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EUROPEAN EMPLOYMENT LAW CASES

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Germany: how to compensate age discriminaton

Greece: no Facebook at work

Austria: no "Widerspruch" right

Netherlands: another Botzen-type case

Germany: "glass ceiling" and statistics

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INTRODUCTION

From now on the cover of EELC carries the subtitle "Official Journal of the European Employment Lawyers Association EELA". This association, the only one of its sort, unites almost 1,300 professional employment lawyers from about 30 European countries. Starting with this second 2011 edition, all those lawyers will receive the digital version of EELC. Hopefully, many members of EELA will report judgments delivered in their own jurisdictions that are of interest to employment lawyers elsewhere. That way, EELC can become the premier vehicle for the distribution of employment law jurisprudence within Europe.

This issue contains many instructive case reports. One, from Austria, illustrates rather nicely the pros and cons of the German concept of *Widerspruchsrecht*. Does it violate basic rights to provide that following a transfer of undertaking the workers have no choice but to accept a new employer or lose their jobs? Another case report, from Germany, raises the question of how to compensate a worker who loses his job for a discriminatory reason. The next issue of EELC will contain an article on this question in relation to the doctrine that sanctions must be effective, proportionate and dissuasive. A third case report, also from Germany, addresses the difficult issue of whether statistics alone may be sufficient to establish a presumption of discrimination. Does a company in which 69% of the workforce is female but where two thirds of the senior staff are male and where not one woman has been promoted to senior management in 30 years need to demonstrate that refusal to promote a woman is for a good reason, or does that woman bear the full brunt of the burden of proof?

An Irish case highlights the "insider-outsider" paradox: the more that permanent employees are protected the more that employers will resort to successive fixed-term contracts, thereby excluding predominantly young, female and vulnerable groups from the normal dismissal protection rules. The abuse of fixed-term contracts is a pan-European phenomenon, most of all in countries where the statutory dismissal protection of permanent staff is strongest. Finally, a Greek case points to the pitfalls of social media in the workplace - currently a hot topic everywhere.

The ECJ Court Watch section contains controversial material, such as Advocate-General Cruz Villalon's opinion in the *Prigge* case on whether the compulsory retirement of a *Lufthansa* pilot at age 60 is objectively justified. The A-G examines the public security exception, the occupational requirement exception and the general objective justification exception and finds each of them wanting. Advocate-General Bot discusses the complex issue of whether seniority goes across in the event of a transfer of undertaking and A-G Trstenjak examines whether remuneration during paid leave should include variable pay.

The ECtHR section focuses on discrimination on grounds of belief.

July 2011
Peter Vas Nunes

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2011/18

No general "Widerspruch" right in Austria

COUNTRY AUSTRIA
CONTRIBUTOR ANDREAS TINHOFER, MOSATI RECHTSANWÄLTE, VIENNA

Summary
In February 2011 the Austrian Supreme Court confirmed that Austrian law, except in certain specific situations, does not give employees the right to resist a transfer of undertaking with the effect of retaining their employment with the transferor. In other words there is no general right of *"Widerspruch"* to object to the transfer, such as exists under German law. However, the court did broaden the scope of the exceptions to the rule, where employees do have a *Widerspruch* right.

Facts
In 2008 the defendant, an insurance company ("A"), contracted out one of its business units, which dealt with the assessment of damage to cars, to an affiliate ("B"). It transferred to B not only the activities of the business unit, but also its furniture, office equipment, financial assets, contracts with clients and suppliers, documentation, electronic data, etc. A notified the business unit's employees that as of 1 January 2009 their employment relationship would transfer to B with the retention of all their existing terms of employment including those set out in the collective agreement to which A was subject, as that agreement would read from time to time. Given that B was under an obligation to apply another collective agreement, this meant that, in contrast to normal Austrian practice, the employees in question would benefit from two collective agreements simultaneously, in effect cherry picking from both agreements. By way of explanation, Austrian law provides that the transferee's collective agreement replaces that of the transferor. In other words, what happened in this case was a voluntary departure from the law in favour of the transferred employees.

Despite this favourable arrangement, a group of 33 employees objected to the transfer. They did in fact begin to work for B, but only under protest and with reservation of rights. Their case was supported by A's works council, which took its management to court, seeking a declaratory judgment that the said 33 employees had remained in the employment of A. This claim was based on the argument that the contracting out of the damage assessment activities did not qualify as a transfer of undertaking within the meaning of (the Austrian law transposing) the Acquired Rights Directive 2001/23 (the ARD). In the alternative, the works council asked the court to declare that the 33 employees' terms of employment had deteriorated as a result of the transfer to B within the meaning of (the Austrian transposition of) Article 4(2) of the ARD, which provides that if the contract of employment is terminated because the transfer involves a substantial change in working conditions to the detriment of the employee, the employer shall be regarded as having been responsible for termination of the contract of employment. This alternative argument rested on the fact that the continued application of the "old" collective agreement was merely on a voluntary basis, thus affording the transferred employees a lower level of protection than would have been the case had the collective agreement continued to apply by law.

The court of first instance rejected the works council's claim, ruling that the contracting out of the damage assessment unit qualified as a transfer of undertaking and that the employees' terms of employment had not changed to their detriment. It is noteworthy that in these first instance proceedings, the issue of whether employees have the right to resist going across to the transferee and to remain in the transferor's employment (this right to be referred to below by the German expression *"Widerspruchsrecht"*) was not addressed. This issue came up for the first time in the appeal proceedings. However, the Court of Appeal (the *Oberlandesgericht Wien*) denied the existence of such a right. The works council appealed this decision to the Supreme Court (*Oberster Gerichtshof*).

Judgment
The Supreme Court upheld the Court of Appeal's judgment. The interesting part of its judgment is not that it confirmed that the contracting out of the car damage assessment unit qualified as a transfer of undertaking within the meaning of the ARD: this was a foregone conclusion. The interesting element is that the court went in depth into the works council's assertion that there is a general *Widerspruchsrecht* under Austrian law.

The Supreme Court began by referencing the ECJ's judgments in the cases of *Berg* and *Busschers* (ECJ 5 May 1988, cases 144 and 145/87), *Katsikas* (ECJ 16 December 1992, cases C-132, 138 and 139/91) and *Merckx* and *Neuhuys* (ECJ 7 March 1996, cases C-171 and 172/94). In *Berg* and *Busschers* the ECJ held that a transfer of undertaking causes the employment contract with the transferor to end automatically and that there is no universal principle of law outlawing such an automatic replacement of one employer by another against the employee's will. In *Katsikas* the ECJ held that an employee cannot be compelled to cross over to the transferee and may therefore refuse to go across, and that Member States are free to provide that in such a case the employment with the transferor continues. The court mentioned that an obligation for the employees to work for an employer they have not freely chosen would in effect violate their "fundamental rights". In *Merckx* and *Neuhuys* the ECJ held that if an employee, in a jurisdiction where there is no right to remain in the transferor's employment, refuses to go across to the transferee on account of inferior terms of employment at the transferee, he shall be deemed to have been constructively dismissed by the transferor. The Austrian Supreme Court concluded from these ECJ judgments that the ARD does not obligate Member States to provide for a *Widerspruch* right in their domestic law.

The Supreme Court went on to find that Articles 3(4) and 3(5) of the Austrian law transposing the ARD, which is known as the *AVRAG*, are in compliance with the ARD. Article 3(4) AVRAG grants employees a *Widerspruch* right in two specific situations, neither of which applied in the case at hand, namely (i) where the transfer would cause an employee to lose dismissal protection derived from a collective agreement and (ii) where the transferee fails to honour a promise in respect of pension. Article 3(5) AVRAG allows an employee to resign and to claim the same benefits as if he had been dismissed (i.e. constructively dismissed) because a transfer of undertaking had resulted in a deterioration of his terms of employment as a result of the application of the transferee's collective agreements. Articles 3(4) and 3(5) both indicate that the Austrian legislator, when transposing the ARD, had no intention to provide for a *Widerspruch* right beyond these specific circumstances.

The works council also argued that a compulsory transfer of an employee from one employer to another is at odds with the Austrian

constitution. The Supreme Court rejected this argument. It began by noting that Parliament has a wide measure of discretion in matters of social policy. The court went on to point out that there are other situations where an employee is faced with an involuntary change of employer which are perfectly accepted, such as where the employer dies and his business is taken over by his heirs and where one company merges with another. In most cases the employer's identity is of no relevance to the employee. Moreover, ever since the ARD was transposed into Austrian law in 1992, employees know that they may one day end up being employed by another employing entity. Finally, the interests of the other employees must be taken into account, in that their jobs could be put at risk if a potential purchaser of their business has no certainty that he will be taking over that business' key employees.

In summary, the Supreme Court confirmed the view that Austrian law lacks a "general" right of *Widerspruch*. However, surprisingly, the court went on to effectively open three "back doors" for employees who wish to remain in the employment of the transferor:

1. there are situations comparable to those provided in Article 3(4) *AVRAG* which the Austrian legislator seems to have "forgotten" to exempt from the main rule that employees transfer automatically, whether they like it or not. By way of illustration, the court referred to its 1997 decision, in which it had allowed a works council member to oppose a transfer and to remain in the transferor's employment, the reason being that the absence of such a right would allow employers to circumvent the statutory dismissal protection afforded to works council members by hiving off the relevant part of the business.
2. there may be exceptional situations in which an employer's identity is relevant, such as where a person is employed by a well-known artist and involuntary transfer to another employer would frustrate the objective of the employment.
3. intentional curtailing of the employee's rights, such as transferring him to an insolvent transferee in order to get rid of him cheaply, should not be allowed.

Commentary

Comments from other jurisdictions

Germany: (Paul Schreiner, Simona Markert): The German situation is quite different to the situation in Austria regarding the right to oppose against a transfer. Section 613a VI BGB (*Bürgerliches Gesetzbuch*) gives employees a general right to oppose a transfer of undertaking with the effect of retaining their employment with the transferor. It stipulates the following:

"The employee may object in writing to the transfer of the employment relationship within one month of receipt of notification under subsection 5[1]. The objection may be addressed to the previous employer or the new owner."

German case-law acknowledged this general right to object to the transfer to another employer before Section 613a BGB was amended in this regard. In contrast to the Austrian decision reported above, the courts held that forcing an employee to continue his service with another employer, without his having a right to oppose the transfer, would violate the German constitution.

As to the rights and obligations of the transferee vis-a-vis the employees affected by the transfer, the German situation corresponds to that in Austria. If the rights and obligations in force between the transferor and the transferred employees immediately before the transfer date were governed by the provisions of a collective agreement (or of a "works agreement"), then those provisions become part of the employment relationship between the transferee and the transferred employees, unless there is a collective agreement in force at the transferee with binding effect on those employees. Such binding effect exists if the employees are members of the trade union that concluded the agreement. However, even if the provisions of a collective bargaining agreement have been incorporated into the employment contract, they may not be altered to the disadvantage of the employee before the end of the year following the transfer date.

In the situation at hand, the employment contracts apparently referred to a collective agreement that was different from the transferee's collective agreement. In such a situation the collective agreement applicable at the transferor is not automatically replaced by the one at the transferee. Section 613a BGB only regulates the situation in respect of two applicable collective bargaining agreements, but not of employment contracts which contradict an existing collective agreement at the transferee.

In principle the parties to an employment contract are free to have different regulations in the employment contract than those contained in the applicable collective agreement. To assess which provision prevails, German law provides that a comparison to decide which regulation would be more favourable to the employee must be performed, and the one chosen is then considered to be effective. This seems to be comparable to the cherry-picking effect in Austria.

There is one important exception to this rule in Germany. In the past, clauses in employment contracts incorporating a collective agreement were treated differently. The courts held that the purpose of such clauses was to treat all employees equally and therefore to extend the scope of the collective agreements to all employees, including those who are not members of a trade union. Since this is still the purpose following a transfer of undertaking, the clause incorporating the collective agreement was deemed to refer henceforth to the transferee's collective agreement. In 2002 the German Civil Code was changed. One of the changes led to employment contracts being qualified as "form contracts". This, however, led to the conclusion that most reference clauses used at that time had to be read as referring to the collective bargaining agreement effective at the transferor. As a result of this difference in treatment the courts treat reference clauses differently depending on whether they were concluded before or after 2002. For cases in which the contract was concluded after the change to the Civil Code, courts regularly tend to read the employment agreements as referring to the collective bargaining agreement applicable at the transferee, whereas for cases prior to the change, the courts tend to read such agreements as referring to the collective bargaining agreements at the transferor.

United Kingdom (Julian Parry): Employees in the UK do not have the right to refuse to transfer and to remain in their original employment. If employees object to the transfer, their employment ends at the point of transfer without entitlement to any compensation. However, if the transfer will involve a substantial change to their working conditions to their material detriment, then they may resign and claim constructive dismissal – liability for which will attach to the transferee.

Subject: Transfer of Undertaking
Parties: Betriebsrat der G (works council) – v – G (employer)
Court: Austrian Supreme Court (*Oberster Gerichtshof*)
Date: 22 February 2011
Case number: 8 ObA 41/10b
Hardcopy publication: Not yet available
Internet-publication: http://ww.ris.bka.gv.at/jus/

(Footnote)

1 Subsection 5 requires the previous employer or the new employer to notify the employees affected by the transfer in text form prior to the (planned) transfer date, of the reason for the transfer, of the legal, economic and social consequences of the transfer for the employees, and of measures that are being considered with regard to employees.

2011/19

Austrian Supreme Court more friendly to employee claims following transferor's insolvency

COUNTRY AUSTRIA
CONTRIBUTOR MARTIN RISAK, UNIVERSITY OF VIENNA

Summary
Following a transfer of undertaking, the plaintiff's new employer became insolvent. At that time, the plaintiff had a claim for unpaid wages against his former employer, the transferor. Under previous case law he could not have been compensated for this claim by the national guarantee institution. The Supreme Court reversed this heavily criticised doctrine.

Facts
In 2006 a business activity transferred. As a result, the plaintiff went across from the transferor (the "old employer") to the transferee (the "new employer"). On the date of the transfer he had a claim for two months of unpaid wages (the "two-month claim").

Three months after the transfer, the new employer went into insolvency. Its obligations towards the plaintiff were paid by the Austrian guarantee institution pursuant to the Insolvency Directive 80/987, *IEF-Service GmbH* (IEF).

The plaintiff did not apply to the IEF for payment of the two-month claim because he assumed that such a claim would have been rejected. This assumption was based on the following reasoning. The Austrian law transposing the Acquired Rights Directive 2001/23 provides that the transferor and the transferee are jointly liable in respect of obligations of the transferor that arose before the transfer. The Austrian law transposing the Insolvency Directive (*Insolvenz-Entgeltsicherungs-gesetz*) provides that the IEF will not compensate employees for claims for which a third party, such as a former employer, is liable. This caused him to assume that an application to the IEF to compensate him for the two-month claim stood no chance of success. Based on this assumption, the plaintiff limited his IEF application to the sums that the new insolvent employer had left unpaid. He brought a claim against the old employer in respect of the two months of salary it had left unpaid.

While the claim was pending, the old employer also became insolvent. The plaintiff turned to the IEF again, this time asking it to settle the two-month claim. The IEF turned down the application, arguing that the plaintiff could and should have included the two-month claim in the application he submitted at the time the new employer went into insolvency.
The plaintiff took legal action against the IEF. Both the court of first instance and the court of appeal ruled in his favour. The IEF appealed to the Supreme Court.

Judgment
Had it applied its prior case law, the Supreme Court would have affirmed the lower courts' judgments. This case law originated from cases where the transferor had become insolvent and where the IEF had turned down claims for unpaid wages on the grounds that the employee could claim against the transferee. In one decision in 2002[1] the Supreme Court extended its reasoning to the opposite situation, where the transferee became insolvent and a transferor existed who was jointly and severally liable.

This previous case law had been heavily criticised as being incompatible with the Insolvency Directive. Article 3 of this directive provides that the Member States shall take the measures necessary to ensure the payment of employees' outstanding claims resulting from contracts of employment against their insolvent employers. The Supreme Court deduced from the ECJ's judgments in *Caballero* (C-442/00) and *Núñez* (C-498/06) that where an employee's claim is based on clear legal grounds, a guarantee institution has no right to make payment conditional on additional investigation. This implies that an employee cannot be obligated to sue his former employer in order to collect wages the latter has left unpaid.

In another 2002 decision, heeding the criticism of its previous legal position, the Supreme Court had indicated that it was uncertain whether that case law was compatible with the Insolvency Directive[2]. Now, in 2011, the court has decided it is time to reverse its case law. For the plaintiff this has meant that, in hindsight, following the insolvency of his new employer, he could have claimed from the IEF not only what this new employer owed him but also the two months of salary he was owed by the old employer. The only relevant fact at that time was that the new employer owed him money. The fact that this obligation was one the new employer had inherited from its predecessor was not relevant. Therefore, the plaintiff could and should have asked the IEF to pay his two-month claim. Had he done so, the IEF would have had to pay him. On the other hand, the IEF is not under an obligation to compensate an employee in respect of an obligation of a non-employer, such as the old employer.

