less than they would have contributed had they lived in The Netherlands (§ 104).

10. The next issue in the ECJ's ruling had to do with the fact that the Dutch insurance companies in question terminated the relevant insurance contracts in their entirety (i.e. in respect of the compulsory basic benefits and the voluntary supplementary benefits) rather than only in relation to those benefits that are also provided under the Spanish scheme. The Dutch law that came into force on 1 January 2006 provided for the automatic termination of insurance contracts concluded by non-residents. It does not (explicitly) provide for such termination in respect of residents of The Netherlands. Moreover, the plaintiffs allege that Dutch law obligates Dutch insurance companies to accept all persons as insured persons for all types of sickness benefits available (i.e. basic benefits as well as supplementary benefits) without medical testing, but such an obligation does not exist in respect of non-residents. The referring court will need to ascertain whether this allegation is accurate, in which case there would be a different treatment for residents and non-residents. The absence of a statutory obligation to insure non-residents, in particular with respect to supplementary sickness

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benefits, in combination with the automatic termination of all existing insurance contracts on 1 January 2006, would be liable to encourage the insurance companies concerned to get rid of "bad risks", which retirees tend to be, or to raise the premiums above the level prevalent in their home country (§ 105-124).

11. **Ruling**: Neither Regulation 1408/71 nor Article 21 TFEU preclude national legislation under which recipients of a pension, who reside in another Member State in which they are entitled to sickness benefits in kind provided by that Member State, must pay, in the form of a deduction from their pension, a contribution in respect of those benefits even if they are not registered with the competent institution of their Member State of residence. However, Article 21 TFEU does preclude national legislation in so far as it induces or provides for an unjustified difference of treatment between residents and non-residents as regards ensuring the continuity of the overall protection against the risk of sickness enjoyed by them under insurance contracts concluded before the entry into force of that legislation.

ECJ 14 October 2010, **case C-428/09** (*Union Syndicale Solidaires Isère – v – Premier Ministre, Ministère du Travail, de Relations Sociales, de la Famille, de la Solidarité et de la Ville* and *Ministère de la Santé et des Sports*) (**"Solidaires Isère"**), French case (WORKING TIME)

Facts

Decree 2006-950 inserted into the French Labour Code certain provisions in respect of "educational commitment contracts". An example of such a contract is where a person engages himself as an activity leader or a director of a holiday camp for schoolchildren. The rules governing the working hours of such persons – whose contracts must not have a duration exceeding 80 days in any 12-month period – entitle them to a minimum weekly rest period of 24 consecutive hours, but not to a daily rest period of 11 hours as required by Article 3 of the Working Time Directive 2003/88 ("the Directive"). A trade union applied to the *Conseil d'Etat*, the highest French administrative court, to annul said Decree on account of it being contrary to the Directive.

Article 17(1) of the Directive allows the Member States to derogate from certain of the Directive's provisions, including Article 3, "when, on account of the specific characteristics of the activity concerned, the duration of the working time is not measured and/or predetermined or can be determined by the workers themselves". Article 17(3) allows the Member States to derogate from, (*inter alia)*, Article 3 in certain cases, which include (b) "security and surveillance activities requiring a permanent presence in order to protect property and persons, particularly security guards and caretakers or security firms" and (c) "activities involving the need for continuity of service or production".

National proceedings

The *Conseil d'Etat* asked the ECJ (1) whether the Directive applies to casual or seasonal staff in holiday and leisure centres and, if so, (2) whether Article 17 of the Directive applies and, if so, (3) whether the conditions laid down in Article 17 are satisfied in the case of said casual or seasonal staff.

ECJ's ruling

1. The Directive applies to all sectors of activity within the meaning of Framework Directive 89/391 on Health and Safety, the scope whereof explicitly includes educational, cultural and leisure activities. The exceptions provided in Directive 89/391 (public service and civil protection activities) are to be interpreted restrictively (§ 19-24).

2. The concept of "worker" must be defined in accordance with objective criteria, the essential feature of an employment relationship being "that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration". The fact that individuals with "educational commitment contracts" are not subject to all provisions of the French Labour Code is not relevant, nor is the fact that such individuals are employed on a fixed-term contract for a maximum of 80 days per year (§ 25-32).

3. In view of the foregoing, the ECJ answers the first question affirmatively: the individuals at issue fall within the scope of the Directive (§ 33).

4. The second question has two parts: (a) do workers employed under educational commitment contracts come within the scope of the derogations of Article 17(1) or 17(3)(b) of the Directive and, if so, (b) are the conditions for such a derogation satisfied (§ 34)?

5. As exceptions to the European rules for the organisation of working time, which aim to protect workers' health and safety and which are "of particular importance", the derogations in Article 17 must be interpreted restrictively (§ 35-40).

6. Article 17(1) of the Directive does not apply to persons employed under educational commitment contracts if, as seems to be the case, they are not free to decide the number of hours that they are to work (§ 41-43).

7. Does the derogation in Article 17(3)(b) in respect of security and surveillance activities apply? On the one hand, members of staff at holiday and leisure centres carry out activities designed to educate and occupy children, which would indicate a negative answer. On the other hand, they are responsible for those children's safety, which would indicate a positive answer to this question. Furthermore, the ECJ notes that activities performed by staff at holiday and leisure centres could also be covered by Article 17(3)(c) regarding "activities involving the need for continuity of service or production", since the children involved live, throughout the period of their stay, continuously with and under the supervision of the centre's staff (§ 44-48).

8. Article 17(3) provides that derogations from *(inter alia)* Article 3 are allowed only on the condition "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". In order to comply with this condition, the "equivalent periods of compensatory rest" must be such that (i) "the worker is not subject to any obligation vis-à-vis his employer which may prevent him from pursuing freely and without interruption his own interests in order to neutralise the effects of work on his safety or health", (ii) such periods must follow on immediately from the working time which they are supposed to counteract and (iii) work periods must alternate regularly with rest periods. Moreover, in order to be able to rest effectively, "the worker must be able to remove himself from his working environment for

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a specific number of hours which must not only be consecutive but must also directly follow a period of work". The provision of French law that the duration of an educational commitment contract may not exceed 80 days does not satisfy the Member States' obligation to ensure that equivalent periods of compensatory rest as required by Article 17(2) of the Directive are provided. In fact, a maximum number of working days per annum is not even relevant (§ 49-53).

9. Finally, the ECJ addressed the French government's argument that the exceptional nature of the activities of the staff at holiday and leisure centres does not allow provision of equivalent periods of compensatory rest, as the staff would then need to abandon the children under their supervision. Article 17(2) of the Directive allows derogation in such exceptional circumstances provided (i) the impossibility to provide compensatory rest is "for objective reasons" and (ii) the workers concerned are afforded "appropriate protection". It is conceivable that condition (i) is satisfied in the case of staff at holiday and leisure centres, but condition (ii) is not satisfied. The imposition of an annual ceiling on the number of days worked (80 per year) "cannot in any circumstances be regarded as appropriate protection", the objective of the "appropriate protection" rule being "exactly the same as that of the daily minimum rest period provided for in Article 3 of [the] Directive or the equivalent period of compensatory rest provided for in Article 17(2), namely to enable those workers to relax and dispel the fatigue caused by the performance of their duties"(§ 54-60).