Commentary
The unfortunate plaintiff paid a heavy price for relying on existing case law. To him, the Supreme Court's decision must have come as an unpleasant surprise, all the more so as, ironically, his loss of the case was the result of a more employee-friendly approach by the Supreme Court. To employment law specialists the decision was less surprising, given the critical reception of the Supreme Court's earlier doctrine and the court's repeated hints that it was unsure of the compatibility of that doctrine with EU law.

Under the new doctrine, an employee whose employer becomes insolvent following a transfer of undertaking is relieved of the burden of pursuing his claim against his former employer. He can have his wage arrears paid by the IEF even if those arrears arose before the transfer.

Subject: Insolvency
Parties: Thomas F – v – IEF – Service GmbH
Court: *Oberster Gerichtshof* (Austrian Supreme Court)
Date: 22 March 2011
Case number: 8 ObS 9/10x
Hardcopy publication: not available yet
Internet-publication: www.ris.bka.gv.at/jus

(Footnotes)
1 Case 8 ObS 119/02m
2 Case 8 ObS 204/02

2011/20

Activity transferred 80/20% to A and B: employee goes across to A for 100%

COUNTRY THE NETHERLANDS
CONTRIBUTOR PETER VAS NUNES, BARENTSKRANS, THE HAGUE

Summary
A cleaning company had a contract with the owner of two buildings, A and B. The plaintiff, an employee of the cleaning company, spent about 80% of his working time supervising the cleaners in building A and the remaining 20% of his working time cleaning in building B. Following a competitive bid, his employer lost the contract in respect of building A to one competitor and the contract in respect of building B to another competitor. The court found that he transferred fully (100%) into the employment of the competitor that won the contract in respect of building A.

Facts
A cleaning company (let us call it "the old employer") had contracted with the owner of two buildings, A and B, to clean those buildings[1]. The old employer employed 11 employees to do this work. One of them was the plaintiff. He had three tasks: (i) to supervise the 10 cleaners whose duty it was to clean building A, (ii) to clean building B himself and (iii) occasionally, to help out in building A when one of the cleaners there was sick or on leave. He was employed for 38 hours per week. He spent 31.75 hours per week, which was about 80% of his working time, on (i), his supervisory task; and 6,25 hours, which was about 20% of his working time, on (ii), his cleaning task. His employment agreement was governed by the collective agreement for the cleaning industry. This provides that if a cleaning company loses a cleaning contract for a certain building, the company that wins the contract for that building must offer employment – on broadly unchanged terms – to the cleaners who were employed to clean that building (with certain exceptions that are not relevant in this case). Cleaners who accept the offer become employees of the company that won the contract. Those who reject the offer remain in the employment of the company that lost the contract.

On 1 November 2010 the old employer lost the contract in question. It lost the contract to clean building A to one competitor (the defendant) and it lost the contract to clean building B to another competitor (let us call this "Company X"). The defendant offered to employ the plaintiff for 31.75 hours per week. What happened then was in dispute. The defendant said that the plaintiff rejected its offer, whereas the plaintiff stated that he had merely asked for time to think over the offer. In any event, the defendant did not take over the plaintiff. It did take over eight of the cleaners who were employed in building A. Company X informed the plaintiff that it did not need his services.

Apparently neither the old employer nor the plaintiff were aware that the service provision change constituted a transfer of undertaking. For this reason, the old employer applied for, and obtained, a dismissal licence and then dismissed the plaintiff with effect from 19 February 2011. It paid the plaintiff's salary until that date.

Meanwhile, the plaintiff sought the advice of a lawyer. She informed him that the service provision change of 1 November 2010 constituted a transfer of undertaking and that he had therefore transferred into the defendant's employment. Evidently, the lawyer's intervention did not have the desired effect, because on 18 February 2011, the plaintiff brought injunction proceedings against the defendant. He asked the court to order the defendant to allow him to perform his work in building A and to pay him his salary from 1 November 2010[2].

Judgment
The court found that the service provision change constituted a transfer of undertaking. As for the defendant's contention that the plaintiff had turned down its offer of employment, the court observed that the defendant had not informed the plaintiff of his legal rights under the transfer of undertaking rules and that therefore, even if the plaintiff had rejected the offer, he had not done so with the intention to waive his legal rights. Based on this reasoning, the court ordered the defendant to employ the plaintiff for 38 hours per week.

Commentary
There are two aspects to this case that elicit an explanation.

The first is that the court made no effort to explain why it ordered the defendant to employ the plaintiff for 38 hours and not for 31.75 hours per week. Perhaps the court felt that it was not necessary to provide a reason for this, given that the proceedings were not ordinary proceedings but merely interlocutory proceedings, in which the plaintiff sought injunctive relief. Another reason could be that the plaintiff, besides working 31.75 hours per week in building A, occasionally worked there for longer to provide cover if one of the cleaners was sick or on leave. Yet another reason for the decision is that the court may have felt that a contract of employment cannot be split into two parts (see EELC 2011/2).

The second point to note relates to the collective agreement for the cleaning industry, which is binding on all cleaning companies in The Netherlands. Although the parties to the agreement – an employers' federation and unions – are well aware of the law regarding transfers of undertakings, they persist in renewing a collective agreement that seems to disregard the law. Generally, cleaning a building is a labour-intensive activity. Therefore, if the winner of a tender does not offer employment to any of the employees of the party that lost the tender,

there is normally no transfer of undertaking (see, for example, the ECJ's recent ruling in the *CLECE* case). However, in the event that the winner of a cleaning tender offers employment to the majority of the relevant employees, as the collective agreement for the cleaning industry required (see the ECJ's ruling in the famous *Süzen* case), this creates a transfer of undertaking situation. By compelling the winner of a cleaning tender to offer employment to (almost[3]) all of the cleaners working in the building that is the object of the tender, the collective agreement has the effect of bringing service provision changes that would not normally qualify under Dutch law as a transfer of undertaking within the scope of the transfer of undertaking rules (which is similar to the situation in the UK). The requirement in the collective agreement that the winner of a cleaning contract must offer employment, even if there is a transfer of undertaking involving the automatic transfer of the relevant cleaners' employment contracts, is an anomaly and, as this case shows, can create confusion.

Comments from other jurisdictions

Denmark (Christian Clasen): This decision is interesting because in Denmark there is debate on whether an employee, following the transfer of his main activity, can claim full-time employment with the transferee even though he formerly spent less than 100% of his working time in the economic entity that was transferred. The general opinion is that this is probably the case, but that it could also result in employees being laid off, because it could risk creating a shortage of work if, for instance, 10 employees working 80% are transferred and all have a claim for full-time work.

It is also interesting that the treatment of the collective agreement under Dutch law can be decisive as to whether a transfer of an undertaking has taken place. In Denmark, the position is that whether or not there is a transfer of undertaking within the meaning of the Acquired Rights Directive the definition of "undertaking or part of an undertaking" does not depend on what any applicable collective agreements states.

Germany (Henning Seel): In German law, the transfer of business is laid down in Section 613a of the Civil Code ("BGB"). The acquirer succeeds to the rights and duties arising from the existing employment relationships. The contractual relationship as a whole passes over to the acquirer. The working conditions, including the working hours, remain unchanged.

The German labour courts, which also have to follow the rulings of the ECJ, do not accept that there is a transfer of undertaking in a labour-intensive industry if the winner of a tender does not offer employment to any of the employees of the previous contractor who lost the tender. There is no "service provision change clause" in German law that would foresee a transfer of undertaking in such a situation. A transfer of undertaking will, however, be created if the winner of a cleaning tender offers continued employment to a relevant number of cleaners who worked in the building(s) subject to the tender. In this event, members of the previous "cleaning-team" who do not get an offer to work for the new contractor can refer to Section 613a BGB: their employment relationships pass over to the new contractor as a legal consequence of the transfer of undertaking.

A collective bargaining agreement obliging the winner of a cleaning contract to offer employment to the previous staff in addition to the automatic transfer of the employment agreements, does not exist. Such an anomaly is not known in German law.

United Kingdom (Julian Parry): Under the UK's Transfer of Undertakings (Protection of Employment) Regulations 2006, service provision changes are specifically included in the definition of a transfer of an undertaking. Therefore, if the scenario in this case were to occur in the UK it would always amount to a transfer, even if the transferee refused to take on any of the staff.

The UK courts have decided that liability for the employment contract of a transferred employee cannot be divided between two transferees on a percentage basis, otherwise an employee could potentially become the servant of two masters. Instead, each employee transfers to one transferee on his or her existing terms (including as to hours), even if he or she had originally done work in different parts of an undertaking which is subsequently divided between transferees. The courts would decide to which aspect of the undertaking the employee was principally "assigned" and the transferee taking on that part of the undertaking would become the new employer, assuming responsibility for all liabilities under the contract of employment *(Kimberley Group Housing Ltd v Hambley and others* [2008] IRLR 682*)*.

Subject: transfer of undertaking
Parties: not (yet) known
Counsel: D.S. Verkerk (for plaintiff) and M. Hofsté-Leidekker (for defendant)
Court: *Rechtbank 's-Gravenhage sector kanton (*Lower Court)
Date: 26 May 2011
Case number: 1036605\CV EXPL 11-1170
Internet-publication: www.rechtspraak.nl ➔ LJN BQ3465

(Footnotes)

1 In fact, building A was a group of seven buildings. For the sake of simplicity I have called them, jointly, "building A".
2 This was despite the fact that the old employer had continued to pay his salary until 14 February 2011.
3 This requirement is limited to cleaners who have worked no less than 18 months in the building in question.

2011/21

Favouring employee on maternity leave in redundancy selection was discriminatory

COUNTRY UNITED KINGDOM
CONTRIBUTOR HANNAH WILLIAMS, LEWIS SILKIN, LONDON

Summary
An employer unlawfully discriminated against a male employee on the ground of his sex by inflating the score of an employee who was on maternity leave in a redundancy selection process. Employees who are pregnant or on maternity leave may be accorded favourable treatment, but only to such extent as is reasonably necessary to compensate for the disadvantages occasioned by their condition.

Facts
This case concerns Mr de Belin who was employed by Eversheds Legal Services Ltd as a solicitor. In September 2008, he was placed at risk of dismissal for redundancy along with a female colleague, Ms Reinholz.
In carrying out the redundancy selection process, Eversheds scored both employees according to a number of performance criteria. One of these was "lock up", which measures the length of time between a piece of work being undertaken and the receipt of payment from the client: the shorter the period, the higher the score awarded. The measurement was performed as at 31 July 2008 and Mr de Belin received the lowest possible score of 0.5.
Ms Reinholz had commenced a period of maternity leave on 10 February 2008 and was still absent on the measurement date. This meant it was not possible to measure her lock up period as at 31 July 2008, since she had no client files at that time. Eversheds decided to award her the maximum score of 2 for this criterion. At the conclusion of the redundancy scoring process, Mr de Belin's overall score was 27 and Ms Reinholz's score was 27.5. Accordingly Mr de Belin was selected for redundancy.
Mr De Belin complained that the way in which he had been treated was unfair and also constituted sex discrimination. Had Ms Reinholz not been awarded the maximum score for lock up, her overall score at the conclusion of the process would not have been higher than his. Mr de Belin suggested some alternative methods of scoring lock up performance which he argued would have been fair to both employees, such as looking at the period before Ms Reinholz went on maternity leave. Eversheds, however, declined to change their approach. It said that it was required by law in order to ensure that Ms Reinholz was not disadvantaged as a result of her maternity absence, since this could expose the firm to the risk of her bringing a sex discrimination claim.
Mr de Belin complained to the Employment Tribunal that Eversheds' treatment of him amounted to direct discrimination contrary to the Sex Discrimination Act 1975 (the "SDA"). He also claimed that he had been unfairly dismissed.
Eversheds' main defence was to rely on section 2(2) of the SDA which provided that any "special treatment afforded to women in connection with pregnancy or childbirth" must be ignored when assessing whether a man had suffered sex discrimination.

The Employment Tribunal's Decision
The Employment Tribunal decided that section 2(2) should be interpreted narrowly, to mean that a man cannot bring a claim for sex discrimination based on the legislative protections enjoyed by employees who are pregnant or on maternity leave. For example, there is a statutory provision in the UK that women in this position must be given priority for suitable alternative employment in a redundancy situation. However, the Tribunal said, if an employer goes beyond those specific statutory protections, a comparable man who has been treated less favourably will have a valid case for sex discrimination.
On this basis, the Tribunal upheld Mr de Belin's claim under the SDA. It also found that he had been unfairly dismissed. He was awarded compensation for loss of earnings to date and for two years into the future. Eversheds appealed to the Employment Appeal Tribunal (EAT).

The Employment Appeal Tribunal's Decision
Eversheds submitted that in various cases the European Court of Justice had been rigorous in interpreting EU law so as to exclude a possibility of disadvantage to pregnant employees or those with young children. Construing section 2(2) of the SDA in accordance with those underlying principles, Eversheds argued that it was under a positive obligation to accord Ms Reinholz the maximum score with regard to lock up. It was possible that, had Ms Reinholz remained at work until 31 July 2008, she would have performed sufficiently well to receive the maximum score. It followed that awarding her any lesser score might have meant she lost out by reason of her absence on maternity leave.
In relation to unfair dismissal, Eversheds contended that even if the Employment Tribunal's finding of sex discrimination were to be upheld, it did not automatically follow that the dismissal should be unfair. The firm had been faced with a very difficult legal situation and had acted reasonably, even if it turned out that it had acted wrongly, in attempting to comply with what it understood to be its legal obligations to Ms Reinholz. Since it had acted reasonably, the dismissal could not properly be characterised as unfair.
In reply, Mr de Belin accepted that Ms Reinholz would have been treated unlawfully if no arrangements had been put in place to see that she did not lose out in the application of the scoring system through her absence on maternity leave. However, any such arrangements should have gone no further than was necessary to achieve that aim. Mr de Belin argued that Eversheds, in adopting the approach that it did, had gone beyond its legal obligations with the result that he was placed at an unfair and illegal disadvantage.
In essence, Mr de Belin argued that Eversheds had failed to observe the principle of proportionality. There were alternative ways in which Ms Reinholz's right not to be placed at a disadvantage as a result of her absence on maternity leave could have been proportionately protected, as Mr de Belin had suggested during the redundancy consultation process.
The EAT accepted Mr de Belin's submissions and dismissed Eversheds' appeal as to liability. In the EAT's judgment, an employer's obligation to pregnant employees or those on maternity leave cannot extend to favouring them beyond what is reasonably necessary to compensate them for the disadvantages occasioned by their condition. Accordingly, to the extent that a benefit extended to a woman who is pregnant or on maternity leave is disproportionate, this will entitle a male colleague who is correspondingly disadvantaged to bring a claim for sex discrimination.
As to the fairness of Mr de Belin's dismissal, the EAT accepted that there may in principle be circumstances in which a discriminatory dismissal is not unfair. However, in the present case, the EAT did not consider it was reasonable for Eversheds to believe that it had no

alternative to maintaining a maximum lock up score for Ms Reinholz when it became clear that this would be decisive in Mr de Belin's selection for redundancy. The dismissal was therefore unfair as well as discriminatory.
Eversheds' appeal on the issue of remedy was, however, successful. The EAT ruled that the Employment Tribunal had unduly dismissed evidence that Mr de Belin was likely to have been made redundant a few months after his dismissal without giving it proper consideration. This could have reduced his award for future loss of earnings substantially. Ordering that Mr de Belin's compensation should be reconsidered by a different tribunal, the EAT stated that tribunals must not opt out of their duty to consider thoroughly evidence relating to future loss simply because the task is a difficult one which may involve a large degree of speculation.

Commentary
This decision serves as a cautionary tale to employers who treat pregnant employees and those on maternity leave more favourably than colleagues in the belief that they are doing what is required of them by law, without considering the detrimental impact that such conduct may have on other employees. The EAT's interpretation of section 2(2) of the SDA is surely correct. It would be inconsistent with the spirit and purpose of the SDA and EU equal treatment principles for there to be a general prohibition on male employees complaining about more favourable treatment given to female colleagues on maternity leave.
Employers should therefore not automatically give a woman on maternity leave the "benefit of the doubt" when assessing performance – whether this is for the purposes of a redundancy exercise, appraisal or bonus decision. Rather, they should consider whether there is any alternative, fairer way of making the relevant assessment (for example, by reference to the woman's performance before beginning maternity leave).
In my view, the most sensible course of action for Eversheds to have taken would have been to dispense altogether with lock up as a redundancy scoring criterion. Alternatively, they could have considered the most recent period for which they were able to obtain actual lock-up data for both individuals, which would have been the period immediately preceding the commencement of Ms Reinholz's maternity leave.
Note: At the time of this case, the legislation relevant to the discrimination claim was the SDA, which has since been replaced by provisions contained in the Equality Act 2010. (In particular, the provision previously set out in section 2(2) of the SDA is now located at section 13(6) of the 2010 Act.) The EAT's ruling in this case therefore continues to be relevant under current UK anti-discrimination legislation.

Comments from other jurisdictions
Austria (Andreas Tinhofer): This is an interesting case and the court decision regarding sex discrimination seems well-founded. Under Austrian discrimination law any measures promoting the factual equality of women with men ("affirmative action") must be proportionate, which was clearly not the case here. I share the view that the employer should have either dispensed with lock-up as a redundancy scoring criterion or considered an earlier period for which there was a lock-up date in respect of both employees.
Under Austrian employment law the "fairness" of a dismissal can be challenged only if it is "socially unjust" (*sozialwidrig*). If the plaintiff is successful the dismissal is quashed by the court and the employee will have to be re-instated by the employer. In a redundancy situation the employer has to select the employees to be dismissed mainly on the basis of social criteria (on the assumption that the works council has objected to the proposed dismissal, which is normally the case). As the lock-up score relates neither to the social situation of the employee and his family nor to the employee's performance, it would not have justified the dismissal of Mr de Belin before an Austrian court.

Germany (Paul Schreiner): In Germany selection schemes always have to include the basic characteristics of a social selection process within the meaning of the Dismissal Protection Act (*Kündigungsschutzgesetz*, abbreviated "KschG"), such as age, obligations to support relatives, duration of service and disability. It is in principle possible to agree on additional selection criteria, but in general the social selection process is solely based on these criteria. This selection process is subject to review by the courts and therefore the employer is usually advised to adhere to the criteria given in the KSchG. If, however, two employees are equally protected against a dismissal due to social selection, the employer may well establish additional criteria for its decision.
Therefore a case like this is hard to find in German case law. From my point of view, on the assumption that both employees in this case were equally protected, a German court would likely have examined whether two points were usually awarded to persons who had reached their targets by 100% or only if targets were exceeded. In general, German courts tend to assume that an employee is able to achieve her targets in full had she been working, but if the employee claims she would have exceeded the amount forecast, she would need to deliver sufficient proof.

Subject: Sex discrimination
Parties: Eversheds Legal Services Ltd – v – De Belin
Court: Employment Appeal Tribunal
Date: 6 April 2011
Case number: [2011] UKEAT/0352/10
Hard copy publication: Not yet reported
Internet publication: www.bailii.org

2011/22

Replacement of 51 year-old TV presenter was age discrimination

COUNTRY UNITED KINGDOM
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Summary
A 51-year-old female TV presenter suffered unjustified age discrimination when she was replaced by younger presenters. Whilst the employer's wish to appeal to younger viewers was a legitimate aim, the dropping of an older presenter in order to pander to their assumed prejudices was not a proportionate means of achieving that aim.

Facts
Miriam O'Reilly, aged 51, was an award-winning television presenter employed by the British Broadcasting Corporation (BBC) on its *Countryfile* programme about rural affairs and farming. She also contributed to the BBC radio show *Costing the Earth* and the *Countryfile* printed magazine.
The BBC decided to move *Countryfile* from its daytime slot on Sunday to a primetime evening slot. Ms O'Reilly was informed that she would no longer be required to appear on the show as they wanted to attract

a significantly larger audience by "refreshing" the existing presenter line-up. Three other female presenters aged between 42 and 44 and one 43-year-old male presenter were also told they would not be moving forward to the primetime show. The new line-up included several presenters, both male and female, aged between 26 and 38. One presenter (a 68-year-old man), who had presented on the show since it began over 20 years earlier, was kept on.

Ms O'Reilly complained to the production team and her colleagues and various news articles appeared in the press speculating about the "ageist" decision to drop her from the programme. She subsequently brought a claim of direct age and sex discrimination against the BBC. In addition, she complained that she had been victimised for raising those allegations. She asserted that, following her complaints, she was only offered one *Costing the Earth* programme (on the "environmental cost of ageing") and the possibility of one other. She was also no longer asked to contribute to articles in the *Countryfile* magazine.

The Employment Tribunal's Decision

One of Ms O'Reilly's submissions before the Employment Tribunal was that she had been subjected to a joint combination of age and sex discrimination. The BBC pointed to the fact that the Equality Act 2010 included a specific provision – not yet implemented – outlawing "combined" or "dual" discrimination on the basis of two protected characteristics (section 14). Since that measure was not yet in force, the BBC argued that combined discrimination could not be unlawful under current anti-discrimination legislation. The Employment Tribunal found that this reasoning was flawed, stating that a woman's sex or age need not be the "sole or principal reason" for the detrimental treatment in question. It was possible to claim discrimination on *both* grounds under existing law if they significantly influenced the reason for the treatment.

A central element of the BBC's defence was that its decision was based on criteria that the presenters for the new slot required: a profile that would make them familiar to peak-time audiences; an ability to present shows in an "immersive manner"; and knowledge of rural affairs. However, the Tribunal found that there was no record of candidates having been assessed against those criteria. Rather, the key witnesses for the BBC had "offered the complacent explanation that this is just the way things are done in the media world". On the evidence, the Tribunal refused to accept that the criteria were devised and adopted as the BBC suggested.

In relation to age discrimination, in the absence of defined and consistently applied selection criteria, the Tribunal found that BBC's decision to appoint the new presenters was influenced by their age. The age profile of the primetime presenting group had been reduced significantly and, although the long-standing presenter aged 68 had been retained, he was a well-known figure which made his position unique. The evidence suggested that the BBC was essentially looking for younger, more diverse talent to replace the existing presenters and thereby refresh and rejuvenate the programme. Their "comparative youth" had been a significant factor, whereas Ms O'Reilly's age had been key factor in the decision not to consider her. Accordingly, she had been subjected to direct age discrimination.

That was, however, not the end of the matter because direct age discrimination can potentially be objectively justified in the UK (unlike direct discrimination on other protected grounds). The Employment Tribunal therefore considered the BBC's alternative argument that their actions had been justified by the aim of appealing to a wider audience, including younger viewers. Although accepting this was a legitimate aim, the Tribunal found there was no evidence to suggest that choosing younger presenters was required to appeal to such an audience. In any case, it would not be proportionate to pass over older presenters simply because of the assumed prejudice of younger viewers. The BBC's objective justification therefore failed.

With regard to sex discrimination, the Employment Tribunal rejected the contention that the claimant's gender had been a significant factor, either alone or in combination with age. The outcome would have been no different had Ms O'Reilly been a man of the same age with the same skill set, because the "element of comparative youth" would still have been missing. The Tribunal noted that certain sexist comments to Ms O'Reilly by colleagues were not made by those with responsibility for the decision as to whether or not she was to be kept on for the primetime *Countryfile* show. That decision was not due to her sex but on the basis of her age alone.

Finally, in relation to Ms O'Reilly's complaints of victimisation, the Tribunal found that the decision no longer to involve her in the *Countryfile* magazine had resulted directly from annoyance surrounding her allegations of discrimination. Moreover, offering Ms O'Reilly the *Costing the Earth* programme on ageing was a deliberate act of the BBC that made her feel she could not present, resulting in her stepping down as a presenter on the programme. Both these incidents amounted to unlawful victimisation.

Normally, a remedies hearing would have followed, in which Ms O'Reilly would have sought a declaration by the Tribunal, damages for loss of earnings and for injury to feelings, as well as "recommendations" by the Tribunal requiring the BBC to conduct age quality audits and take steps to address identified under–representation of this group. However, Ms O'Reilly withdrew her case before the remedies hearing, which seems to indicate that the dispute was settled. The BBC's Director-General announced that the BBC accepted the Tribunals judgement and publically apologised to Ms O'Reilly.

Commentary

Although only a first-instance judgement, this ruling has sent shock waves through broadcasting and media circles. It is significant as being the first Tribunal decision to address the apparent disadvantage faced by older presenters in the industry (particularly women, it must be said, despite the Tribunal's rejection of the allegation of sex discrimination on the facts).

Following *O'Reilly*, broadcasters, and particularly those making casting decisions, need to ensure they can show that their processes are transparent and legally compliant. The optimum is to draw up specific and relevant criteria and apply them scrupulously and fairly in choosing between candidates. At a minimum, managers should ensure they can present a coherent and reasoned selection process to support the decisions they reach. Until now, it appears to have been common practice to make such decisions on a "creative" and far less structured basis. The BBC executives in *O'Reilly* fell at this hurdle as the "objective" criteria on which their decisions were allegedly based were not initially identified but developed gradually through the course of the proceedings.

An additional consideration for broadcasters is whether age itself can ever be a valid consideration to include in the decision-making process where, for example, broadcasters are seeking to engage with a particular age group. Even though this was recognised as a legitimate aim in *O'Reilly*, the decision shows how difficult justification on this basis may be – particularly as there are few statistics available to support the assumption that viewers are more likely to engage with presenters closer to their own age.

One potential objective justification which was not argued in *O'Reilly* is "intergenerational fairness" – the sharing out of job opportunities between the generations. In appropriate cases this argument could be more successful, in an industry where the positions are few and older "stars" with network experience and a strong audience profile are likely directly to reduce the number of opportunities for younger workers.

Note 1: If the other presenters had brought their claim within the three month time limit, I think that they would have had a good chance of claiming direct age discrimination. The male presenter (who later returned to *Countryfile*) and two of the female presenters were told that they would not be moving to the evening show. In the absence of consistently applied selection criteria and considering their ages, a tribunal would have been likely to conclude that age was a significant factor in the reason for their "less favourable" treatment. The other female presenter was told that she would no longer be used owing to the extent of her involvement following her relocation to South Africa. Although it would be for the tribunal to decide the real reason for the treatment, she was approximately the same age as the other presenters and so could have also argued that she had been subject to age discrimination on the evidence.

Note 2: In March 2011, the UK Government announced that the above-mentioned provisions in the Equality Act 2010 covering "combined discrimination" will not be brought into force as part of its drive to reduce the amount of red tape faced by businesses.

Comments from other juridictions

Germany (Martin Reufels):

1. This is a very interesting ruling that will certainly have an effect on broadcasting and media operations in the European Union. According to section 10 of the German General Equal Treatment Act, different treatment based on age may be justified if the reasons for the different treatment meet the threshold of a proportionality test. The aim of the different treatment must be legitimate, and the means of achieving it must be proportionate. As a result, it could well be the case that TV-stations take age into account age as a factor when determining who should act as a presenter for a given show, in particular where the audience for that show is predominantly within a certain age range. For example, there cannot be much doubt that a broadcaster should be free to impose a general age limit on presenters for a children's TV-show where the concept of the show is that it should be presented by teenagers. However, every show must be based on a specific and clearly outlined concept.
2. In addition, the courts will need to be aware that broadcasters enjoy special protection, in that they benefit from the freedom of press and freedom of expression, and are therefore entitled to retain a certain liberty and discretion in writing their material. A tendency to severely restrict the way in which broadcasters operate would obstruct the flexibility and variety of the programming.

Subject: Age discrimination
Parties: O'Reilly –v– (1) British Broadcasting Corporation; (2) Bristol Magazines Ltd
Court: The London (Central) Employment Tribunal
Date: 10 January 2011
Case number: ET 2200423/2010
Internet publication: www.bailii.org/ew/cases/Misc/2011/1.html

2011/23

Rebranding of pub discriminated against gay employee

COUNTRY UNITED KINGDOM
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Summary

An employee suffered discrimination on grounds of sexual orientation on account of his employer's policy of rebranding a well-known "gay" pub in order to widen its clientele. This was done in such a way as to disadvantage gay customers and so directly discriminated against the claimant, who was himself gay and uncomfortable implementing the policy.

Facts

For over four decades, the Coleherne Pub in London developed a national and international reputation as London's first "gay pub". It was purchased in 2008 by Realpubs Ltd ("Realpubs"), an owner and operator of "gastropubs" throughout the UK. By that time, the Coleherne was in decline: it had blacked-out windows and was frequented by drug dealers and male prostitutes. Realpubs' business model was to buy failing pubs and reposition them as gastropubs. In line with this policy, they re-opened the Coleherne as the Pembroke Arms in December 2008.

Mr Lisboa, an openly gay man, was interviewed for an assistant manager post. During the interview, there was discussion about the character and reputation of the pub and the strategy of transforming it into a gastropub. However, assurances were made to Mr Lisboa that Realpubs wanted to retain the existing gay clientele. Mr Lisboa was offered and accepted the position but resigned after only six weeks.

During Mr Lisboa's employment, a number of measures were taken to implement the objective of broadening the pub's appeal. These included encouraging the staff to seat customers who did not appear gay in areas where they could be seen from outside the pub. There was also a reorganisation of staff, in line with Realpubs' policy to have a more even balance between the sexes, which resulted in the termination of two male employees on capability grounds and the resignation of an employee who was admired by the existing gay clientele. Finally, one of the directors of the pub (Mr Heap) wanted to post a notice outside stating "this is not a gay pub" – an act which Mr Lisboa successfully resisted as being inappropriate.

Mr Lisboa objected to these various measures on the basis that they made the pub less welcoming to gay people generally. He felt pressured into implementing a policy that made him uncomfortable and as a result he decided to resign. He brought claims of direct discrimination on the grounds of sexual orientation and unfair constructive dismissal in an Employment Tribunal (ET).

The discrimination claim had two aspects:

- First, Mr Lisboa complained that he had been subjected to certain homophobic comments that Mr Heap had made directly to him.
- Second, he alleged that he had been put under pressure to work towards and co-operate with a policy intended to make the pub less welcoming to gay customers than to "straight" customers. He relied on the case of *Weathersfield Ltd – v – Sargent* [1999] ICR 425, which established that requiring an employee to carry out a discriminatory instruction in itself amounts to unlawful discrimination.

With regard to the constructive dismissal claim, Mr Lisboa contended that his employer's requirement that he implement a discriminatory policy constituted a repudiatory breach of contract, entitling him to resign and treat himself as dismissed.

The Employment Tribunal's Decision

The ET found that three comments made by Mr Heap to Mr Lisboa were personally offensive to him as a gay man and resulted in him suffering detriment on the grounds of his sexual orientation. Accordingly, the ET awarded Mr Lisboa £4,500 compensation for injury to his feelings in respect of the remarks made by Mr Heap. However, in relation to the *Weathersfield* claim, the ET concluded that, since Realpubs' aim of rebranding the pub was lawful, it must follow that the steps taken in pursuance of that aim were also lawful. The ET also rejected Mr Lisboa's constructive dismissal claim, finding that his resignation was not mainly in response to the remarks made to him, but rather his mistaken perception that Realpubs was a "homophobic organisation".

The Employment Appeal Tribunal's Decision

Before the Employment Appeal Tribunal (EAT), Mr Lisboa argued that the ET had adopted the wrong approach by failing to take into account the overall effect of the employer's implementation of its rebranding policy on gay employees.

The EAT noted that the instant case was more nuanced than *Weathersfield – v – Sargent*, where the employer's policy of not renting vehicles to black or Asian people was unambiguously discriminatory. However, the ET had failed to address the key issue: whether, in the process of widening the pub's appeal, the employer had implemented its rebranding policy in a way that meant the gay clientele would be treated less favourably on grounds of their sexual orientation than straight customers were.

The EAT noted that advancing a policy intended to broaden appeal, without more, was not controversial. However, the measures proposed by Realpubs would have the cumulative effect of making the gay clientele feel less welcome in the Pembroke Arms than straight customers. Since those gay customers were plainly treated less favourably by reason of their sexual orientation, Mr Lisboa's claim based on *Weathersfield – v – Sargent* should succeed.

Finally, the EAT reversed the ET's finding that Mr Lisboa was not constructively dismissed. His resignation was prompted by unlawful discrimination that clearly amounted to a repudiatory breach. Moreover, even if the *Weathersfield* claim had failed, the EAT commented that it would have allowed the constructive dismissal claim in any event. The homophobic remarks made by Mr Heap that gave rise to the "conventional" direct discrimination claim were a contributory factor in Mr Lisboa's decision to resign. That was sufficient to found a claim of constructive dismissal.

As a result, the EAT set aside the ET's award in respect of Mr Lisboa's injury to feelings and directed that compensation should be reassessed by a different Employment Tribunal (presumably leading to a higher award).

Commentary

This case was decided under the Employment Equality (Sexual Orientation) Regulations 2003, which have since been repealed and replaced by provisions dealing with sexual orientation in the wide-ranging Equality Act 2010. The Act, like the Regulations, is sufficiently broadly worded to allow a discrimination claim where an employee is dismissed or subjected to detrimental treatment, not by reason of his or her own sexual orientation, but for disobeying an instruction to discriminate against someone else. The same approach applies to other protected characteristics such as race (as in *Weathersfield v Sargent*), sex, age, disability and religion or belief.

Indeed, the Equality Act (unlike the 2003 Regulations) now contains a provision which expressly outlaws the giving of an instruction to discriminate on the ground of sexual orientation or other protected characteristics.

This case provides a good illustration of how employers' marketing and branding strategies can land them in hot water if they are based on stereotypical and discriminatory assumptions. In particular, Realpubs' approach of seating customers who did not appear to be gay in prominent places not only discriminated against gay customers but was based on the questionable assumption that the "straight" and family clientele they were seeking to attract would find the pub less desirable if they saw it was frequented by gay people.

An interesting parallel can be drawn with the recent *O'Reilly – v – BBC* case reported elsewhere in this edition of EELC.

Comments from other jurisdictions

Germany (Paul Schreiner): The basic difference in German law is that there is no statutory claim for redundancy pay or for any form of severance except where a social plan, concluded by the employer and the works council, is involved. However, a German court would likely have found that Realpubs discriminated against Mr Lisboa since there appears to have been discriminatory behaviour by Mr Heap. Further, one would have to examine whether or not a hostile environment was created by Realpubs in taking measures to avoid homosexual customers. Both situations would have led to a claim for immaterial damages for Mr Lisboa.