10. **Ruling**: persons employed under an educational commitment contract fall within the scope of the derogation in Article 17(3) (b) and/or (c) of the Directive, but the French legislation at issue fails to afford them appropriate protection and is, therefore, not compatible with the Directive.

ECJ 11 November 2010, case C-232/09 *(Dita Danosa – v – LKB Lizings SIA) (**"Danosa"**),* Latvian case (DISMISSAL – PREGNANCY)

Facts
In December 2006, Ms Danosa was appointed as the sole member of the Board of Directors of the newly established company, LKB. She was awarded salary and other benefits, but her legal status (employee/agent?) was not determined. In July 2007, the General Meeting of Shareholders ("the GMS") decided to remove her as a member of the Board of Directors ("a Board member"). She was pregnant at the time, but it is not clear whether the shareholders knew this and, if so, whether her pregnancy played a role in the decision to remove her. Ms Danosa brought an action claiming that she had been unlawfully dismissed as an employee, given that the Latvian Labour Code outlaws dismissal during pregnancy.

National proceedings
LKB based its defence on the Latvian Commercial Code, which authorises the GMS to dismiss a Board member at any time. Whether this defence was successful is not known. What is known is that the court of first instance and the appellate court dismissed Ms Danosa's action. She appealed to the Supreme Court. In the Supreme Court case proceedings she argued that she should be treated as a worker for the purpose of EU law regardless of whether she was to be considered as such for the purposes of Latvian law, and that Article 10 of Directive 92/85 obligates Latvia to ensure that pregnant workers are protected against dismissal. LKB countered that Board members do not work under the direction of another person and cannot therefore be treated as workers for the purposes of EU law. The Supreme Court was of the opinion that, where a Board member comes within the concept of "worker" as determined in ECJ case law, Directive 92/85 applies, whether or not the individual in question holds a contract of employment, and that both Directive 92/85 and Directive 76/207 prohibit termination of the employment relationship in the case of a pregnant woman. Nevertheless, the Supreme Court found it necessary to refer two questions to the ECJ: (1) are Board members "workers" in the meaning of EU law? and (2) is the provision of the Latvian Commercial Code, which allows Board members to be dismissed even when they are pregnant, incompatible with Directive 92/85?

ECJ's ruling
1. The referring court's questions are based on the premise that the removal of Ms Danosa from her post as a Board member took place, or may have taken place, essentially because of her pregnancy. There is no reason to suggest that the questions referred to the ECJ are hypothetical or unrelated to the main proceedings (§ 35-37).

2. The concept of "worker" in Directive 92/85 must be defined in accordance with objective criteria that distinguish the employment relationship. The essential feature of an employment relationship is "that, for a certain period of time, a person performs services for and under the direction of another person, in return for which he receives remuneration". The nature of the relationship under national law – e.g. agency, *sui generis*, self-employed or Director – is irrelevant (§ 39-42).

3. It is clear that Ms Danosa provided services to LKB for a certain period of time and in return for remuneration. The question, therefore, is whether her relationship to LKB involved the degree of subordination required for her to qualify as a "worker" in the meaning of the ECJ's case law. LKB maintained that the relationship between a company's shareholder(s) or supervisory board and a Board member is one of independent agency and must be based on trust, which means that it must be possible to terminate it if ever that trust is no longer forthcoming. The ECJ does not subscribe to this view: the fact that Ms Danosa was a Board member does not rule out the possibility that she was in a relationship of subordination to LKB. Whether or not this was the case depends on: (1) the circumstances in which she was recruited, (2) the nature of her duties, (3) the context in which those duties were performed, (4) the scope of her powers and the extent to which she was supervised and (5) the circumstances under which she could be removed (§ 43-47).

4. Given that Ms Danosa had to report to and cooperate with LKB's supervisory board and that the GMS, over which she had no control, had the power to dismiss her, she satisfied *prima facie* the criteria to qualify as a "worker" in the meaning of the ECJ's case law (§ 48-51).

5. Was Ms Danosa a "pregnant" worker as defined in Directive 92/85, that is to say "a pregnant worker who informs her employer of her condition, in accordance with national legislation and/or national practice"? It is for the referring court to determine whether Ms Danosa had informed LKB of her pregnancy. However, even if she had not done this at the time of her dismissal, account must be taken of Article 10 of Directive 92/85, which prohibits the dismissal of pregnant (etc.) workers, save in exceptional cases for reasons

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unrelated to the worker's condition. It would be contrary to the spirit and purpose of the Directive not to apply this prohibition in a situation where the employer knows that the employee is pregnant even though she has not formally informed her employer of that fact (§ 52-55).

6. Supposing Ms Danosa cannot claim dismissal protection under Article 10 of Directive 92/85, either because she does not fall within the concept of "worker" or "pregnant worker", or because the decision to dismiss her was unconnected to her pregnancy and the reason for the decision was substantiated in writing and permitted under Latvian law, she can still possibly rely on the protection against discrimination on the grounds of sex under Directive 76/207 (§ 58-64).

7. The dismissal of a worker (essentially) on account of pregnancy constitutes direct sex discrimination. It would be contrary to the principle of Directives 76/207 and 86/613 (which applies to self-employed persons) and against the principle of equality between men and women as enshrined in Article 23 of the Charter of Fundamental Rights of the EU to accept that a company can remove a Board member on account of her pregnancy, even if she does not qualify as a "pregnant worker" in the meaning of Directive 92/85 (§ 65-73).

8. **Ruling**: even if Ms Danosa is not a "pregnant worker" within the meaning of Directive 92/85, if her removal as a Board member was on account of her pregnancy (bearing in mind the reversal of the burden of proof), that removal would be contrary to Directive 76/207. In as much as Latvian law allows such a removal, it is not in line with EU law (§ 74).

ECJ 18 November 2010, joined cases C-250/09 and C-268/09 *(Vasil Ivanov Georgiev – v – Tehnicheski Universitet - Sofia, Filial Plovdiv) (**"Georgiev"**)*, Bulgarian case (AGE DISCRIMINATION)

Facts

Georgiev was a lecturer, later a professor, at Sofia Technical University. In 2006, he was dismissed on the grounds that he had reached the retirement age of 65. This was pursuant to Bulgarian law, which provided that professors could not continue on a contract for an indefinite period beyond the age of 65. They could continue on one-year contracts up until the age of 68. Accordingly, Georgiev was offered a one-year contract, which was extended for two more years but was not extended any further when he turned 68. Georgiev brought two actions before the local court in Plovdiv. One action sought to reclassify his fixed-term contract as a contract of indefinite duration, the other challenged the decision to terminate his employment relationship at the age of 68.