The Netherlands (Peter Vas Nunes):

1. Realpubs' policy to have a more even balance between the sexes resulted in the termination of two male employees "on capability grounds". I imagine that these two employees might also have had a claim for direct discrimination.
2. Mr Lisboa relied on a doctrine developed by the courts in the *Weathersfield* case, but he could also have based his claim on (a purposive interpretation of the UK law transposing) Directive 2000/78, Article 2(4) of which provides that an instruction to discriminate against persons on the grounds of, *inter alia*, sexual orientation shall be deemed to be discrimination.

Subject: Sexual orientation discrimination
Parties: Lisboa – v – (1) Realpubs Ltd; (2) Pring; (3) Heap
Court: Employment Appeal Tribunal
Date: 11 January 2011
Case number: [2011] UKEAT/0224/10
Hard copy publication: [2011] EqLR 267
Internet publication: www.bailii.org

2011/24

How much compensation for lost income following discrimination?

COUNTRY GERMANY
CONTRIBUTOR PAUL SCHREINER, LUTHER RECHTSANWALTSGESELLSCHAFT, ESSEN

Summary
How much can an employee, whose fixed-term contract was not extended for a reason that was age-discriminatory, claim?

Facts
The plaintiff was the Managing Director of a hospital in Cologne. As is common in Germany for managing directors, he was employed on the basis of a five year contract. In his case it ran from October 2004 to September 2009. In the normal course of events, the plaintiff's contract would have been extended for a second five-year period, i.e. to September 2014. However, as the hospital's shareholder had a policy of not employing senior staff beyond the age of 65, and as the plaintiff was 62 when his first contract ran out, his contract was not extended. Various press statements issued by the hospital at the time indicated a clear connection between his departure and his age.

The plaintiff took the hospital to court, alleging age discrimination and claiming compensation both for five years of lost income and for immaterial damages. In its defence, the hospital argued that despite the press statements, in truth the only reason for the non-extension of the plaintiff's contract was his inadequate performance.

The court of first instance dismissed the claim. It reasoned that the German anti-discrimination law, the AGG, does not apply fully to self-employed persons and to "organs" of a company such as managing directors, but applies merely by analogy (*mutatis mutandis*), and that therefore such individuals lack the full protection of the AGG.

Judgment
On appeal, the *Oberlandesgericht* (OLG) reasoned differently. It began by recalling that the non-extension of an employment contract against the wishes of the employee is the equivalent of turning down a job application. It also found that the AGG applies to such rejections in relation to managing directors just as much as it does to other employees.

The court then applied s22 of the AGG which, in accordance with European law, provides that where an individual demonstrates *prima facie* discrimination, the measure in question is presumptively discriminatory and the burden of proof to the contrary shifts to the employer. In the present case, the statement to the press issued by the hospital, which suggested a clear connection between the non-extension of the plaintiff's contract and his age, constituted sufficient *prima facie* evidence of age discrimination. Even if the plaintiff's performance had been poor – an allegation he disputed – age would have been at least one of the factors influencing the decision not to extend his contract and, under German law, it is sufficient for a measure to be considered in breach of the anti-discrimination law if no more than one of several reasons for a measure is discriminatory. In conclusion, given that the hospital had failed to rebut the presumption of age discrimination, the court established that the non-extension of the plaintiff's contract was discriminatory.
The next question was whether the discrimination was justified. The court found that it was not. It saw no reason why the employment contract of the Managing Director of a hospital should terminate at the age of 65. Moreover, even if such a reason had existed, it should not have prevented the shareholder from offering to extend the plaintiff's contract for three more years, i.e. until age 65.

Given the unjustified discrimination, the plaintiff was entitled to compensation. The issue was how much. As regards loss of income, the court did not arrive at a conclusion, since the plaintiff had not specified his claim, merely applying for a declaratory judgment that the hospital had an obligation to pay him damages. As regards immaterial damages, the court awarded two months' salary, being € 36,600, in consideration of the harm done to the plaintiff's reputation by the statements to the press.

Commentary
The OLG left unanswered the most interesting question in this case, namely how much to award the plaintiff for loss of income. This question is hotly debated in German legal literature.

Personally, I wonder whether an employee whose fixed-term contract is not extended for a discriminatory reason – a situation which is deemed equivalent to the rejection of a job application – should be entitled to any compensation for lost earnings at all. Barring certain specific exceptions in the law (e.g. young works council members), there is no rule in German law requiring an employer to enter into an employment contract with any particular person. If there is no such obligation, then surely not (re-)hiring a person cannot constitute a breach of any duty, and if there is no breach, how can there be an obligation to compensate? I am aware that this line of thought runs counter to the generally accepted doctrine held by German scholars.

Some of those scholars hold that in a situation such as that reported above, the plaintiff should be compensated for lost earnings up until his statutory retirement age, which in this case would have been an amount equal to about three years' salary (from 62 to 65). In this particular case, I do not see why the damages should be limited to the period up until the statutory retirement age, given that German law does not provide for an obligation to retire at any particular age and the plaintiff was apparently willing to work beyond that age. At the other end of the spectrum there are scholars who argue that compensation for lost earnings should be limited to the salary the plaintiff would have earned up until the first possible termination date. In this case, the plaintiff's contract included a clause allowing either party to terminate the contract prematurely by giving nine months' notice. Thus, in the view of these scholars, his claim should be limited to nine months' salary. I do not subscribe to this view, for the following reason. Under German law a dismissal is valid only if it is lawful. An unlawful dismissal, e.g. one based on discrimination, is void, in which case the employment continues. Surely a dismissal following directly after a discriminatory non-renewal of contract is just as unlawful as the non-renewal itself. Therefore, limiting the compensation for lost earnings to, in the case of the plaintiff, nine months, would be in breach of the law.

In brief, this judgment has opened the way for a debate on the issue of compensation for lost earnings. It will be interesting to see what the Federal Labour Court does.

Comments from other jurisdictions

Austria (Martin Risak): In the Austrian context I would expect a court to qualify the non-renewal of a fixed-term contract, which is not regulated explicitly, as a case of non-hiring. The damages issue would then be solved as follows: The Austrian Act on Equal Treatment (*Gleichbehandlungsgesetz*) provides that if the employment relationship was not finalised for a discriminatory reason, the employee may claim damages of a minimum of two months' pay if he or she would have been employed had the hiring procedure been non-discriminatory. The prevailing literature states that the maximum would be the wages until the end of the next possible notice period or, in the case of a fixed term contract, until the contract's expiry date. In this case, alternative income the employee would be likely to have earned during that period should be taken into account given that – as a matter of general legal principle – a party who has suffered loss must take all reasonable measures to mitigate that loss.

The Netherlands (Peter Vas Nunes): the German court in this case equates involuntary non-renewal of a fixed-term contract to non-hiring. This is in line with the ECJ's case law, e.g. in the *Melgar* case (*ECJ 4 October 2001, case C-438/99*). I have always found this doctrine a bit artificial. In this case, the Managing Director had been employed for five years at the time of the non-renewal. The hospital, i.e. the shareholder, had had ample opportunity to get to know him. Surely not renewing a contract in such a situation should not be deemed comparable with a decision not to hire an unknown job applicant?

As for the damages issue, I expect a Dutch court would have estimated the period during which the plaintiff's contract would have continued beyond September 2009 in the event the contract had been renewed, and would have awarded as compensation for lost earnings (i) the amount of salary for that period, adjusted to present day value, minus (ii) alternative income the plaintiff would be likely to have earned during that period.

United Kingdom (James Davies): UK employment law expressly equates the non-renewal of a fixed term contract with a dismissal, so in this case there would have been a discriminatory dismissal. As under German law, on the facts described the burden of proof would probably have transferred to the employer to prove it had not discriminated. The claimant would win if he could show that a discriminatory reason was one of the reasons for the "dismissal".

The compensatory element of the award would be calculated on the employee's actual likely loss of earnings taking into account mitigation (i.e. income he could obtain from other sources during the relevant period) and the chance he would have left anyway (either by being dismissed, resigning or retiring). So, the court would decide how long it believed the claimant would have continued working for the employer if it had not been for the discriminatory "dismissal". It would then award him his lost earnings (salary and benefits) for that period, less any amount he either obtained – or ought reasonably to have obtained – through mitigating his loss by working elsewhere.

Subject: Age discrimination - termination
Parties: Laetitis – v – Städtische Kliniken Köln
Court: Oberlandesgericht Köln (Court of Appeal)
Date: 29 July 2010
Case number: 18 U 196/09
Hardcopy publication: OLG Köln EWiR § 15 AGG 2/10, 801
Internet-publication: www.justiz.nrw.de

2011/25

Statistics alone insufficient to establish presumption of "glass ceiling"

COUNTRY GERMANY
CONTRIBUTOR PAUL SCHREINER AND SIMONA MARKERT, LUTHER RECHTSANWALTSGESELLSCHAFT MBH

Summary

An employee who is not promoted to a higher position and who alleges that this is because there is a "glass ceiling", must establish facts from which it may be presumed that there has been gender discrimination. Providing statistics to the effect that women are underrepresented in senior positions is insufficient for this purpose.

Facts

The plaintiff was a female HR Manager, reporting to the male HR Director. When the latter left the company, the company did not publish a vacancy, nor was the plaintiff informed that she could apply for the position. Instead, an external male person was appointed. The plaintiff felt sidelined. She alleged that she was not invited to apply for the HR Director position because of her gender. She brought legal action against her employer, seeking compensation equal to the balance between her salary as an HR Manager and the salary she would have earned had she been promoted to HR Director, as well as compensation for hurt feelings.

The plaintiff based her gender discrimination claim on statistics. Whereas 69% of the workforce consisted of women, only one third of the senior staff[1] were female. Furthermore, not one woman had been promoted to the level of Director in the company for 30 years. Finally, statistics indicated that the percentages of women in the various positions were lower in the defendant company than they were within the relevant branch of industry.

The court of first instance dismissed the claim. On appeal, the *Landesarbeitsgericht* (LAG) reversed the decision and awarded the plaintiff's claim. This decision was based on Article 22 of the General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz*, abbreviated 'AGG'). This provision is the German transposition of Article 19 of the "Recast Directive"[2] which requires Member States to ensure that "when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish [...] facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment". The LAG found that the statistics submitted by the plaintiff were sufficient to establish a presumption of gender discrimination and that the defendant had not proved its absence.

The defendant appealed to the highest German court for labour affairs, the *Bundesarbeitsgericht* (BAG).

Judgment

The BAG held that statistics can constitute a relevant indication that discrimination may be involved. However, in this case, the statistics

presented by the plaintiff were not, in themselves, sufficient to warrant reversing the burden of proof. The disparity in the ratio of women as a percentage of the entire workforce and women in senior positions does not establish a presumption of gender discrimination, because there can be many non-discriminatory reasons for such a disparity. In particular, the statistics presented by the plaintiff did not relate specifically to female employees in positions directly below and directly above the alleged "glass ceiling". The fact that no woman had been promoted to the Director level in 30 years was also insufficient to establish presumptive discrimination, given that it was not clear if and to what extent women had previously applied for Director positions. In addition, the turnover rate at the managerial level in this company had always been very low, most senior staff remaining with the company for lengthy periods, in many cases over 30 years. This low turnover rate led to historical disparities that had existed 30 years ago subsisting for a long while. Finally, statistics relating to other companies are not relevant.

With this reasoning, the BAG sent the case back to the (same) LAG, which was instructed to establish whether there were indicators of possible gender discrimination other than the statistics. The case is now pending again before the LAG. In general the BAG said that statistics must refer specifically to the employer concerned and must relate to the relevant behaviour.

Commentary

By the present decision, the BAG decided one of the central practical questions regarding Article 22 AGG – and, in my view, convincingly. Clearly, the mere fact that employees belonging to a certain category (gender, nationality, race, age, disability, religion, etc.) are over or underrepresented within a certain hierarchical level in an organisation as compared to such employees as a percentage of the total workforce, is insufficient to allow even a *prima facie* conclusion of discrimination. As a general rule it can be said that a company that grows "organically", i.e. not through mergers, etc., is dependent for the composition of its workforce on many factors beyond its control, such as the type of industry, the regional job market and its working hours. Take, for example, a textile company that offers ironing services. Such a company will, as a rule, employ people to carry out the ironing who are almost always women, and better paid sales staff comprising both men and women. In such a case, statistics comparing ironing and the sales department would almost surely lead to the result that men are overrepresented in the sales department in comparison to the total workforce. However, this situation cannot lead to the conclusion that women are discriminated against, given that even only one male employee in the sales department could yield statistical evidence that men are overrepresented in the higher paid jobs. If one were to judge on the basis of statistics alone, discrimination would have to be presumed. In reality, however, the reason for the allocation of men and women in this case may be found in the fact that the ironing services require an experienced workforce, which leads to overrepresentation of employees above a certain age. At the time these employees were hired, ironing was not considered to be a suitable job for a man.

The BAG has yet to award a discrimination claim based on statistical evidence. This case may be the first step. The BAG for the first time provides guidance on the use of statistics for establishing (a presumption of) discrimination. In the case at hand, the statistics submitted by the plaintiff were insufficient. However, the BAG leaves open the possibility that in certain cases, statistical evidence alone may be sufficient to warrant shifting the burden of proof to the employer. Unfortunately, the BAG fails to make clear what is needed for this to happen. It looks as if the BAG wishes to decide this on a case by case basis. In this case, if the plaintiff had presented statistics to the effect that female employees were underrepresented significantly more strongly at the level directly above that of Manager than at the Manager level, would that have been sufficient? It is hard to tell.

A point to note is that the LAG based its judgment entirely on statistical evidence. It did not examine whether the procedure that led to the appointment of an external male HR Director complied with the principle of transparency as set out by the ECJ in, *inter alia,* its rulings in the *Danfoss* and *Royal Copenhagen* cases[3].

Comments from other jurisdictions

United Kingdom (Ailsa Murdoch): As in Germany, the UK requires claimants to prove that there is a *prima facie* case of discrimination. If the claimant provides facts from which a tribunal could decide (in the absence of any other explanation) that an employer has discriminated, the burden of proof shifts to the employer and they will be required to demonstrate that there is an alternative explanation for the alleged discrimination.

Cases in the UK have gone both ways in assessing the weight that may be applied to statistics. There have been cases (which remain good law) where statistical evidence has been sufficient to support a *prima facie* finding of discrimination (*Rihal v Ealing London Borough Council* [2004] EWCA Civ 623). There are also cases where the statistics alone have not been considered strong enough to switch the burden of proof to the employer (*Abiola v North Yorkshire County Council* [2010] UKEAT 0369/08). It is clear that the sufficiency of the statistical evidence must be considered on a case-by-case basis and is fact-sensitive. Tribunals are entitled to decide on the merits of the particular statistical evidence with which they are supplied and to draw their own conclusions as to whether it is sufficient.

Subject: sex discrimination, promotion
Parties: not published
Court: *Bundesarbeitsgericht* (Federal Labour Court)
Date: 22 July 2010
Case number: 8 AZR 1012/08
Hardcopy publication: NJW-Spezial 2011, 18
Internet-publication:
www.bundesarbeitsgericht ➔ Entscheidungen ➔ case number

(Footnotes)

1 Senior staff in this case being employees not covered by the relevant collective agreements because their salary exceeded the maximum under those agreements, so-called "non-tariff" employees.
2 Directive 2006/54 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.
3 ECJ 17 October 1989 case 109/88 (*Danfoss*) and ECJ 31 May 1995 case 400/93 (*Royal Copenhagen*).

2011/26

Nine fixed-term contracts: no abuse

COUNTRY IRELAND
CONTRIBUTOR GEORGINA KABEMBA, MATHESON ORMSBY PRENTICE, DUBLIN

Summary
An employee was given two consecutive fixed-term contracts, lasting a total of almost one year. Then, after a break of about four months, she was given seven consecutive fixed-term contracts lasting a total of 3 ½ years. Irish law allows "continuous" fixed-term employment up to a maximum of four years. It was therefore relevant whether the second series of seven contracts constituted a continuation of the initial series of two contracts. This was not the case, but the employer was nevertheless ordered to pay € 5,000 for failure to specify the reason why the ninth contract was not permanent.

Facts
Ciara Joyce was employed by Donegal County Council as an assistant archivist for two separate employment periods on a total of nine fixed-term contracts. The purpose of the first contract (19 July 2004 to 19 February 2005) was to provide maternity cover for a permanent archivist who was the sole staff member in the archive services at the time. This contract was then extended by a further four months (19 February to 17 June 2005) to complete the project on which Ms Joyce was working. Then there was a break of approximately four months (17 June to 20 October 2005). After this break, Ms Joyce was re-employed on seven successive fixed-term contracts which lasted a total of 3½ years.