National proceedings

The court referred three questions to the ECJ. The third question, as interpreted by the ECJ, sought an interpretation of Bulgarian law, which is out of the ECJ's remit and which the ECJ therefore declined to answer. The ECJ reworded the first and second questions together, as asking whether Framework Directive 2000/78 ("the Directive") precludes national legislation under which university professors who have reached the age of 68 are compulsorily retired and may continue working beyond the age of 65 only by means of one-year fixed-term contracts that are renewable at most twice, and, if so, whether such national legislation must be disregarded.

ECJ's ruling

1. The Bulgarian legislation at issue falls within the scope of the Directive, as it affects "employment and working conditions" as provided in Article 3(1)(c) of the Directive (§ 27-30).

2. Compulsory retirement at the age of 68 and the imposition of a fixed-term contract beyond the age of 65 both cause employees to be treated less favourably on the grounds of age as defined in Article 2 of the Directive (§ 31-34).

3. The question to be addressed, therefore, is whether this differential treatment is objectively justified as allowed by Article 6. This question breaks down into two sub-questions: (i) does the difference of treatment have a legitimate aim and, if so, (ii) are the means of achieving that aim appropriate and necessary (§ 35-36)?

4. The example of a legitimate aim in point (c) of the second paragraph of Article 6 (maximum age for recruitment), as implemented in Bulgarian law, is not relevant (§ 37).

5. What was the Bulgarian legislator's aim when it introduced the said rules? This is not clear, and it is up to the Bulgarian courts to determine the legislator's aim. However, the ECJ does state that if the aim was to allocate the posts for professors in the best possible way between the generations, in particular by appointing young professors, or if it was to achieve a mix of generations to promote an exchange of experiences and innovation with a view to enhancing the quality of teaching and research, then that is a legitimate aim. On the other hand, if it is true, as submitted by Georgiev, that the average age of university professors in Bulgaria is 58 because young people are not interested in pursuing a career as a professor, then such aims would not be aligned to the reality of the job market (§ 38-48).

6. Supposing the aim pursued by the Bulgarian legislator is legitimate, are the means adopted to achieve that aim appropriate and necessary? This, again, is for the referring court to determine. The ECJ does, however, point out that the Member States enjoy broad discretion in their choice of aims to pursue and of the means to achieve those aims. Also, if the Bulgarian legislator's aims were to encourage the recruitment of younger professors and/or to enhance educational quality as hypothetically set out above, then the means to achieve those aims are appropriate and necessary, given that (i) 68 is five years higher than the Bulgarian statutory age at which men normally acquire the right to a pension, thus offering professors a relatively long period to pursue their careers and (ii) the relevant legislation is not based only on a specific age, but also takes account of the financial compensation by way of a retirement pension (§ 49-55).

7. "It follows", so the ECJ continues, "that the setting of an age limit for the termination of a contract of employment does not exceed what is necessary to attain employment policy aims such as *[encouragement of recruitment of younger people and developing the quality of teaching]*, provided that that national legislation reflects those aims in a consistent and systematic manner. It is for the national court to ascertain whether such an age limit genuinely reflects a concern to attain the aims pursued in a consistent and systematic manner. [...] In particular, it is for that court to examine whether the legislation at issue in the main proceedings distinguishes between, on the one hand, lecturers and university

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professors and, on the other hand, other university teaching staff by not providing for the compulsory retirement of the latter, as Mr Georgiev claims. It would thus be necessary to ascertain whether such a distinction corresponds to a necessity in the light of the aims pursued and the particular characteristics of the teaching staff at issue or whether, on the contrary, it indicates an inconsistency in the legislation, which does not therefore satisfy the conditions set out in Article 6(1) of Directive 2000/78" (§ 55-56).

8. As for the appropriateness and the necessity of the conclusion of fixed-term contracts from the age of 65, the ECJ distinguished the case of *Georgiev* from that of *Mangold* (ECJ 22 November 2005, case C-144/04). The application of one-year contracts that are renewable at most twice may be appropriate and necessary in the case of Bulgarian professors, if it encourages the promotion of younger teaching staff, because (i) the decisive factor is that the professor has acquired a right to a retirement pension in addition to reaching a certain age, (ii) that age is 68, which is much higher than the age of 52 at issue in *Mangold* and (iii) the fixed-term contracts at issue are limited to a period of one year and renewable at most twice, thus meeting the requirements of the Framework Agreement on Fixed-Term Work (Directive 1999/70) (§ 57-67).

9. Given that the Technical University of Sofia is a public institution, directives can be relied on against it (direct vertical effect), and the national courts must therefore not apply any national law that is contrary to a directive.

10. Ruling: Directive 2000/78 must be interpreted as meaning that it does not preclude national legislation [...] under which university professors are compulsorily retired when they reach the age of 68 and may continue working beyond the age of 65 only by means of fixed-term one-year contracts renewable at most twice, provided that that legislation pursues a legitimate aim linked inter alia to employment and job market policy, such as the delivery of quality teaching and the best possible allocation of posts for professors between the generations, and that it makes it possible to achieve that aim by appropriate and necessary means. It is for the national court to determine whether those conditions are satisfied.

ECJ 18 November 2010, case C-356/09 *(Pensionsversicherungsanstalt* – v – *Christine Kleist) (**"Kleist"**)*, Austrian case (SEX DISCRIMINATION)

Facts
Ms Kleist was a doctor, born in 1948. She had been employed since 1985 by the *Pensionversicherungsanstalt*, which is a public employer ("the Employer"). She was covered by a collective agreement, which provided that employees with 10 or more years of service cannot be dismissed except on certain grounds (i.e. they have enhanced dismissal protection). However, paragraph 134 of the collective agreement ("Para 134") exempted from this rule dismissals on account of the employee having attained the normal retirement age as provided in Austrian social security law. This exemption was designed for the benefit of younger persons, the idea being that retiring employees create job vacancies.

In Austria, ever since 1955, the normal retirement age is 65 for men and 60 for women (the retirement age for women will rise in annual steps starting in 2024). The Employer's policy was to retire all staff upon them reaching this age. Accordingly, Ms Kleist was dismissed in December 2007, with effect from 1 July 2008, at which time she would be 60.

Ms Kleist challenged her dismissal in court, basing her claim on a provision of Austrian law that a dismissal can, under certain conditions, be unlawful. This is the case where a dismissal has an adverse effect on the employee's fundamental interests and the employer is unable to substantiate the dismissal for good reasons. However, when determining whether a dismissal adversely affects the employee's fundamental interest, account is taken of retirement income. As a result, an unlawful dismissal claim following termination on the ground of age is unlikely to be successful.

National proceedings
The court of first instance found against Ms Kleist. On appeal this judgment was reversed. The Employer appealed to the Supreme Court, which referred questions to the ECJ. These questions related to Directive 76/207 (as amended by Directive 2002/73 and as later replaced by "Recast Directive" 2006/154). Article 3(1) of this Directive prohibits discrimination on the grounds of sex in relation to employment, including dismissals and pay. The Directive does not prohibit sex discrimination in relation to social security, which is governed by Directive 79/7.

The ECJ rephrased the Austrian court's questions as follows: must Directive 76/207 "be interpreted as meaning that national rules which, in order to promote access of younger persons to employment, permit a public employer to dismiss employees who have acquired the right to draw their retirement pension, when that right is acquired by women of an age five years younger than the age of which it is acquired by men, constitute discrimination on the grounds of sex prohibited by that Directive"?

In the ECJ proceedings, Ms Kleist argued that Para 134 violated not only Directive 76/207 but also the prohibition of age discrimination under Framework Directive 2000/78. The Employer argued that there was merely indirect sex discrimination, which was objectively justified by the desire to create vacancies for younger persons.

ECJ's ruling
1. The ECJ begins by pointing out that (i) the conditions for payment of a retirement pension and (ii) the conditions governing termination of employment are separate issues (§ 24).

2. Article 3(1)(a) of Directive 76/207 prohibits sex discrimination in relation to dismissal (§ 25).

3. The term "dismissal" must be given a wide meaning. It includes an age limit set for the compulsory dismissal of workers even if the dismissal involves the grant of a retirement pension. Thus, Ms Kleist's dismissal was a dismissal as provided in the Directive (§ 26-27).

4. A policy to dismiss a female employee because she has attained the qualifying age for a retirement pension constitutes sex discrimination if the retirement age under national legislation is different for men and women (§ 28).

5. The criterion determining the age at which doctors such as Ms Kleist can be dismissed without enhanced dismissal protection is inseparable from their sex. Therefore her dismissal constitutes a difference in treatment that is directly based on sex (§ 29-31).

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6. The question to be addressed, therefore, is whether female workers aged 60-65 are in a comparable situation to that of male workers in the same age bracket. Does the fact that they are eligible for a statutory retirement pension, and that their male counterparts are not, make their situation incomparable ("specific")? The answer depends, *inter alia*, on the object of the rules establishing the difference in treatment. The objective of Para 134 was to govern the circumstances in which employees can lose their job. Contrary to the situations in the ECJ's rulings in *Roberts* (C-151/84) and *Hlozek* (C-19/02), the advantage accorded by Austrian law to female workers of being able to claim a retirement benefit five years sooner than men, is not directly connected with this objective, men and women being "in identical situations so far as concerns the conditions governing termination of employment". The reason Austria has different retirement ages for men and women is "to compensate for the disadvantage suffered by women socially, in relation to the family and economically" (§ 32-38).

   Note: Advocate-General Kokott distinguished Ms Kleist's case from that in Hlozek as follows: "In Hlozek the bridging allowance was specifically aimed at financially cushioning a special risk of long-term unemployment, a risk which was statistically proven to arise for men and women at different ages and was particularly high as the statutory retirement age drew closer. In the present case, however [...] there are no indications of there being such a specific risk."

7. The ECJ has repeatedly held that, given the fundamental importance of the principle of equal treatment, the exception to the prohibition of sex discrimination in Directive 79/7 (the Directive on equal treatment of men and women in matters of social security) must be interpreted strictly. That exception does not apply in the present case of Ms Kleist, which deals with dismissal, not with social security (§ 39-40).

8. In summary, Ms Kleist was treated differently to her male colleagues directly because of her sex, whilst her male colleagues were in a comparable situation. Given that none of the exceptions to the prohibition of direct sex discrimination apply, Para 134's objective of promoting employment of younger persons cannot justify the discrimination (§ 41-43).

9. Ms Kleist's argument in respect of age discrimination was not raised until after the Austrian court referred questions to the ECJ, so there is no need to address this issue (§ 44-45).

10. Ruling: Directive 76/207 must be interpreted as meaning that national rules that permit an employer to dismiss employees who have acquired the right to draw their retirement pension, when that right is acquired by women sooner than by men, constitute direct discrimination on the grounds of sex prohibited by that Directive.

OPINIONS

Opinion of Advocate-General Jääskinen of 15 July 2010, case C-147/08 *(Jürgen Römer – v – Freie und Hansestadt Hamburg)* (**"Römer"**), German case (SEXUAL ORIENTATION DISCRIMINATION)

Facts

This case concerns Mr Römer, a former employee of the City of Hamburg. Following his retirement in 1990, he received an old-age pension based on contributions that his employer ("Hamburg") and he had made in the course of his employment. On 15 October 1991, Mr Römer, who was homosexual, entered into a civil ("registered") partnership with another man. He informed Hamburg of this fact and asked Hamburg to reduce the amount of income tax that it deducted from his pension. This request was based on the fact that, in accordance with a provision of German tax law ("the Tax Provision"), Hamburg deducted tax according to tax bracket I, the more favourable tax bracket III being reserved for married couples or persons with family responsibility. Mr Römer demanded to be reclassified into tax bracket III, which would increase his monthly pension by over € 300. He based his claim on Framework Directive 2000/78 ("the Directive"), which outlaws discrimination on the basis of, *inter alia*, sexual orientation. Hamburg denied his request, arguing that the different treatment of married retirees and retirees with a civil partnership was justified by the fact that the former can have children and that the German Constitution declares that marriage and family deserve special protection by the government. Mr Römer countered that civil partners can also have children.

National proceedings

The court to which Mr Römer applied referred seven questions to the ECJ. In brief, the questions asked:

1. whether the pension in question qualifies as a "state scheme" as provided in Article 3(3) of the Directive;
2. if not, whether the pension is exempted from the scope of the Directive pursuant to paragraph 22 of its Preamble, which provides that the Directive "is without prejudice to national laws on marital status and the benefits dependent thereon";
3. if not, whether the distinction between married couples and civil partners pursuant to the Tax Provision is compatible with the Directive;
4. if not, whether that distinction violates Article 141 EC (now Article 157 TFEU) or another fundamental principle of EU law;
5. whether, in the event the distinction is incompatible with the Directive or with other EU law, a person such as Mr Römer has the right to be treated in the same way as a married person and, if so, whether this right goes back further than 2 December 2003, the Directive's transposition deadline;
6. if so, whether this applies only to that portion of his pension rights accrued after 17 May 1990 (the date of the ECJ's ruling in the *Barber* case);
7. whether the German Constitution can justify discrimination.

Opinion

1. (re Question 1) Article 3(3) excludes from the Directive's scope "payment of any kind made by state schemes or similar, including state social security or social protection schemes". In its *Maruko* ruling (2008, case C-267/06), the ECJ held that the exemption in Article 3(3) is limited to payments that do not qualify as "pay" in the meaning of Article 141 EC. The ECJ has interpreted the concept of "pay" very broadly, basically interpreting it to include all types of employment-based pension that satisfy three conditions: the benefits are limited to a special category of workers, they are directly related to length of service and they are calculated on the basis of salary. Mr Römer's position satisfies all three conditions and therefore qualifies as "pay". The fact that the pension scheme in question was laid down by a governmental organisation is not relevant (§ 48-68).