The foregoing is summarised in the following table:

contract 1	(7 months)	Period A: 11 months
contract 2	(4 months)	
break	(> 4 months)	
contract 3		Period B: 3 ½ years
contract 4		
contract 5		
contract 6		
contract 7		
contract 8		
contract 9		

In September 2008, an agreement between public sector unions and local authority employers was concluded, implementing cost-containment public spending measures. It was agreed that a 3% payroll cut was required. This framework agreement was communicated to all local authority managers in October 2008, along with the fact that payroll cuts included the non-renewal of fixed-term contracts of those who had not acquired entitlements to contracts of indefinite duration. On foot of this, Ms Joyce was advised in November 2008 that it was unlikely that her contract would extend beyond 31 March 2009. The position was subsequently made redundant on 31 March 2009 and Ms Joyce was paid her statutory redundancy entitlement.[1]

Irish law on fixed-term employment is contained in the Protection of Employees (Fixed-Term Work) Act, 2003. This Act (the "2003 Act") is the transposition into Irish law of Directive 1999/70 concerning the Framework Agreement on Fixed-Term Work. Under the 2003 Act, an employee obtains an entitlement to an indefinite or "permanent" contract where the aggregate duration of "continuous" fixed-term contracts reaches four years, unless objective grounds justifying a renewal of a further fixed-term contract can be made.[2] Fixed-term contracts are not "continuous" if they are separated by a gap during which the employee is not employed by the employer, even if such a gap lasts no longer than one day. However, if the gap qualifies as a "lay-off" period, it is disregarded. A lay-off period is a period during which "an employee's employment ceases by reason of his employer being unable to provide the work which the employee was employed to do and (a) it is reasonable in the circumstances for that employer to believe that the cessation of employment will not be permanent and (b) the employer gives notice to that effect to the employee prior to the cessation"[3]. In addition, in order to combat abuse of successive fixed-term contracts, where a non-extension is "wholly or partially connected with the purpose of the avoidance of a fixed-term contract being deemed to be a contract of indefinite duration", a subsequent new fixed-term contract is deemed to create a "continuous" series of contracts[4].

Ms Joyce, who was represented by her union, argued that, under the terms of the 2003 Act, she had established the right to a contract of indefinite duration based on the fact that she had 4½ years of "continuous" service on nine consecutive contracts. There were three main points to this argument:

1. the gap of four months qualified as a lay-off period and should therefore be disregarded;
2. (in the alternative) the non-extension of Ms Joyce's ninth contract was for the purpose of avoiding a permanent contract arising;
3. the County had failed to make objective grounds justifying the non-renewal of the ninth contract and its inability to offer permanent employment.

Re 1. The Minimum Notice and Terms of Employment Act 1973 states that continuation of an employee in employment shall not be broken by dismissal followed by "immediate" re-employment. Ms Joyce contended that, as the duration of the gap between her second and third contracts lasted no longer than about four months and qualified as a lay-off period, she had effectively been re-employed "immediately". She outlined that she had had a well-founded and reasonable expectation that she would be given a contract of indefinite duration and claimed that she had been informed on several occasions that she would be further engaged in employment and had no reason to believe otherwise. Given these circumstances, a four month gap should be held as not frustrating continuous service and, therefore, 4½ years' continuous service should be applied, meaning that Ms Joyce became entitled to a permanent contract with effect from 19 July 2008.

In response, the County argued that Ms Joyce's second period of employment was not an extension of the first period. It was claimed it was a new series of contracts. The first period of employment was to provide maternity cover. The second period of cover was to complete an entirely new series of specific projects. Therefore, the break in service of approximately four months could not be construed as a "lay-off" period and continuity of service did not apply.

Re 2. Ms Joyce contended that the County had dismissed[5] her with the sole purpose of avoiding the creation of a permanent contract. She based this contention on the argument that there had been sufficient funding in place for the retention of her position until the end of 2009.

The County denied that the non-renewal of Ms Joyce's contract was connected with the purpose of avoiding her fixed-term contract being deemed to be one of indefinite duration. The County outlined that in accordance with the provisions of the 2003 Act had Ms Joyce accrued an entitlement to a contract of indefinite duration, like many others in such a situation, she would have been retained on a permanent contract. However, owing to the constraints on its budgetary resources, its policy at the time was to terminate all other fixed-term contracts upon their expiry. So had Ms Joyce continued in employment after March 2009, she would more than likely have accrued an entitlement to a contract of indefinite duration by operation of law and such an entitlement would have arisen in October 2009. However this was not the case. Cost-cutting measures for payroll had been agreed between the employer and the unions. The County outlined that any of those fixed-term employees who had over four years' continuous service were given contracts of indefinite duration. They contended that Ms Joyce had not accrued the continuous service, was not covered by the 2003 Act and the County was, therefore, under no obligation to offer her a contract of indefinite duration.

Re 3. Ms Joyce's third argument was that the County had failed to comply with the written requirements of the 2003 Act whereby an employer must provide a written statement setting out the objective grounds justifying the renewal of a fixed-term contract and its inability to offer a contract of indefinite duration[6].

In response to this argument, the County accepted that the last contract issued to Ms Joyce on 24 November 2008 did not specify the reason justifying the renewal for a further fixed-term contract and the reasons why she was not being issued with a contract of indefinite duration. However, the County outlined that Ms Joyce was fully aware of the circumstances when her contract was renewed on a fixed-term basis. The County contended that this breach constituted a mere administrative error on its part and was not done out of malice.

The matter was originally before the Rights Commissioner[7]. The Rights Commissioner ruled against Ms Joyce and the matter was appealed to the Labour Court.

Judgment

The Labour Court deemed that Ms Joyce may have had an expectation of continued employment due to the number of extensions in contract she had received in the past. However, she was given a clear warning on 24 November 2008 that her contract was unlikely to be renewed beyond 31 March 2009. The Court looked at the fact that the archives service was not part of the County's core work and said that an assistant archivist position was one that could be made redundant as the need for the job was not fixed and permanent. The Court also found it significant that the County had not replaced Ms Joyce's position in the archive service since Ms Joyce had been made redundant. The Court accepted that the termination of all fixed-term contracts was agreed as one of the cost-containment measures by both the County and the unions involved. As a result, the decision not to renew Ms Joyce's fixed-term contract after March 2009 was taken in a neutral, impersonal and policy-driven manner, and was not motivated by the individual circumstances but by the requirements placed on the County through the public spending measures, which were entirely motivated by the economic climate and financial constraints requiring significant cost-containment measures to be taken during 2008 and 2009. The Court ruled that the avoidance of a contract of indefinite duration was not a consideration in the County's decision to terminate her employment. The Court, therefore, found that Ms Joyce's claim of penalisation was not well-founded.

With regard to penalisation the Court referred to A*deneler – v – Ellinikos Organismos Galaktos*[8] which recognised that such abuse can arise from the continuous use of fixed-term employment contracts to meet the fixed and permanent needs of the employer. A clear objective of both the fixed-term framework agreement and 2003 Act is the prevention of such abuse. That objective could be effectively frustrated if an employer could dismiss a fixed-term employee with impunity before he or she could accrue a right to a contract of indefinite duration, so as to replace them with another fixed-term employee.

The Labour Court was of the view that there was every indication that Ms Joyce was fully aware that it was unlikely a further contract would be issued, as a clause added to her 24 November 2008 contract (the final one) mentioned the current economic climate and the financial constraints within Donegal County Council meant it was unlikely that the County would be in a position to offer a further contract extension beyond 31 March 2009. However, the Court deemed that the fact that the County had not provided particulars in writing of the objective grounds justifying the further renewal of her contract and its failure to offer a contract of indefinite duration meant that it had effectively failed to give proper notice to Ms Joyce that she would not be offered a contract of indefinite duration. On this basis the Court awarded Ms Joyce € 5,000 in compensation for the breach of the 2003 Act[9].

Commentary

There is a fine line between meeting the needs of the employer and ensuring that the rights of fixed-term employees are not abused. The contention of Ms Joyce and her union representative that the gap of service of nearly four months should be ignored was in some senses a fair contention to make but realistically a far-fetched one. However, this case shows that it is vital for an employer to have proof and cogent evidence that periods of fixed employment can be seen as distinct and separate. The outcome may have been different had the County not been in a position to prove this.

As outlined in the case report "*National University of Maynooth – v – Dr Ann Buckley*" (EELC 2011/8), funding has long been used, particularly by employers in the state sector, for objectively justifying the use of successive fixed-term contracts rather than converting fixed-term employees to permanent status. And, as illustrated by this Labour Court judgment, it is a fair and legitimate reason particularly in under-funded sectors.

The case also illustrates that the courts will view quite strictly and narrowly what constitutes notification to a fixed-term employee that their contract will not be renewed. Ms Joyce was fully aware that it was unlikely that she would have a further contract issued, given the additional clause issued in her contract. However, the Labour Court did not see this as complying with the 2003 Act. In addition, whilst the County claimed this was an administrative error, it was not deemed sufficient by the Labour Court, which saw fit to compensate Ms Joyce in the sum of € 5,000 in respect of non-pecuniary loss. Therefore, the judgment shows that failure to comply strictly with the 2003 Act because of an admistrative error can be costly to the employer.

Comments from other jurisdictions

Germany (Paul Schreiner, Elisabeth Höller): German law distinguishes between two types of fixed-term contracts: those where the limitation in time is justified by an objective reason and those not so justified. An objective ground can be found, *inter alia*, in project work or the substitution of an employee on parental leave. Fixed-term contracts

concluded without such a reason are limited to a total of two years. During this two-year period a fixed-term contract can be extended three times (making a maximum total of four fixed-term contracts). Another condition for the validity of a fixed-term contract is that there must not have been an employment relationship between the parties before. In a recent decision the Federal Labour Court held – in contrast to the vast majority of German legal literature – that this restriction did not apply to employment relationships that ended more than three years before the conclusion of the fixed-term contract. In the Irish situation reported above a German court would therefore have concluded that the employment relationship before the break precluded the employer from concluding a new fixed-term contract after the break.

In Germany the conclusion of consecutive fixed-term contracts for a duration exceeding two years can only be valid if an objective reason for the limitation is given. German law does not provide for an obligation by the employer to give a written statement explaining the objective reasons justifying the renewal of a fixed-term contract or the employer's inability to offer a permanent contract. However, German Federal Court case law holds that, in the case of consecutive fixed-term contracts, the objective reasons to justify their limitation in time must be more substantial as the length of the employment with the same employer increases. Thus, the number and duration of the limitations might indicate that "substitution of an employee" could not be used as an objective reason.

Pursuant to section 14 paragraph 4 TzBfG the limitation of an employment contract must be in written form. A violation of this requirement – even amounting to just one day being worked without a written employment contract – will lead to a permanent employment relationship.

United Kingdom (Gemma Chubb): The position described in Ireland is similar in the UK. Where employees have been continuously employed for four years or more on a series of successive fixed-term contracts, they will automatically be deemed to be permanent employees unless the use of a fixed-term contract can be objectively justified.

As in Ireland, for these provisions to apply the employee must be "continuously employed" and a break between contracts could potentially prevent the employee from acquiring permanent status. Continuity will be broken by a break of one clear week between two contracts, unless certain exceptions apply. One of these is where a break is due to a "temporary cessation of work". A recent Employment Appeal Tribunal case (*Hussain – v – Acorn Independent College Ltd* [2011] IRLR 463) considered the question of what constitutes a "temporary cessation" and held that the relevant issue was the reason for the termination of the first contract. Whether or not there was an expectation of further work at the cessation date is not relevant.

Subject: Fixed-term contracts
Parties: Ciara Joyce – v – Donegal County Council
Court: Labour Court
Date: 17 January 2011
Case number: FTD 111
Internet publication: www.labourcourt.ie → recommendations

(Footnotes)

1 In Ireland, employees, including fixed term employees, aged 16 and over with more than two years' service are entitled to a statutory payment of two weeks per year of service plus one 'bonus' week under the Redundancy Payments Acts, 1967 – 2007.
2 Section 9 of the Protection of Employees (Fixed Term Work) Act 2003.
3 Section 11 Redundancy Payments Act 1967.
4 Section 13(1)(d) of the 2003 Act as construed in *Clare County Council – v – Power FTD*, 0812/2008.
5 The definition of dismissal in the 2003 Act expressly includes the non-renewal of a fixed-term contract.
6 Section 8 (2): *"Where an employer proposes to renew a fixed-term contract, the fixed-term employee shall be informed in writing by the employer of the objective grounds justifying the renewal of the fixed-term contract and the failure to offer a contract of indefinite duration, at the latest by the date of the renewal."*
7 Rights Commissioners are appointed by the Minister for Enterprise, Trade and Innovation. They operate as part of the Labour Relations Commission and are independent in their functions. Rights Commissioners investigate disputes, grievances and claims referred by individuals or small groups of workers under employment legislation.
8 Case C-212/04, [2006] ECR 1-6057.
9 Section 8 of the 2003 Act.

2011/27

Pregnancy protection despite collective redundancy

COUNTRY HUNGARY
CONTRIBUTOR GABRIELLA ORMAI, CMS MCKENNA, BUDAPEST

Summary
A civil servant in a public hospital was informed that she was to be dismissed in the context of a collective redundancy. As she was pregnant at the time, she had dismissal protection and could not be dismissed. Subsequently, the hospital's activities were privatised. Even though the Hungarian transfer of undertaking legislation does not apply fully to civil servants, the entity that took over the hospital had to offer her employment.

Facts
A doctor was employed as a civil servant by a public hospital, owned and operated by a county. On 1 February 2007 the hospital's relevant staff were informed that there would be a collective redundancy as a result of which approximately 10% of the staff, including the plaintiff, would be dismissed. At the time of this "pre-notification"[1], the plaintiff was pregnant. This fact is relevant because under Hungarian law, if an employee has the benefit of dismissal protection at the time of a pre-notification, for example because she is pregnant, the employee cannot be dismissed until after the protection period has expired. Accordingly, the plaintiff could not be dismissed at the time her redundant colleagues lost their jobs.

Meanwhile, the county had established a limited liability company, of which it was the sole owner. On 1 December 2007 this company ("Newco") took over the hospital's activities as well as those members of its staff who were still employed on 30 November 2007.

Had the hospital been a private institution prior to 1 December 2007, the transfer of activities and staff would have qualified as a transfer of undertaking as provided in the Hungarian Labour Code's provisions transposing Directive 2001/23. However, the Labour Code does not apply fully in the public sector. Instead, the Civil Servants Act provides that when a public service is "outsourced" to a private entity (privatisation), that entity must offer employment, on equivalent terms, to all the civil servants employed at the time of the transfer. Those civil servants who accept the offer lose their status of civil servant and become ordinary employees of the private entity. Those who reject the offer are, as a rule, terminated. In other words, there is no automatic transfer of employment.

The approximately 200 civil servants who had become redundant were no longer employed in the hospital on 30 November 2007, the day before the transfer to Newco. Therefore, Newco was not under an obligation to offer them employment. The plaintiff was not one of them, as she was still employed on that date. She therefore argued that Newco should have offered her employment.

Judgment
The court of first instance and, on appeal, the Court of Appeal found in favour of the plaintiff. They held that her status as a civil servant could not have been terminated validly until after her dismissal protection period had ended, which was after the date of the transfer. Therefore, at the time the hospital transferred from the county to Newco, the plaintiff was in the same position as the other (non-redundant) civil servants. It follows that Newco should have offered her employment.

Newco was granted leave to appeal to the Supreme Court. It argued that, in the event of a transfer of a business, the dismissal protection granted by Directive 2001/23 does not extend to dismissals for economic, technical or organisational (ETO) reasons entailing changes in the workforce. The collective redundancy carried out before the hospital was transferred was done for an ETO reason. Thus, there was no possibility to employ the plaintiff in the hospital and Newco was not obliged to continue employing her.

The Supreme Court agreed with Newco that the plaintiff's position was, without doubt, affected by the collective redundancy. However, the fact remained that she had continued to be a civil servant until the transfer took place, and so her status was similar to that of her non-redundant colleagues. Therefore, Newco should have offered her a job. Accordingly, the Supreme Court affirmed the lower courts' judgments.

Commentary
Under Hungarian law, whilst the Labour Code governs the key issues of transfer of a business, the Civil Servants Act regulates the scenario where a public sector activity is transferred to a private company. Whereas in the former case the transfer of rights and obligations of an employment relationship takes place automatically, under the Civil Servants Act the private company must make an offer to the civil servants to conclude an employment relationship on the same terms. The difference is that the latter scenario is not automatic. Had the privatisation qualified as a transfer of undertaking, the plaintiff would also have transferred into the employment of Newco on her existing terms.

This case raises interesting questions. For example, when are we dealing with an employer's legal succession? In this case, there is no doubt that Newco was the county's successor as owner and operator of the hospital. In other cases, however, it is not always clear whether the transfer of resources constitutes a transfer of undertaking or a legal succession as provided in the Labour Code. Another question is: which employees are affected? For example, where an activity is transferred and there are employees who work partly on that activity and partly on other activities that are not transferred, it is not always clear which employees go across to the transferee and which remain with the transferor. There is no "black or white" answer to such questions, so the circumstances always need to be considered on a case-by-case basis.

Comments from other jurisdictions
Germany (Eva Rütz): The privatisation of a public enterprise is considered to constitute a transfer of undertaking, if the requirements of section 613a of the German Civil Code (BGB) are met. This is usually the case, but may not be in cases of privatisation by law. If a transfer of business has occurred, the relevant employment relationships are transferred automatically to the new employer in the form in which they existed at the time of the transfer. If notice of termination was served before the date of the transfer but the notice period had not expired at that time, the employment relationship is transferred with the notice remaining effective.

If an employment relationship cannot be terminated because special protection provisions against dismissals apply (e.g. maternity protection)

the employment is transferred and the dismissal protection remains effective. However, the new employer will be entitled to terminate the employment once the special protection against the dismissal has expired. According to section 613a (4) (first sentence) BGB, only a dismissal relating to the transfer of the business is invalid. Dismissals based on other reasons (e.g. on conduct or for operational reasons) are always legitimate (cf. section 613a (4) (second sentence) BGB).

Please note that section 613a (1) BGB does not apply to civil service agreements ("*Beamtenverhältnisse*"). Thus, civil service agreements are not transferred to the new owner of the business in the case of a transfer of the business (e.g. the privatisation of a public enterprise). Given that the new owner of the business has no obligation to offer employment to the civil servants, the civil service relationship remains between the civil servant and his or her public employer. The public employer is entitled to assign a new task to the civil servant, consistent with his or her public function (cf. Article 20 *Beamtenstatusgesetz*).

Subject: transfer of employee rights
Parties: not known
Court: Supreme Court (*Legfelsőbb Bíróság*)
Date: 2010 (date not known)
Case number: EBH2010.2165
Hardcopy publication: BH 2010/1
Internet-publication: not available

(Footnote)
1 Hungarian law provides, in accordance with Article 4(1) of Directive 98/59, that employees cannot be collectively dismissed until 30 days following notice of intent to dismiss.

2011/28

No derogation is possible in relation to daily 11 hour rest period

COUNTRY FRANCE
CONTRIBUTORS CLAIRE TOUMIEUX AND SUSAN EKRAMI

Summary

The daily rest period of 11 consecutive hours set by Directive 93/104, as amended by Directive 2000/34/EC[1] is interpreted as prohibiting all derogations.

Facts

Mr Burckel was an educator hired by a non-profit association for the mentally ill. His employment was governed by a collective agreement ("branch Agreement"). This agreement allowed non-profit institutions to reduce their minimum daily rest period in respect of employees responsible for putting to bed and waking patients, from the statutory 11 hours to 9 hours, provided the employees in question were granted two hours of compensatory leave. Mr Burckel regularly had less than 11 but more than 9 hours of rest between two working days. His employer argued that in such cases the compensatory time-off had to be proportional to the reduction of the daily rest period. By way of a purely hypothetical example, suppose Mr Burckel's weekly work pattern involved him working from Monday to Friday between 7 and 11am (4 hours) and between 5 and 9pm (4 hours) each day. Consequently, on four days per week (Monday – Thursday) the period between going home (9 pm) and beginning work the next day (7 am) was 10 hours i.e. one hour (50%) less than the statutory minimum. The employer interpreted the collective agreement as entitling Mr Burckel to (no more than) 2 hours x 50% = 1 hour of compensatory leave for each of these four days. Mr Burckel disagreed with his employer's interpretation of the collective agreement. He pointed to article 6 of the collective agreement, which provided that, by derogation to national French law, *"the minimum rest period of 11 hours between two working days may be reduced to 9 hours for those employees who are in charge of putting to bed and awakening the patients. Employees covered by the preceding paragraph are afforded two-hours' compensatory time-off"*. Mr Burckel's interpretation of this text was that the two-hour compensatory time-off was a flat-rate penalty for the employer, regardless of the extent of the daily rest time reduction. In the hypothetical example given above, Mr Burckel would be entitled to two hours of compensatory leave for each of four days per week = 8 hours (one whole day) of compensatory time-off each week.

Court of Appeal

By a decision handed down on 14 January 2009, the Court of Appeal followed the employee's interpretation of the branch Agreement, holding that since it did not refer to any pro-rated calculation, the two-hour compensatory time-off was a flat-rate penalty which had to be borne by the employer regardless of the number of rest hours reduced. Disagreeing with the interpretation given by the Appeal judges, the Association appealed the decision before the Supreme Court.

Supreme Court

The French Supreme Court (*Cour de Cassation*) overruled the Court of Appeal's decision, holding that *"since the threshold of the daily rest period resulting from Directive 93/104/EC of 23 November 1993, as amended by Directive 2000/34/EC of 22 June 2000 is set at 11 consecutive hours, it follows that, under domestic law, exceeding the daily range of 13 working hours is prohibited"*.

The Cour de Cassation held that, since the employee was not afforded the minimum daily rest period of 11 consecutive hours between workdays, he was entitled to receive the claimed compensation and that the employer could not oppose this on the basis of the branch Agreement, as its provisions were contrary to the threshold set by EU law.

Commentary

The question put to the Cour de Cassation related to the interpretation of the two-hour compensatory time-off provided by the branch Agreement. Was it a flat rate or a proportional consideration? However, the Supreme Court did not opine on how the branch Agreement should be interpreted but instead, rather surprisingly, rendered its decision on grounds of incompatibility between French domestic law and European Union law.

Its reasoning is striking – the Cour de Cassation inferred from the text of Article 3[2] of Directive *93/104,* which sets the daily rest period at 11 consecutive hours, that the daily working period is capped at 13 hours without any possible derogation.

We all know that national courts are bound to interpret their domestic law in light of EU Directives, but what if the derogation is provided by

the Directive itself? Article 17 (2) of Directive 93/104 expressly provides that *"Derogations [to the daily rest period] may be adopted by means of laws, regulations or administrative provisions or by means of collective agreements or agreements between labour unions provided that the employees 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".* Such derogation is also possible under French domestic law. In fact, Article L. 3131-2 of the Labor Code[3] expressly allows for reduction of the daily rest period under certain conditions. It is precisely in accordance with this article that the branch Agreement in the health, social and medico-social sector, which derogates in this way, was set up.

So how could the Cour de Cassation possibly rule as it did, where exceptions to the daily rest period existing under both Directive 93/104 and domestic law clearly provide that the employee should be granted equivalent compensatory rest? Normally, in such circumstances, the Cour de Cassation would check whether the employees were granted proper compensatory rest by the branch Agreement and then take a position on the interpretation of the two-hour compensatory time-off.

What prompted the Cour de Cassation to rule as it did is not clear. Perhaps its position can be attributed to insufficient knowledge of the contents of the Directive, especially ss 17-2 and 17-3, given that in its ruling the Cour de Cassation does not even refer to those sections. In any event, should the Cour de Cassation maintain its position in future decisions, this could have dire consequences for activities where derogation is necessary due to the need to ensure continuity of service.

Comments from other jurisdictions

Austria (Martin Risak): Issues like the ones reported in this case are not very likely to be raised in Austria as the working time law is very explicit about possible deviations from the 11 hour rest-period. It states, for example, that the applicable collective bargaining agreement may reduce the rest period down to eight hours provided this is compensated with an adequately extended rest period within the next ten days. A shortening to less than ten hours is only allowed if the collective bargaining agreement provides for additional measures to ensure the employees have adequate rest. Collective bargaining agreements, which cover about 95% of the employees in the private sector, therefore often include provisions to shorten the daily rest periods along with measures to compensate for the shortfall.

The Netherlands (Peter Vas Nunes): if the French Supreme Court's judgment really is based on insufficient knowledge of the content of the Working Time Directive (since 2 August 2001: Directive 2003/88) all I can do is be amazed.

Subject: minimum rest periods
Parties: AFDAIM Foyer Joulia – v – Burckel
Court: *Cour de cassation* (Supreme Court)
Date: 28 September 2010
Case number: Cass soc. No 09-41511
Internet publication: www.legifrance_gouv. fr

(Footnotes)

1 Replaced in 2004 by Directive 2003/88
2 Article 3 "Member States shall take the measures necessary to ensure that every employee is entitled to a minimum daily rest period of 11 consecutive hours per 24-hour period".
3 By Article L. 3131-2: "An agreement, extended collective bargaining agreement, enterprise or establishment agreement may allow exceptions to the minimum daily rest, under conditions determined by Decree, particularly for activities involving the need to ensure continuity of service or services requiring fractioned intervention periods. Such Decree also provides the conditions under which such derogation is possible where there is no collective agreement and, in cases of emergency work because of an accident or threat of injury, or an exceptional increase in business activity."

2011/29

Daughter's disorder not "force majeure"

COUNTRY DENMARK
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Summary

Long-term sickness of an employee's family member, however serious, does not qualify as *force majeure* in the meaning of the Danish law implementing the Framework Agreement on Parental Leave.

Facts

As a general rule, employees must attend work – even if their children are sick and need looking after. If a family member is suddenly seriously ill or severely injured, however, the employee may take time off. This is laid down in the Danish Act on Employees' Entitlement to Absence for Special Family-Related Reasons, which provides amongst other things that employees are entitled to paid absence from work where this is necessary for compelling family reasons in the case of illness and accidents where the employee's immediate presence is urgently required (*force majeure*). The entitlement is for unpaid leave, although some employees are entitled to paid leave under a collective agreement or their individual contracts.

The Act implements Directive 96/34/EC[1] and puts into effect the Framework Agreement on Parental Leave concluded on 14 December 1995 between the general cross-industry organisations (Unice, CEEP and the ETUC). It states in clause 3:

1. Member States and/or management and labour shall take the necessary measures to entitle workers to time off work, in accordance with national legislation, collective agreements and/or practice, on grounds of force majeure for urgent family reasons in cases of sickness or accident making the immediate presence of the worker indispensable.

2. Member States and/or management and labour may specify the conditions of access and detailed rules for applying clause 3.1 and limiting this entitlement to a certain amount of time per year and/or per case.

Neither the Danish Act on Employees' Entitlement to Absence for Special Family-Related Reasons nor the framework agreement on parental leave defines what a *force majeure* situation is.

A warehouse employee had a daughter who had just started school. After a short while, she began acting in an unusual way and it turned out that she could be suffering from OCD (*obsessive compulsive disorder)*. Initially, the father's employer was sympathetic to the employee's difficult situation and gave him several days off in the autumn and half of December 2006 plus January and February 2007. The father did not receive pay while staying at home with his daughter, but instead claimed benefits from the local authority in accordance with Danish social law.

Then, in late February, the father informed his employer that he would not be able to return to work until May at the earliest. At that point, the employer had had enough. The father was dismissed with three months' notice and required to work the notice period. When he did not turn up for work, he was summarily dismissed.

The father's trade union could not tolerate this and the parties ended up in the High Court, where the union relied on the Danish Act on Employees' Entitlement to Absence for Special Family-Related Reasons. The High Court ruled entirely in favour of the employer.

Judgment

On appeal, the Supreme Court held that the Act did not apply because the daughter's condition had lasted several months and therefore no longer qualified as a *force majeure* situation. It seems that the Supreme Court in its judgment focuses exclusively on the Danish understanding of force majeure without drawing on any EU law definition of the concept. On this basis, the Supreme Court held that a dismissal would have been fair, but that summary dismissal was unfair. Accordingly, the father was entitled to notice pay.

In overturning the High Court's judgment, the Supreme Court took into account, amongst other things, that the employer had accepted the father's absence for quite some time and that the employer had failed to prove that the father had been warned that he would be summarily dismissed if he did not turn up. On those grounds, the Supreme Court held that the summary dismissal was too harsh a measure in the circumstances.

Commentary

The judgment shows that the Danish Act on Employees' Entitlement to Absence for Special Family-Related Reasons applies only in *force majeure* situations such as traffic accidents or acute illness.

Whether the Directive and the Framework Agreement are quite as narrow is debatable and they might be interpreted differently in other jurisdictions.

Comments from other jurisdictions

Austria (Andreas Tinhofer): In Austria, employees are entitled to one week of continuous paid leave in order to care for a sick child (or other close relative) living in the same household if this is necessary. If the child's sickness – or rather, the need for care – lasts for a longer period of time, the employee can use his annual leave entitlement, without the employer's approval. Alternatively, or after the annual leave entitlement has been exhausted, the employee can claim unpaid leave. There is no statutory provision limiting the length of unpaid leave. However, the employee's duty to look for alternative care arrangements will become more compelling the longer the situation lasts.

During the period of absence the employee does not enjoy any special protection against dismissal. On the other hand, the absence is not a valid reason for a summary dismissal. If a child is seriously ill, each of the parents may ask for unpaid leave or for a reduction or adjustment to working hours for an initial period of up to five months. This term may then be prolonged to nine months in total. During that time the employee may be given notice only with the prior approval by the employment court.

Cyprus (Natasa Aplikiotou): The definition of "*force majeure*" is broadly similar both in the Danish Act and the relevant Cypriot legislation. A *force majeure* situation arises where there are compelling family reasons in the case of illness or accident directly necessitating the presence of the employee.

Nevertheless, there are some differences in application in Denmark and Cyprus, with the Danish legal framework affording judges wider discretion to assess *force majeure* on a case by case basis. Though the Danish courts seem to leave open the amount of time allowed for *force majeure*, in Cyprus, the Law Providing for Paid Annual Leave of 1967 (Law 8/1967) and the Law for Parental Leave and Leave due to "Force Majeure" Reasons of 2002 (Law 69(I)/2002), limit the entitlement to seven days per year. Additionally, article 12 of Law 69(I)/2002 establishes that the leave should be unpaid in all cases, contrary to the exception allowed under Danish Law.

Germany (Simona Markert): Section 616 of the German Civil Code (*Bürgerliches Gesetzbuch*, BGB) provides that employees are entitled to paid absence from work when necessary for compelling reasons in the case of illness and accidents where the employee`s immediate presence is urgently required and stipulates the following:

"The person obliged to perform services is not deprived of his claim to remuneration by the fact that he is prevented from performing services for a relatively trivial period of time for reasons personal to the employee without fault on his part. However, he must permit to be credited against him the amount he receives under a health or accident insurance policy that exists on the basis of a statutory duty for the period during which he is prevented from performing the services."

"Reasons personal to the employee" also refers to the unforeseeable illness of family members, where the employee´s immediate presence is urgently required.
The term "relatively trivial period of time" is not defined by law and therefore the circumstances of the case must be considered. If the employee is prevented from rendering his services for more than a trivial period of time, the employee can no longer claim remuneration. Apart from this possibility for short periods, consideration must also be given to the Pflegezeitgesetz, the *'PflegeZG'*, a law that governs the obligations of employees and employers where the employee needs to act as a carer and is prevented from working. The *PfegeZG* differentiates between short-time caring for a period of up to ten days and long-time caring for a period of up to six months.
The short-time caring facility is only provided for the unforeseen serious illness of relatives. In general the PflegeZG does not foresee an entitlement to remuneration at such times, but a claim for remuneration can sometimes also be made using, for example, in section 616 of the Civil Code, mentioned above, or in collective bargaining agreements.

The long-time caring facility entitles the employee to care for relatives if the employer employs more than 15 employees. In such cases, the employee must inform his employer no later than ten days before the commencement of the need for care. In such a situation there is, in principle, no obligation on the employer to pay remuneration.
However, the employment relationship may not be terminated by the employer during caring (Section 4 *PflegeZG*).

United Kingdom (Ailsa Murdoch): The UK provisions implementing the EU Parental Leave Directive give employees a statutory right to *unpaid* time off work to care for dependants. Employees may take a "reasonable amount" of time off if it is "necessary" in certain circumstances: for example, to assist if a dependant is ill or injured, to make arrangements for a dependant's care, or if a dependant dies, or to deal with an incident involving the employee's child at school. Employees can bring a claim against their employers for failing to permit them to take time off in accordance with this right. In addition, if the employee is dismissed and the reason (or principal reason) relates to taking time off pursuant this right, the dismissal will be unfair.

The question of when time off is "necessary" has not been considered in many cases in the UK. However, the judgments so far suggest that these provisions only enable employees to take time off to deal with an immediate crisis rather than on-going issues. One judgment in particular (*Qua v John Morrison Solicitos* [2003] IRLR 184) concluded that, in the "vast majority" of cases, it would only be reasonable to take a few hours – or possibly up to one or two days – to deal with the problem that has arisen.

Depending on the nature of the illness suffered by the dependant and whether it amounts to a disability for the purposes of discrimination legislation, it is possible that an employee could claim disability discrimination by association if they are treated less favourably than other employees making similar requests for time off. Such a case would only succeed if the employer treated the employee less favourably because of the dependant's disability - for example, because the dependant was HIV positive. Cases of this type are likely to be relatively rare, but it is an avenue open to employees to explore under the UK's Equality Act 2010.

Subject: Absence from work for compelling family reasons
Parties: The Danish Union HK acting for A – v – B
Court: Danish Supreme Court
Date: 17 February 2011
Case number: 233/2008
Internet publication: Please contact info@norrbomvinding.com

(Footnote)
1 To be replaced, as from 8 March 2012, by Directive 2010/18 implementing the Revised Framework Agreement.

2011/30

Visiting Facebook at work is a valid reason for termination

COUNTRY GREECE
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Summary
In this first case in which a Greek court addressed the issue of an employee spending working time on Facebook, the court found that a summary dismissal was not disproportionate.

Facts
In 1989 the plaintiff was hired by Singapore Airlines as a booking and ticket sales employee. As of 2000 she handled only ticket reservations. During the entire period up to 2008 she was an excellent employee and had received bonuses on top of her salary for good performance.

In April 2009 an agreement was executed between the company and a group of 16 employees including the plaintiff. The agreement provided that their salaries would remain unchanged, i.e. that there would be no increases, in the 12 month period April 2009 to March 2010. The agreement was reached despite opposition by the plaintiff.