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2. (re Question 2) Two superior German courts – the "*Verwaltungsgericht*" and the "*Bundesgerichtshof*" – have mistakenly held that benefits that depend on a person's marital status are exempted from the Directive's scope pursuant to paragraph 22 of its Preamble. Paragraph 22 does no more than state the obvious, namely that the EU Council may only adopt directives within the areas of competence conferred on the Community. The Directive meets this requirement, as it leaves the Member States free to legislate on marriage and other forms of personal unions as well as on the legal status of children and other family members (§ 69-81).

3. (re Question 3) Does the Tax Provision discriminate directly on the basis of sexual orientation? In other words, is there a situation "where one person is treated less favourably than another is, has been or would be treated in a comparable situation on the grounds of his sexual orientation"? Is Mr Römer's situation "comparable" to that of a married man? It is settled case-law of the ECJ that, in order to be comparable, situations need not be identical. Following a comparison of the rights and duties of civil partners towards one another and those of married couples towards one another, the Advocate-General concludes that the differences are too small to justify a different treatment. Therefore, given that (according to the order for reference) German law limits marriage to different-sex couples and limits civil partnership to same-sex couples, the different treatment, for tax purposes, of a person with a civil partner as compared to a married person is based directly on sexual orientation (§ 84-100).

4. In the event the ECJ does not find direct discrimination, then there is at least indirect discrimination on the basis of sexual orientation, as homosexuals cannot acquire tax bracket III status by marrying with one another, which heterosexuals can. The Tax Provision is not objectively justified, so that the indirect discrimination is prohibited (§ 101-111).

5. In summary (on questions 1, 2 and 3), the Tax Provision is incompatible with the Directive (§ 112-113).

6. (re Question 4) The Tax Provision does not violate Article 141 EC because it does not discriminate on the basis of gender. The ECJ's ruling in the transgender case *K.B.* (2004, case C-117/01) does not lead to a different conclusion (§ 114-121).

7. Is there a "general principle of Community law", such as non-discrimination on the grounds of age (see *Mangold* and *Kücükdevici)*, that prohibits discrimination on the grounds of sexual orientation? In its 1998 ruling in the *Grant* case (C-249/56), the ECJ held that at the relevant time of that case, such discrimination was not prohibited. However, the EC Treaty was amended with effect from 1 May 1999 (Treaty of Amsterdam), by introducing Article 13(1) EC, which specifically outlaws discrimination on the basis of sexual orientation. Moreover, in 1999 the ECtHR held, in the *Salgueiro da Silva Mouta* case, that such discrimination falls within the scope of Article 14 ECHR and cannot be tolerated. The fundamental rights guaranteed by the ECHR form an integral part of the principles guaranteed in Article 6(3) TEU and Article 21(1) of the Charter of Human Rights of the EU explicitly prohibits discrimination on the grounds of sexual orientation. Given these facts, the Advocate-General is of the opinion that non-discrimination on the grounds of sexual preference is a "general principle of Community law" (§ 122-134).

8. (re Questions 5 and 6) Given that Hamburg is a governmental organisation, the Directive has (vertical) direct effect. Therefore, if the Tax Provision is merely incompatible with the Directive, Mr Römer can claim application of tax bracket III from, at the earliest, 2 December 2003, the Directive's transposition deadline. A later date could be called for, as registered partners were not comparable to married persons under German law until a later date, the law having been amended in phases (§ 135-153).

9. In the event the ECJ declares the Tax Provision to be unlawful, that will not have dire financial consequences for Hamburg. There is, therefore, no need to limit the effects of the ECJ's ruling in time as in the *Barber* ruling (§ 154-162).

10. (re Question 7) No provision of national law, whatever its status, not even a constitutional provision, can derogate from Community law (§ 163-179).

11. **Conclusion**: the Tax Provision falls within the scope of the Directive and constitutes discrimination as provided therein. It is also in breach of a general principle of Community law (§ 180).

Opinion of Advocate-General Kokott of 30 September 2010, case C-236/09 (*Association Belge des Consommateurs Test-Achats ASBL and Others)* (**"Test-Achats"**), Belgian case (SEX DISCRIMINATION)

Facts

In 2008, Test-Achats, a Belgian non-profit consumer organisation, and two individuals brought an action before the Constitutional Court of Belgium. They sought annulment of a Belgian law transposing Directive 2004/113/EC of 13 December 2004, implementing the principle of equal treatment between men and women in the access to and the supply of goods and services ("the Directive"). Article 4 of the Directive prohibits (direct and indirect) discrimination based on sex in the access to and the supply of goods and services. Article 5(1) requires the Member States to ensure that in all new contracts concluded after 21 December 2007 at the latest, the use of sex as a factor in the calculation of premiums and benefits for the purposes of insurance and related financial services shall not result in differences in individuals' premiums and benefits. Article 5(2), however, allows the Member States "to permit proportionate differences in individuals' premiums and benefits where the use of sex is a determining factor in the assessment of risk based on relevant and accurate actuarial and statistical data". Article 15(3) limits this power to derogate from Article 15(1) by providing that costs related to pregnancy and maternity shall not result in such differences. Paragraph 19 of the Preamble, referring to the derogation possibility of Article 5(2) states, "Exemptions are allowed only where national legislation has not already applied the unisex rule".

National proceedings

The applicants in the Belgian proceedings argued that the said Belgian law was incompatible with the principle of equal treatment of men and women. The Constitutional Court, finding that the Belgian law merely makes use of the exemption under Article 5(2) of the Directive, and that therefore the applicant's complaint applied equally to the Directive itself, found it necessary, before ruling on the action pending before it, to ask the ECJ for guidance on the validity of Article 5(2) of the Directive.

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Opinion

1. The Advocate-General does not mince his words, remarking, right at the outset (§ 21-23 of his opinion):

"Article 5(2) is a provision of Directive 2004/113 which was not contained in the Commission's original Proposal for a Directive. What is more, in the statement of reasons for the Proposal for the Directive the Commission, after examining in detail the problem at issue in the present case, declared itself firmly against allowing differences based on sex in respect of insurance premiums and benefits and expressly found them to be incompatible with the principle of equal treatment.

It is all the more astonishing that in the present case the Commission emphatically takes the view that Article 5(2) of Directive 2004/113 does not infringe the principle of equal treatment between men and women, but is in fact an expression of that principle. Even when asked, the Commission was unable to provide a plausible explanation for its sudden change of mind.