In May 2009 the General Manager sent the plaintiff a warning letter. The letter complained of poor performance, amongst other things, consisting of systematically coming in late for work, using the company's telephone lines for personal calls during working time, and using the Internet to visit irrelevant sites. On 29 April 2009 she had been caught visiting Facebook by the General Manager and the Sales Manager.

In a letter dated 25 May 2009 the General Manager warned the plaintiff that if she continued her unprofessional behaviour, the company would be left with no choice but to dismiss her without notice. The plaintiff replied by an email dated 4 June 2009, inviting the General Manager to apologise in writing within ten days for his "insulting, defamatory and excessive letter", adding that if no such apology were made, she would interpret the General Manager's letter of 25 May as "an act of revenge" against the lawful exercise of her rights, both in respect of certain issues from the past and in respect of the salary freeze. The General Manager replied informing her that he considered the content of her letter as a continuation of her failure to act in accordance with the terms of her contract, including harming the company's interests, and for these reasons he proceeded to dismiss her on 18 June 2009.

The plaintiff filed a lawsuit claiming that her termination was abusive and therefore invalid, as it was based on revenge for her participation in the legal exercise of her employment rights. Furthermore, she claimed arrears of salary (€ 36,560 for the period from June 2009 to April 2010) as well as compensation for moral damages for insult amounting to € 250,000.

Judgment
The Athens First Instance Court rejected the plaintiff's claim, ruling that her dismissal was lawful and had been carried out for a serious and valid cause. The court based this ruling on testimonies and depositions by several witnesses that the plaintiff had made a habit of

coming late to work, receiving personal phone calls from friends and relatives during working hours and calling them back on the company's telephone lines, thereby creating problems in the service to clients.

The court took into consideration the fact that the company had, in December 2008, sent an email to all its employees forbidding visiting sites such as Facebook, that were irrelevant to the job. Despite this, as former colleagues of the plaintiff testified, she visited Facebook on a daily basis in order to read and write comments and that, frequently, when customers called requesting reservations, she replied that the reservation system was out of order and that they should therefore call back later. She did this so that she would have more time available to visit Facebook.

The judgment concluded that the dismissal was not vengeful and was not based on the plaintiff's reaction to the salary freeze.

Commentary

This case attracted a great deal of publicity in Greece, because it was the first time that a court had ruled on the issue of use of social networking sites in employment.

The judgment is also interesting, because it elaborates on two fundamental principles of labour law, namely the principles of trust and proportionality. Trust must always exist between the parties to an employment relationship. In the case reported above the plaintiff's behaviour had caused her employer to lose trust in her, thereby making collaboration difficult.

The court rejected the plaintiff's argument that termination of her employment was a disproportionate reaction and therefore abusive, given her excellent performance during all the years since the beginning of her employment. Even an employee with 20 years of excellent performance can be dismissed. The court focused on the real motive for the termination, which was the deficient performance of duties by the plaintiff; the fact that any spirit of true cooperation had ceased to exist between the parties; and the employer's legitimate interests.

Comments from other jurisdictions

Austria (Andreas Tinhofer): This case would have most likely been decided in the same way in Austria, although no court decision is yet known to have dealt with the use of social media networks in the workplace. However, it is a well-established principle that employees must not spend a substantial amount of their working time pursuing private interests. This applies to private phone calls, along with any other form of communication, and use of the Internet which is not work-related. In such a situation a summary dismissal is lawful if the employee does not respect a prior warning to discontinue such conduct.

Czech Republic (Nataša Randlová): In the Czech Republic employees are not permitted to use the employer's equipment or other means necessary for performance of the work, including computers and telecommunication equipment, without the employer's written consent. The employer is entitled to enforce this restriction. In addition, an employee must use all of his working time to fulfil his obligations towards the employer. An employee who spends his or her working time on Facebook and uses the employer´s computers to do so, would certainly be considered to be in breach of the disciplinary rules. Whether or not the employee can be dismissed immediately, dismissed with notice or reprimanded, will depend on a number of factors, such as the employee's position (managerial or not); whether the employee has breached the rules in the past; whether damage was caused; and whether the employee breached the rules intentionally negligently. Immediate dismissal is an serious measure and should be used carefully. In the case reported above a more appropriate measure would have been to serve notice on the employee for systematic less serious breaches of discipline.

United Kingdom (Gemma Chubb): Despite the fact that there has been little relevant case law in the UK, the use of social media at work is becoming a hot topic amongst human resources specialists and employment lawyers. Employers are currently treading a difficult path in trying to assess how much control they can or should exercise over employees' use of social media.

Using social media in a way which constitutes clear misconduct – for example, excessive use when the employee is supposed to be doing work for the employer – is no different from any other kind of bad behaviour. Provided the employer has clear standards that it has notified to employees, so that employees understand what is expected of them and the consequences of getting it wrong, dismissal is likely to be an appropriate response. In this case, the employer had sent an email forbidding employees from using Facebook and similar sites, so a UK court would probably find there were valid grounds for dismissal.

However, a UK employer would need to follow a different procedure in order to dismiss fairly. Once a permitted ground for termination is established, the employer still needs to show that it acted reasonably in dismissing the employee for the reason in question. The outcome largely depends on whether the employer followed the appropriate procedure, given the nature of the misconduct and how serious it was. In this case, the claimant seems to have been dismissed without notice and without a performance management procedure having been put in place. In the UK, that would only be appropriate for very serious misconduct. In other cases, the employer should investigate the matter and then hold a disciplinary meeting to discuss the matter with the employee and hear any explanation or mitigating circumstances. Following the meeting, the employer may issue a warning that if the behaviour does not improve, there may be further disciplinary proceedings and eventual dismissal. Normally, the employer would hold a second disciplinary hearing and give a final warning before resorting to dismissal would be appropriate. When an employee is dismissed in such circumstances, he or she should normally be given notice pay.

It is unlawful in the UK to dismiss someone for "blowing the whistle" on unlawful practices. So, if the pay freeze had been unlawful and the employee was dismissed for complaining about it "in revenge", that could be an unfair dismissal.

Parties: AT – v – Singapore Airlines
Court: Athens Court of First Instance
Date: January 2011
Case number: 34/2011
Internet publication: http://lawdb.intrasoftnet.com/nomos/3_nomologia_rs.php

2011/31

Dismissal, not (discovery of) pregnancy, triggers dismissal protection time-bar

COUNTRY LUXEMBOURG
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Summary
It was not until after being dismissed that the employee discovered that she was pregnant and had already been pregnant for a while at the time of her dismissal. Luxembourg law has such short time limits for nullifying a dismissal in these circumstances that the employee effectively had no dismissal protection. Nevertheless, the court held her to the statutory time limits and ruled against her.

Facts
The plaintiff in this case was dismissed by her employer, a bank, by registered letter posted on Friday 26 November and received on Monday 29 November 2010. On 7 December 2010 she discovered that she was pregnant. She went to see a doctor, who on Thursday 9 December 2010 gave her a certificate that she was pregnant and had been pregnant since late October 2010. The plaintiff sent the certificate to the bank with a registered letter on Monday 13 December 2010.

Article L. 337-1 of the Luxembourg Labour Code allows the courts to nullify a dismissal given during pregnancy and to order reinstatement. However, the deadlines for obtaining such a nullification are short:

"1. It is forbidden for the employer to [dismiss] an employee when she is in a medically certified state of pregnancy [...].
2. In the case of [dismissal] before the pregnancy has been medically certified, the employee can, within a time period of eight days from the notification of the dismissal, justify her state by the delivery of the certificate by registered letter.
3. Any dismissal notified in violation of [§ 1 or § 2] is void.
4. Within fifteen days of the termination of the contract, the employee can apply to [the court] for an order to declare the dismissal void [...]."

In this case, paragraph 2 applied. This meant that the deadline for sending the registered letter with the doctor's certificate ran until 29 November[1] + 8 days = 7 December 2010. Paragraph 4 meant that the deadline for filing a petition to the court ran until 29 November + 15 days = 13 December. On both counts, the plaintiff was too late. What to do?

The plaintiff relied on a Statute of 22 December 1986. This Statute provides: *"If a person has not acted within the given time, they can in all matters obtain leave to proceed out of time if, without any fault on their part, they did not know about the event that launched the given time period to proceed or they were prevented from proceeding."*. The plaintiff took the bank to court on 16 December 2010, arguing that "the fact that launched the given time period to proceed" was her discovery that she was pregnant, which was 7 December 2010. Proceeding from this premise, the eight-day deadline did not expire until 15 December and the 15-day deadline did not expire until 22 December 2010.

Judgment
The court turned down the plaintiff's request to proceed out of time. It agreed with the defendant that "the event that launched the given time period to proceed" within the meaning of Article L. 337-1(4) was the dismissal, not the discovery of the pregnancy. The plaintiff knew when she was dismissed, so there was no reason to grant her leave to proceed out of time. The court also held that the eight-day period of Article L. 337-1 (2) does not constitute a procedural time-limit as provided in the statute of 22 December 1986.

Given that Luxembourg law does not allow an appeal against a decision to grant or to turn down a request to proceed out of time, this was the end of the matter.

Commentary
The court took a formalistic approach that seems to ignore the ECJ's case law relating to dismissal during pregnancy, in particular the ECJ's 2009 ruling in the *Pontin* – v – *Comalux* case (C-63/08) (reported on page 38 of EELC 2010-1), in which the ECJ held:

"Articles 10 and 12 of Directive 92/85 (...) must be interpreted as not precluding legislation of a Member State which provides a specific remedy concerning the prohibition of dismissal of pregnant workers [...] laid down in Article 10, exercised according to procedural rules specific to that remedy, provided however that those rules are no less favourable than those governing similar domestic actions (principle of equivalence) and are not framed in such a way as to render practically impossible the exercise of rights conferred by Community law (principle of effectiveness). A fifteen-day limitation period, such as that laid down in the fourth subparagraph of Article L. 337-1(1) of the Luxembourg Labour Code, does not appear to meet that condition".

In the *Pontin* case the referring court had asked the ECJ to rule on the compatibility with Directive 92/85 of both the eight-day time limit for delivering the medical certificate (paragraph 2 of Article L337.1) and the 15-day period for applying to the court (paragraph 4). However, the ECJ noted, "that, unlike the 15-day period, the eight-day period does not appear to constitute a procedural time-limit within which a court must be seised. It is for the referring court to determine whether it is such a time-limit"*[emphasis added]*. For this reason, the ECJ limited its review to the 15-day time-limit and did not go into the question of whether an employee who has failed to send her employer a medical certificate of pregnancy within the eight-day deadline of paragraph 2 has the right to bring proceedings pursuant to paragraph 4. In this regard, the Advocate-General had remarked in the *Pontin* case *"that, contrary to the impression created by the wording of the first question, the possibility under national law of bringing proceedings evidently does not depend on compliance with the notification requirement [...] [T]hat wording must be understood to the effect that by its question the national court draws attention implicitly to the fact that compliance with that time-limit for notification has consequences for the operation of dismissal protection and, thus, also indirect consequences for the potential success of a claim."* Be this as it may, the ECJ's *Pontin* ruling did not deal with the eight-day period, merely with the 15-day period. In the present case, where the dismissal occurred before the employee knew she was pregnant, and therefore before she could obtain a medical certificate, it was the eight-day time-limit that was at issue.

On the one hand the judgment reported here is arguably not incompatible with Directive 92/85, given that in *Pontin*, the ECJ had found the eight-day time-limit not to appear to "constitute a procedural

time-limit". On the other hand, however, the ECJ had instructed the referring court to determine whether the eight-day period really was not "a time-limit whose expiry is likely to prejudice the exercise of an individual's rights". The ECJ had remarked that if the eight-day period was such a time-limit, the principles of equivalence and effectiveness, which make the 15-day period incompatible with EU law, would apply equally to the eight-day period.

In the judgment reported here, there is no indication that the court applied the equivalence and effectiveness tests. It merely noted that the eight-day period is, formally, not such a time-limit, without taking account of the fact that materially, it affects the right of a pregnant employee to exercise her right to dismissal protection. This is because an employee who cannot produce evidence of pregnancy until the 15-day time-limit has expired (or has almost expired) effectively has no dismissal protection. Her claim will simply be turned down.

This judgment also seems to disregard what the Luxembourg government had stated in its brief in the *Pontin* case. In that brief, the government admitted that the 15-day period cannot begin to run against a pregnant employee who is unaware of her pregnancy, precisely because such an employee is prevented from proceeding in court: see §§ 37 and 90 of the Advocate-General's opinion and § 64 of the ECJ's judgment.

What the Luxembourg court in the case reported here should have done is assess whether the eight-day period is equivalent to similar time-periods in domestic law. In my view the answer is affirmative. Luxembourg law contains shorter time-periods. For example, an employee who claims to be medically unfit for work has three days to produce a doctor's certificate to that effect. In comparison, the eight-day period is more favourable and in my view it passes the equivalency test. As for the effectiveness test, the court should have assessed whether the eight-day period is sufficient for the employee (in the wording of Article L. 337-1 Labour Code:) *"to justify her state by sending by registered letter a certificate"*. The court should have investigated how realistic it is for a pregnant employee to comply with this requirement.

In any event, it is difficult to imagine how the approach of the Luxembourg court can be reconciled with the requirement of protection of pregnant employees that, according to Article 10 of Directive 92/85 must be granted *"during the period from the beginning of their pregnancy to the end of the maternity leave"*. In the Advocate General's opinion in *Pontin* (point 90) she observed that: *"it is hardly permissible for that extensive protection in relation to the prohibition on dismissal to be limited on grounds of an omission to notify a pregnancy, in particular, and, at any rate, not where the worker, herself, was unaware of the pregnancy."*

The present case illustrates what I perceive to be a flaw in Directive 92/85. Article 2(a) defines "pregnant worker" as *"a pregnant worker* ***who informs her employer of her condition****, in accordance with national legislation and/or national practice."* Literally, this means that an employee who does not know that she is pregnant (and who therefore does not inform her employer that she is pregnant) is not protected against dismissal. On the other hand, there is Article 10 of the Directive. This is inherently contradictory, in that it provides that workers "within the meaning of Article 2" (i.e. workers who have informed their employer) are protected against dismissal "from the beginning of their pregnancy" A ruling by the ECJ will be necessary to resolve the contradiction between Articles 2 and 10 of the Directive.

Only time will tell whether the Luxembourg judgment reported above will stand alone, but in any event, it shows that the consequences of *Pontin* are still uncertain in Luxembourg.

Comments from other jurisdictions

Austria (Martin Risak): The Austrian Act on the Protection of Mothers (*Mutterschutzgesetz*) provides that a female employee cannot be dismissed without the consent of the court during pregnancy. However, the pregnancy must either have been known to the employer at the time the employment contract was terminated, or the employer must have been informed of the pregnancy or delivery within five days of notice being given. If the employee has no knowledge of her pregnancy she will still be considered to have informed the employer in due time if she informs it immediately after she has become aware of it. This provides gradual duties of information based on the state of knowledge of both the employer and the employee – and means that it remains possible for the expectant mother´s rights to protection against dismissal to be exercised.

Cyprus (Natasa Aplikiotou): These matters are regulated in Cyprus by Article 4 of the Law Providing for the Protection of Maternity of 1997 [Law 100(I)/1997] which, in a similar way to the Luxembourg Law, forbids the employer to issue a notice of dismissal to a pregnant employee who has previously informed it of her state of pregnancy and provided the evidence of a medical certificate. This prohibition lasts for three months after the end of the maternity leave. However, three situations fall outside the sope of these provisions, as follows: (a) where the employee has been found guilty of serious breaches of the terms of employment; (b) where the business has closed down; and (c) where the employment has a fixed duration and it has come to an end.

What is important to mention is that Cypriot Law does not establish any time frame similar to that of Luxembourg Law within which the employee is able to evidence her state of pregnancy and contest her dismissal as void. This matter is left to the discretion and interpretation of the courts.

Further, Cyprus law, in common with the situation in Luxembourg, does not provide protection in situations where an employee does not know she is pregnant.

Czech Republic (Nataša Randlová): Under Czech law a pregnant woman is protected against dismissal from the beginning of her pregnancy. This protection is automatic even if the employee does not know she is pregnant and/or does not inform her employer that she is pregnant. If the employer dismisses an employee and she finds out afterwards that she was pregnant at the time of the dismissal and informs the employer, the dismissal will, in most cases, be invalid and the employer will be obliged to continue to offer work to the employee. Such a dismissal would only not be invalid if the employer or part of it were shutting down or relocating, or if the employee had seriously breached the disciplinary rules.

However because the Czech Labour Code is based on relative invalidity, the pregnant employee must claim it was invalid in the court within two months after the invalid notice of termination was given to her. If the employee does not claim invalidity in court and does not dispute the withdrawal of the notice of termination, the notice of termination will remain valid even though it was given to the employee while she was pregnant.

Germany (Henning Seel): The German legal situation is slightly different to the situation in Luxembourg in terms of the deadline for informing the employer of the pregnancy. Section 9 of the Maternity Protection Act ("MuSchG") stipulates the following: Dismissal of a woman during pregnancy and in the first four months following delivery shall be unlawful if the employer was aware of the pregnancy or delivery at the time it gave notice of dismissal or is informed of it within two weeks after the notice of dismissal was served. If this period is exceeded, no repercussions shall ensue if the delay was for reasons beyond the woman's control and the notification was then made without undue delay.