For my part, I have considerable doubts whether Article 5(2) of Directive 2004/113 in the form chosen by the Council is at all suitable for expressing the principle of equal treatment, in particular the requirement not to treat different situations in the same way. A provision having that objective should be applicable in all Member States. In fact, however, Article 5(2) of Directive 2004/113 is, according to the European Union legislature, only to be applicable 'where national legislation has not already applied the unisex rule'. The provision therefore has the effect that in some Member States it is possible for men and women to be treated differently with regard to an insurance product whereas in other Member States they must be treated in the same way with regard to the same insurance product. It is difficult to understand how such a legal situation could be the expression of the principle of equal treatment under European Union law."

2. The Advocate-General begins by stressing the fundamental importance of the right to equal treatment between men and women as expressed in the TEU and the Charter of Fundamental Rights of the European Union. Directive 2004/113's legal basis is Article 13(1) EC (now Article 19(1) TFEU), which provides that the Council "may take appropriate action to combat discrimination". Although this affords the Council a certain discretion as regards appropriateness, material scope and content of anti-discrimination provisions, such provisions must withstand examination against the yardstick of the fundamental rights recognised by the EU. They must not themselves lead to discrimination, let alone direct discrimination (§ 26-39).

3. Article 5(2) of the Directive permits differences in insurance contracts, which are directly linked to the sex of the insured person. This does not necessarily mean that it is directly sex-discriminatory, because the principle of non-discrimination requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified. What therefore has to be examined is whether the situations in which men and women find themselves with regard to insurance services may differ in a way that is legally significant (§ 40-43).

4. In insurance, recourse must be had to risk prognoses. For example, with regard to life assurance and pension insurance, what matters is the life expectancy of the insured person. It is legitimate to calculate this by carrying out a collective rather than an individual examination (§ 44-46).

5. The Council's said discretion is not boundless. For example, it may not permit a person's race to be used as a ground for differentiation in insurance. What goes for race applies equally to sex. Unlike Article 5(3) of the Directive, which prohibits differentiating premiums on the basis of pregnancy and maternity, Article 5(2) does not focus on any clear biological difference between men and women. On the contrary, it concerns cases in which different insurance risks can at most be associated *statistically* with gender (§ 47-53).

6. The ECJ has not yet ruled on the question whether, in shaping insurance products, differences between people, which can be merely statistically linked to their sex, can or even must lead to different treatment between male and female persons. In its rulings in *Neath* (case C-152/91) and *Coloroll* (case C-200/91) the ECJ merely held that the principle of equal pay was not applicable to gender-based actuarial factors determining the pension contribution made by employers. It did not rule on employee-contributions (§ 54-57).

7. The ECJ has in the past allowed that statistical data may suggest indirect discrimination, but it has never allowed statistics to justify direct discrimination. This is because direct sex discrimination, with the exception of affirmative action, is only permissible if it can be established with certainty that there are relevant differences between men and women that necessitate such discrimination. There is no such certainty where insurance premiums are calculated differently on the basis of life expectancy statistics (§ 58-61).

8. The different life expectancies of male and female insured persons is caused not only by their different genders but also by economic and social conditions and by habits, such as professional activity, family and social environment, eating habits, alcohol/tobacco/drugs, leisure activities and sporting activities. In view of changing role models the effects of behavioural factors on a person's life expectancy can no longer clearly be linked with his or her sex. The Council does not do justice to the complexity of the problem when, in Article 5(2) of the Directive, it simply allows difference between insured persons to continue to be linked to their sex (§ 62-65).

9. Practical difficulties in determining life expectancy on the basis of socio-economic conditions and on habits do not justify the use of sex as a criterion, nor do financial considerations. None of the parties to the proceedings submitted that the introduction of so-called unisex rates would endanger the financial equilibrium of private insurance systems (§ 61-68).

10. In summary, the Advocate-General proposes that the ECJ should declare Article 5(2) of the Directive to be invalid, in the same way that the U.S. Supreme Court in 1978 (*City of Los Angeles – v – Manhart*) and 1983 (*Arizona Governing Comm. – v – Norris*) held that the Civil Rights Act of 1964 prohibits different treatment of insured persons on the basis of their sex (§ 69-70).

11. It is possible to annul Article 5(2) without annulling the entire Directive (§ 71).

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12. Should the ECJ consider Article 5(2) to be valid, the provision would, as a derogating provision, have to be interpreted restrictively (§ 72).

13. **Conclusion**: Given the interests at stake and the need for legal certainty, the Advocate-General proposes that Article 5(2) of the Directive be declared valid until three years following the judgment in this case, except in respect of persons who already raised a claim before the date of the judgment (§ 73-82).

PENDING CASES

Cases C-312 and 313/10 *(Land Nordrhein-Westfalen – v – Melanie Klintz (312) and Sylvia Jansen (313))*, reference lodged by the German *"Landesarbeitsgericht Köln"* on 29 June 2010 (FIXED-TERM CONTRACTS)

When assessing whether a renewal of a fixed-term contract is justified in a particular case for objective reasons within the meaning of Clause 5(1) of the Framework Agreement on Fixed-Term Work, is it compatible with the spirit and purpose of Clause 5(1) to have reference only to circumstances obtained at the renewal date without having regard to how many fixed-term contracts there have already been?

Does Clause 5(1) preclude the application of a provision of national law that justifies successive fixed terms of employment contracts in the public sector alone for the "objective reason" that the employee is paid out of budgetary funds provided for fixed-term employment, whereas in the case of employers in the private sector such economic reasons are not recognised as "objective reasons"?

Is a Member State in breach of Clause 8(3) of the Framework Agreement on Fixed-Term Work if it introduces into its national legislation (by implementing Directive 1999/70/EC) a budgetary reason for a fixed term, which is of general application to the whole of its public sector, but under its national legal system prior to the adoption of Directive 1999/70/EC, only existed in comparable form in small pockets of the public sector (higher education)? Does such a breach mean that the national rule can no longer be applied?

Case C-337/10 *(Georg Neidel – v – Stadt Frankfurt am Main)*, reference lodged by the German *"Verwaltungsgericht Frankfurt am Main"* on 7 July 2010 (WORKING TIME)

Does Article 7 of Directive 2003/88/EC (organisation of working time) also apply to the employment relationships of public servants?

Does the scale of the entitlement to payment in lieu based on Article 7(2) of Directive 2003/88/EC extend only to the minimum leave of four weeks guaranteed by Article 7(1) or does that entitlement also extend to the additional leave for which national law provides?

Case C-393/10 *(Dermod Patrick O'Brien – v – Ministry of Justice (formerly the Department for Constitutional Affairs))*, reference lodged by the Supreme Court of the United Kingdom on 4 August 2010 (PART-TIME WORK)

Is it for national law to determine whether or not judges as a whole are "workers who have an employment contract or employment relationship" within the meaning of clause 2.1 of the Framework Agreement on Part-Time Work, or is there a Community norm by which this matter must be determined?

If judges are such "workers", is it permissible for national law to discriminate (a) between full-time and part-time judges, or (b) between different kinds of part-time judges in the provision of pensions?

Case C-341/10 *(European Commission – v – Republic of Poland)*, action brought by the European Commission on 7 July 2010 (RACIAL DISCRIMINATION)

The Commission alleges that Poland has carried out a defective and incomplete implementation of Directive 2000/43/EC with regard to the following matters: membership of and/or involvement in an organisation of workers or employers, or any organisation the members of which carry on a particular profession, including the benefits provided for by such organisations, social protection, including social security and health care, social advantages, education, access to and supply of goods and services that are available to the public, including housing (Article 3(1)(d) to (h) of the Directive). The Commission rejects the assertion of the Polish authorities that the implementation of the Directive in these areas is ensured by provisions of its Constitution, by legislation and by international agreements indicated in the course of the procedure prior to the bringing of the action.

Case C-347/10 *(A. Salemink – v – Raad van Bestuur van het Uitvoeringsinstituut Werknemersverzekeringen)*, reference lodged by the Dutch *"Rechtbank Amsterdam"* on 8 July 2010 (SOCIAL SECURITY)

Do Regulation 1408/71, as well as the rules on freedom of movement and establishment, preclude an employee working outside Netherlands territory on an oil rig on The Netherlands section of the continental shelf for an employer established in The Netherlands from being in a position in which he or she is not insured under national statutory employee insurance solely on the ground of not being resident in The Netherlands but in another Member State (in this case, Spain), even if such an employee has Netherlands nationality and can also avail of the option to take out voluntary insurance under essentially the same conditions as those that apply to compulsory insurance?

Case C-415/10 *(Galina Meister – v – Speech Design Carrier Systems GmbH)*, reference lodged by the German *"Bundesaerbeitsgericht"* on 20 August 2010 (SEX, RACIAL AND OTHER DISCRIMINATION)

Are Directives 2006/54/EC (sex discrimination), 2000/43/EC (equal treatment irrespective of racial or ethnic origin) and 2000/78/EC (Framework Directive on Equal Treatment) to be interpreted as meaning that where a worker shows that he or she meets the requirements for a post advertised by an employer, that worker has a right vis-à-vis that employer, if he or she does not obtain the post, to information as to whether the employer has engaged another applicant and, if so, as to the criteria on the basis of which that appointment has been made?

Case C-435/10 *(J.C. van Ardennen – v – Raad van Bestuur van het Uitvoeringsinstituut Werknemersverzekeringen)*, reference lodged by the Dutch *"Centrale Raad van Beroep"* on 13 September 2010 (INSOLVENCY)

Must the Insolvency Directive 80/987/EEC be interpreted in such a way as to render generally incompatible with it a national rule that obliges employees, in the event of the insolvency of their employer, in order to (fully) validate their right to have their outstanding wage claims met, to register as job-seekers at the latest on the first working day after the day on which the employment relationship ended or should reasonably have ended?

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Case C-455/10 (*G.A.P. Peeters-Van Maasdijk – v – Raad van Bestuur van het Uitvoeringsinstituut Werknemersverzekeringen*), reference lodged by the Dutch "*Centrale Raad van Beroep*" on 17 September 2010 (SOCIAL SECURITY)

Must Article 45 TFEU and/or Article 21 TFEU (freedom of movement) be interpreted as allowing a national provision, which makes the revival of entitlement to unemployment benefits conditional on the place of residence of the person concerned being within the territory of The Netherlands, even if that person lives just a short distance from the border and is entirely focused on the Dutch job market?

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ECtHR COURT WATCH

Summaries by Paul Diamond, barrister (UK)

***ECtHR 23 September 2010**, Obst – v – Germany (Application No 425/03)* and *Schüth – v –Germany* (Application No 1620/03) (PRIVATE LIFE)

Introduction

The European Court of Human Rights (ECtHR) recently considered these two cases about the dismissal of an employee from a religious organisation. The issue was whether these dismissals were compatible with Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention on Human Rights" or ECHR), which guarantees the right to respect for private and family life. Although both cases involved Church bodies, the rulings have wider implications for all ideological employments, including the scope of Article 4 of Directive 2000/78/EC. This provision allows Member States to maintain or adopt legislation "pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos".

Facts

In *Obst*, a member of the Church of Jesus Christ of Latter Day Saints (the Mormon Church), who was employed by that church in Germany in a senior position as Director of European Relations, was dismissed summarily (without notice) for cause. He was dismissed after confessing that his marriage had deteriorated and that he had had an affair with another woman. He brought proceedings before the local labour court, which declared the dismissal to be void. The Court of Appeal initially upheld the judgment, but following a further appeal to the Federal Labour Court and remittal of the case, the Court of Appeal found in favour of the Church.

In *Schüth*, an organist and choirmaster employed by a Catholic parish in Germany was dismissed without notice for having an extra-marital affair. As in *Obst*, he initiated legal proceedings against his dismissal but in the end the Church prevailed.

Relying on Article 8 ECHR, both *Obst* and *Schüth* complained of the refusal of the courts to overturn their dismissal.

ECtHR's judgment

In both cases, the ECtHR had to examine whether the balance struck by the German labour courts, between the applicants' right to respect for their private life under Article 8 ECHR on the one hand and the rights of the Catholic and the Mormon Church on the other, had afforded the applicants sufficient protection. The ECtHR reiterated that the autonomy of religious communities was protected against undue interference by the State under Article 9 ECHR (freedom of religion) read in the light of Article 11 ECHR (freedom of assembly and association).

By putting in place a system of labour courts and a constitutional court having jurisdiction to review the former courts' decisions, Germany had in principle complied with its positive obligations towards litigants in the area of employment law. The applicants had been able to bring their cases before a labour court with jurisdiction to determine whether the dismissal had been lawful under State labour law while having regard to ecclesiastical labour law. In both cases, the Federal Labour Court had found that the requirements of the Mormon Church and the Catholic Church, respectively, regarding marital fidelity did not conflict with the fundamental principles of the legal order.

As regards *Obst*, the ECtHR observed that the German labour courts had taken account of all the relevant factors and had undertaken a careful and thorough balancing exercise regarding the interests involved. According to those courts' findings, his dismissal amounted to a necessary measure aimed at preserving the Church's credibility, having regard in particular to the nature of his post. The courts had explained why the Church had not been obliged to inflict a less severe penalty, such as a warning, and they had underlined that the injury suffered by *Obst* as a result of his dismissal was limited, having regard among other things to his relatively young age.

The fact that, after a thorough balancing exercise, the German courts had given more weight to the interests of the Church than to those of *Obst*, did not itself raise an issue under the ECHR. The conclusion that *Obst* had not been subject to unacceptable obligations was reasonable, given that, having grown up in the Mormon Church, he had been or should have been aware when signing the employment contract of the importance of marital fidelity for his employer .

As regards *Schüth*, in contrast, the ECtHR observed that the labour court of appeal had confined itself to stating that, whilst his functions as organist and choirmaster did not fall within the group of employees who in case of serious misconduct had to be dismissed, his functions were nonetheless so closely connected to the Catholic Church's mission that the parish could not continue employing him without losing all credibility. The court of appeal had not examined this argument any further but appeared to have simply reproduced the opinion of the Church on this point.

The labour courts had moreover made no mention of *Schüth's* de facto family life or of the legal protection afforded to it. The interests of the Church had thus not been balanced against *Schüth's* right to respect for his private and family life, but only against his interest in keeping his post. A more detailed examination would have been required when weighing the competing rights and interests at stake.

While the ECtHR accepted that in signing his employment contract, *Schüth* had entered into a duty of loyalty towards the Catholic Church which limited his rights to respect for his private life to a certain degree, his signature on the contract could not be interpreted as an unequivocal undertaking to live a life of abstinence in the event of separation or divorce. On balance, the ECtHR found that the German labour courts had failed to weigh *Schüth's* rights against those of the Church employer in a manner compatible with the ECHR.
In summary, the ECtHR unanimously concluded that there had been no violation of Article 8 in *Obst's* case and that there had been a violation of Article 8 in *Schüth's* case.

Commentary

These decisions raise a number of concerns, specifically in relation to religious organisations, but additionally to all ideological employments protected by Article 4 of Directive 2000/78/EC. Such employments include religious organisations, political organisations, environmental groups, charities and employments related to a specific task (for example, the licensing of embryo research (which others may object to)).

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Firstly, there is concern over the jurisdiction of the ECtHR and, by inference, the ECJ. In *Schüth*, a defining factor in the decision by the ECtHR was the meaning given to Directive 2000/78/EC. Germany had implemented this Directive by means of its General Law on Equal Treatment (*AllgemeinesGleichbehandlungsgesetz*). Germany had been subject to a Commission Enforcement Notice dated 31 January 2008 because the Commission was the opinion that Germany had failed to transpose Article 4 of Directive 2000/78/EC properly.

In relation to religious organisations, this very possibility of a secular court reviewing the religious needs of an autonomous religious organisation is likely to have a chilling effect on its operation, and to hamper its religious mission. For this reason, the US courts seek to maintain religious liberty under the First Amendment by seeking to avoid all religious entanglement. This has been done by providing for a doctrine known as *'ministerial exemption' (see Rweyemamu – v – Cote, 520 F.3d 198, 206 (2d Cir. 2008)).* This is an exemption to the law that prevents the US courts from even embarking on an enquiry of any form at all (subject to the preliminary issue of whether the doctrine applies). In contrast, Directive 2000/78/EC requires such an enquiry. For example, in the UK case of *Reaney – v – Bishop of Hereford (2007),* a bishop in the Church of England did not want to employ a homosexual youth worker who said he would be celibate for the duration of the employment. The bishop was found to have breached the national implementing measure for Directive 2000/78/EC. The Employment Tribunal could not separate function (the applicant would preach Christianity and not practice homosexuality) from the ideological nature of the employment (you need to believe that homosexuality is a sin). Does a secular court know the requirements of the Church of England better than a bishop?

Secondly, other ideological non-religious employers may require a commitment to the ethical values of the employer and seek to impose a code of conduct on all employees. Can someone who believes in nuclear power and oil exploration in the North Sea and Alaska be a suitable person for employment in the environmental group *Friends of the Earth*? Does it matter that his advocacy for the intrusion into the Alaska wilderness by US corporate interests takes place after work and forms part of his private life within Article 8 ECHR? Can an atheist scholar teach Islamic ethics to students of the *Qur'an*? Can a Conservative value-orientated person seek employment in a socialist advocacy group?

And fundamentally, is it so wrong to have a Jewish firm of lawyers, a Christian medical practice and a Muslim firm of accountants? The State can promote a version of the 'good', but private citizens must be free not to follow the State's version of the 'good'.

However, to summarise the position following the ECtHR's judgments in *Obst* and *Schüth*, national courts must consider, *inter alia*, i) the requirement for the voluntary assumption of an ideological code as a condition of employment, ii) the importance and reasonableness of the code, iii) the proportionality of any sanction, iv) the interests of the employee, v) the ability of the employee to secure alternative employment, and vi) the importance of autonomy for the ethical body.

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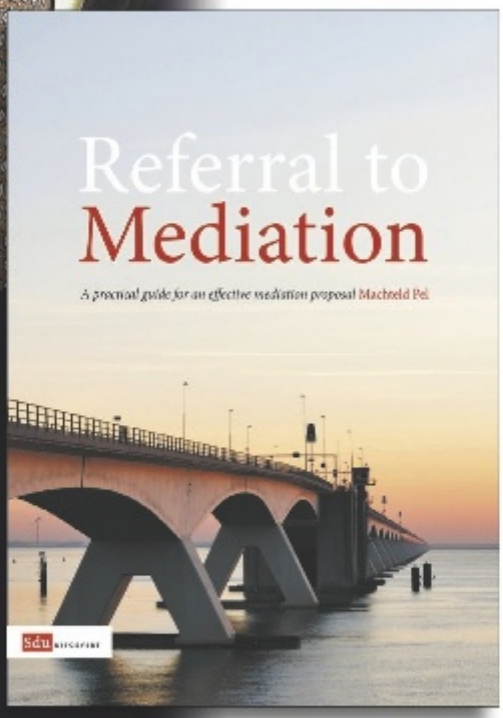

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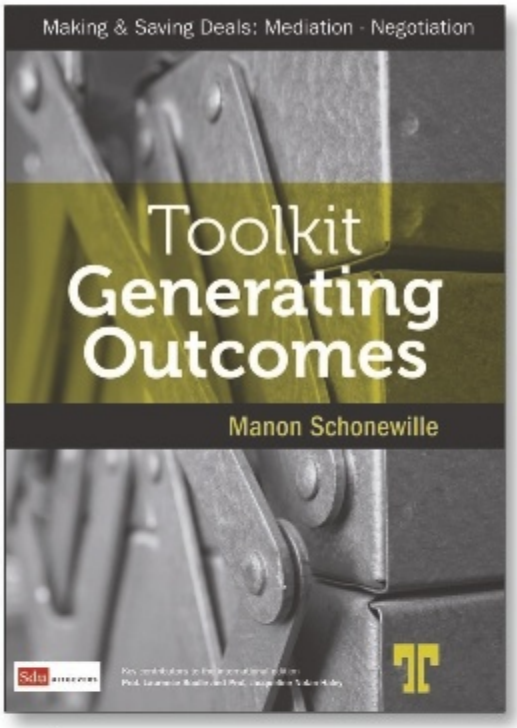
This practical handbook contains an overview of the treasure trove of tools a mediator has at his/her disposal and is written to offer a clear guide on how to "technically" apply these tools. In particular, it includes comprehensive and easy-to-use practical checklists and overviews. Because of its focus on specific and practical knowhow this publication is suitable for both practitioners and scholars.

The author, Manon Schonewille, is Executive Director of ACB Group and Toolkit Company. She also teaches business mediation at Utrecht University in the Netherlands.



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