According to section 4 of the Protection against Unfair Dismissal Act ("KSchG") an employee who wishes to assert a claim that his dismissal is socially unjustified must petition the Labour Court within three weeks of receiving the termination notice to find that the employment relationship has not been dissolved by reason of termination.

In the judgment reported here, the plaintiff received notice of dismissal on Monday *29 November 2010*. On 16 December 2010 she took the bank to court. The period according to section 4 KSchG was therefore met. However, the bank was not aware of the pregnancy at the time it gave notice of dismissal. This means, that – following German law – it is crucial whether the plaintiff informed the employer of her pregnancy properly in accordance with section 9 of the MuSchG. As a rule, the information must be given within two weeks of the notice of dismissal. The plaintiff informed the bank with a registered letter on Monday *13 December 2010*. Thus, the period of two weeks was also met, but even if the time period of two weeks had been exceeded, no repercussions would ensue if the delay was for reasons beyond the woman's control and the notification was then made without undue delay. In the present case, the plaintiff notified without delay once she had received a doctor's certificate. A German labour court would therefore have ruled in favour of the plaintiff.

Subject: Dismissal protection during pregnancy
Parties: X – v – Banque de Luxembourg
Court: Présidente du Tribunal du Travail de Luxembourg
Date: 25 January 2011
Case number: 343/11

(Footnote)

1 Some judgments let the 15-day period run from the date the dismissal letter is sent; others let it run from the date on which that letter is received: see § 28 of the ECJ's ruling in *Pontin*.

2011/32

Employer may amend performance-related pay scheme

COUNTRY PORTUGAL
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Summary
A field salesperson was transferred to the employer's shop for reasons of performance and internal restructuring. In addition, the employer amended the sales commission scheme, as a result of which the salesperson's earnings dropped. The salesperson challenged both changes but, surprisingly, the court found in favour of the employer.

Facts
The defendant is a company that sells hearing aids. It owns several shops all over Portugal and also employs salespersons who visit (potential) customers in their homes. The plaintiff was a saleswoman who was hired in November 2002. Her contract provided that she should either work in one of the shops or in the field (i.e. visiting customers), as determined by the company. Such a provision is known as a "mobility clause". For the first five years of her employment (until June 2007) she worked as a field salesperson within a certain geographic area.

The company's salespersons, both those in the shop and in the field, were paid a fixed base salary and a sales commission equal to a given percentage of their monthly sales, with certain thresholds. Their contracts provided that the company determined the thresholds and the percentages unilaterally on an annual basis.

In July 2007, the plaintiff was transferred from the field to one of the shops. She remained based in the shop until February 2009, when she was instructed to work in the field again, albeit in a different sales region.

Around the same time as the plaintiff's transfer from the shop back to the field, the company amended the terms of the sales commission scheme, raising certain thresholds. The plaintiff contended that this amendment caused her income to drop. She brought proceedings before the local Labour Court, challenging both the decision to transfer her from a shop position to the field (she demanded reinstatement in her former field position) and the decision to amend the terms of the commission scheme.

Judgment
On the issue of the mobility clause, the court observed that although the clause was worded in general terms, given the limited geographical area where the company did business and given the nature of the work to be performed, the clause's scope was not so wide as to invalidate it. Not only was the clause itself valid, the employer was, under the circumstances, entitled to enforce it against the plaintiff, because she had given her written consent to future work location changes when she signed her contract, and because the potential changes were limited. Thus, the court rejected the plaintiff's demand for reinstatement in her shop position.

As for the amendment of the sales commission terms, the plaintiff invoked the Labour Code, which prohibits employers from reducing an

employee's remuneration (except in certain specific cases, such as a new collective agreement, that were not relevant in these proceedings). The court concluded, however, that the amendment at issue was not in breach of the Labour Code, for the following reasons.

The court began by noting that the plaintiff, by signing her contract, which stipulated that the employer determined the commission terms on an annual basis, had given her consent to future modifications of the commission scheme. This was not, in itself, illegal. The Labour Code allows an employer to retain discretion in changing the terms of such a scheme, provided the employee's total earnings are not necessarily reduced. The employer is not obliged to maintain a variable remuneration scheme unaltered for ever. In the case of the plaintiff, the fact that (i) the contract provided for the employer's right to amend the scheme, (ii) the plaintiff had performed poorly and (iii) all employees had the same opportunity to meet the targets, which some of them in fact had met, combined to lead the court to find that the employer had not contravened the Labour Code. In addition, the period of time between the amendment of the commission scheme and the introduction of the claim was too short to determine whether the plaintiff's earnings really had necessarily been reduced.

Commentary

This judgment is innovative, for a number of reasons.

Under Portuguese law a "mobility clause" is invalid if it is widely defined. For example, a clause that allows the employer to determine the employee's place of work anywhere in Portugal would be invalid and therefore ineffective. Additionally, the Labour Code provides that a mobility clause, if valid in the first place, ceases to be valid if it is not used for a period of two years.

In the absence of a (valid) mobility clause, an employee may be transferred to a different work location, either temporarily or permanently, but only within certain restrictions. Temporary relocation requires reasonable prior notice and is only allowed in certain situations or if it has no serious impact on the employee. Permanent relocation gives the employee the right to claim constructive dismissal with compensation.

In the case of the plaintiff, none of these legal obstacles prevented the court from finding in favour of the employer. The court interpreted the rather inflexible Portuguese employment legislation in such a manner that it allows a mobility clause, even where it is widely defined, in certain situations, particularly where the nature of the work and the company's area of operations need to be determined in more detail. Likewise, the court took a flexible approach to a clause allowing the employer to change the composition of an employee's remuneration. This represents an important signal that the Portuguese employment courts are beginning to heed employers' need for flexibility.

Comments from other jurisdictions

Germany (Henning Seel): In Germany a "mobility clause" is common in employment agreements. It usually allows the employer to modify the employee's work to some extent. Such modifications can affect the content of the work, the time of work and the place of work. A mobility clause in a standard employment agreement is subject to an effectiveness test pursuant to section 305ff of the Civil Code ("BGB"). According to section 307(i) BGB provisions in standard business terms are invalid if, contrary to the requirements of good faith, they unreasonably disadvantage the other contractual party. An unreasonable disadvantage is, in case of doubt, to be assumed if a provision is incompatible with essential principles of the statutory provision because it deviates from these, or limits essential rights or duties inherent in the nature of the contract to such an extent that attainment of the purpose of the contract is jeopardized (see section 307(ii) BGB). A provision in an employment agreement which allows the employer to employ the employee at another site in Germany and thus change the employee's previous place of work is valid, since it complies with section 106 of the Industrial Code ("GewO").

However, even if the mobility clause is valid as such, the court would undertake an "execution review", i.e. the determination of another place of work pursuant to a mobility clause must be made on the basis of reasonably exercised equitable discretion. Social aspects must be considered by the employer, who must weigh up interests of the company and of the employee. Whether a determination of the employee's place of work is valid or not thus depends on the special circumstances of the individual case. The nature of the employment and the objective business requirements in terms of flexibility are relevant to this. It is not unlikely that a German court would have decided in the same way as the *Tribunal da Trabalho*. To be cautious, however, an employer subject to German law should, in addition to determining another place of work in a mobility clause, give notice to the employee, with the option of modified conditions of employment ("*Änderungskündigung*"). By doing this, the employer can ensure that the employee will have to accept the new place of work either on the basis of the mobility clause or the notice.

Note also that if a works council exists, it will have a codetermination right with regard to the transfer of an employee. Therefore, the employer must obtain the works council's consent to the planned transfer. The works council must be consulted prior to the (precautionary) *Änderungskündigung*.

Subject: Terms of employment – unilateral amendment
Parties: Not known
Court: *Tribunal da Trabalho* (Labour Court) at Matosinhos
Date: 16 November 2010
Case number: 540/09.6 TTMTS

2011/33

Reimbursement of costs of expert support to Participation Bodies in The Netherlands

BY: E.L.J. BRUYNINCKX AND G.W. VAN DER VOET[1]

This article deals with one aspect of Dutch law in the field of works councils, client councils and school councils (together: "participation bodies"), namely reimbursement of legal fees and other expenses. Reimbursement of legal costs forms a crucial, though sometimes expensive element, in the law aimed at supporting these participation bodies. This article considers both the legal and the practical aspects. It may be of particular interest to lawyers of companies with subsidiaries in the Netherlands.

Works councils

Dutch works councils have far-reaching powers, incomparably more so than their counterparts in other European jurisdictions (*comité d'entreprise, Betriebsrat*, etc.). For example, they almost have a power of veto over certain management decisions and may apply to the courts for an order against management. For this reason, works councils regularly seek the advice of lawyers, accountants and other consultants (together: "consultants") and it is not uncommon for a works council to litigate against management. Obviously, a works council needs funds in order to pay its consultants and to finance legal proceedings. This article sets out briefly what the Dutch Works Councils Act (WCA) says on this topic and how recent case law has construed the law.[2]

Article 22 WCA

The issue of who pays the expenses that a works council incurs is dealt with in Article 22 WCA. This provision consists of three paragraphs:

- paragraph 1 deals with day-to-day expenses such as secretarial assistance, conference rooms, computers, etc.;
- paragraph 2 deals with the cost of hiring consultants and includes litigating against management;
- paragraph 3 provides that a works council may agree to be given a budget out of which it must pay all or some of its expenses.

Paragraphs 1 and 3 rarely lead to disputes and are therefore not addressed in this article. Paragraph 2 provides that, in the absence of a budget covering the cost of hiring consultants and litigating, all such expenses are payable on the employer's account, with two provisos.

The first is that management must have been notified in advance of the works council's intention to engage a consultant. The idea behind this is that management – because of the sizeable costs usually involved – can object in advance, both to the necessity of engaging an expert and/or conducting legal proceedings and to the amount of the (estimated) costs. The law does not set any formal requirements for this notification, but from an evidentiary point of view it is always wise to put it in writing.

The second proviso is that management may object, in which case there is a procedure for determining whether the employer should bear the consultant's costs. This procedure involves seeking the advice of a conciliatory commission and, if that fails to settle the matter, taking legal proceedings in which the court determines whether, in all circumstances of the case, engaging the consultant is reasonably necessary for the works council to discharge its statutory duties.

It should be noted that the costs of legal proceedings can be divided into three categories: (1) the costs of legal assistance, (2) procedural costs such as court fees and the expense of hearing witnesses and experts and, potentially, (3) an award for the opposing party's legal expenses in the event the opposing party (i.e. management) wins the case. Article 22(2) WCA relates only to the first two categories.

A difficulty that crops up regularly is that the works council wishes to hire work on the basis of an hourly rate and therefore cannot state in advance how much he will be charging for his services. For this reason, works councils frequently give management no more than a provisional estimate of the cost to be incurred. Another difficulty is that the procedure for determining who is to bear the consultant's costs in the event the employer objects to footing the bill, takes time and in many cases there is insufficient time to await the outcome. Sometimes a works council will find itself forced to go ahead and hire a consultant without knowing whether or not the employer will pay his fee, with the risk that if the court rules in favour of management, the members of the works council may (depending on the terms of their agreement with the consultant) be personally liable to pay the fee.

Recent case law

No Prior Notification of Anticipated Costs

In 2008, the management of Stichting Thuiszorg Nederland (STN), a non-profit provider of social services for elderly and disabled people, informed the works council of its intention to relocate one of STN's offices and sought the works council's advice on this proposal. The works council hired the services of an accountant for the purpose of assessing the necessity of the proposed relocation, as well as its financial impact. It informed management in an email of the fact that it had engaged an accountant. Management did not object to the accountant being engaged and merely asked the works council to issue its advice within two weeks. Because of this extremely short deadline, the accountant started immediately without prior notification of his likely costs. Strictly speaking, neither the works council nor the accountant acted in accordance with Article 22(2) WCA. Using this as an argument, STN refused to pay the accountant's fees. The County Court of Delft held that under the circumstances STN could blame neither the works council nor the accountant for failing to inform management of the anticipated cost in a (more) timely manner[3]. The circumstances included the fact that management:

- granted only a short deadline to the works council to issue its advice;
- knew that the accountant had been engaged;
- did not object to engaging the accountant as such;
- even after the accountant's estimated costs had become known, still did not object;
- without objecting to the amount, paid the accountant for his work from mid-April 2008 onwards; and
- did not sufficiently dispute that the accountant's fee was reasonable.

This judgment departs slightly from Article 22(2) WCA, but nevertheless does justice to its rationale. Management had the opportunity to object to the works council's desire to engage an accountant in the absence of a cost estimate. Instead of doing this, management simply raised the

time pressure for issuing the advice. Under these circumstances the works council could rely on management not to question the lack of prior notification of the expected costs. The judgment underlines the importance of management's making known in good time its objection to the expert's engagement and/or to the costs involved, in order to avoid "implied consent".

Although this judgment goes to show that the prior notification requirement of Article 22(2) WCA is not an ironclad rule, the outcome was less favourable for the lawyer engaged by STN's works council.[4] The lawyer had not given a prior cost estimate. A major difference, however, with the accountant was that the lawyer was not under extreme time pressure and in his case management had insisted on a prior cost estimate, and in fact, had even asked repeatedly for an estimate (to no avail). Under those circumstances, so the Court of The Hague held, the lawyer had no right to assume that STN had given him a "blank cheque". He should not have confronted management with a *fait accompli*. Contrary to what STN could have expected pursuant to the wording of Article 22(2) WCA, however, the court held that this did not mean that the cost of hiring the lawyer could not be charged to STN at all. In the court's view the purpose of Article 22(2) WCA was that management should pay the costs that under the given circumstances could be reasonably considered necessary in retrospect. It is debatable whether this ruling does justice to the purpose of Article 22 WCA, the second paragraph of which clearly stipulates that the costs of an expert can be charged to the company only if the latter has been notified of the expected costs in advance. Perhaps in this case it was also relevant that management had been notified in advance but did not object to the necessity of hiring a lawyer.

Objection to Cost Estimate

It is possible that management might not initially object, following prior notification of engagement of an expert and of his provisional cost estimate, but later on refuse to pay the costs of further advice. In such a situation, the court's appraisal would focus on the need for the additional services and no longer on the question whether consultation of the expert was reasonably necessary. Before embarking on his (additional) services, the expert engaged by the works council would be wise to first record in writing that management does not object to (additional) consultation and the costs involved. If the expert fails to do so and management objects to the costs, it could end badly for the expert and the works council members. The County Court of Venlo, for example, held that the fact that the works council and the expert had failed to heed management's objections to the amount of the quote submitted by the expert, meant that the costs would be borne by them.[5] In a case before the Court of Middelburg the expert, too, came off the worse.[6] The court held that under Article 22(2) WCA management was not required to pay the costs of legal assistance, because this was in violation of the law's purport, i.e. to avoid management later being confronted with unexpectedly high costs. Management had (unilaterally) made a budget available for each separate item of consultation, stating that if those amounts were inadequate, an application for additional funds was expected. No such new application came, nor did the works council contest the reasonableness of the budgets prior to incurring the costs. Instead, the lawyer confronted management with a fee statement amply exceeding the budget. Because in this case the works council did not have its own budget, as referred to in Article 22(3) WCA (because it had not agreed to having a budget of its own), the court (rightly) decided the dispute on the basis of Article 22(2) WCA. The court held that, by not notifying management in advance of the (substantial) budget excess, the lawyer and the works council had taken the deliberate risk that management would prove unwilling to increase the budget. In appraising whether the costs of the lawyer were reasonable, the court, basing its reasoning on the parliamentary history of the WCA, considered three criteria, namely (i) the importance and nature of the issue, (ii) the amount of the costs and (iii) the employer's financial position. As the company was going through a bad patch financially, the court found it understandable that management did not want to write the works council a blank cheque for those costs. Insofar as they exceeded the budget provided they were held to be for the lawyer's account.

Uncertainty about (Continued) Existence of Works Council

Clearly, the applicability of Article 22 WCA is subject to the condition that the works council (still) exists. The Court of Leeuwarden and the Court of Appeal of Leeuwarden held that this was no longer the case after the transfer of a concession for public (bus) transportation from BBA to Arriva.[7] In both instances the court held that the lawyer's claim no longer had a basis and that Arriva was not required to pay his fee. Neither court agreed with the lawyer that the change of concession constituted a transfer of undertaking as a result of which BBA's works council had also transferred to Arriva. The Court of Appeal referred to the ECJ's "Finnish bus" judgment[8], arguing that there was no question of a transfer of undertaking because Arriva had not acquired any tangible assets (such as buses) from BBA. The latter's works council had not transferred and had in fact ceased to exist on the date on which the concession was transferred. From the date of transfer of the concession the employees who had entered Arriva's service were represented by Arriva's works council. The Court and the Court of Appeal were of the firm opinion that, because the works council had ceased to exist, there was no basis in Dutch law for payment of the costs of legal assistance. In our opinion, both courts wrongly disregarded the fact that the former works council members – who ran the risk of being held personally liable for the lawyer's fees – had an employer/employee relationship with Arriva as well. Given that at the time the expert was engaged – i.e. prior to the transfer of the concession – they were entitled to rely on the expert's fees being costs that they had to incur for the works council (then still in place) to properly discharge its duties, it seems incorrect (i.e. incompatible with the principle of "good employership") that the members of the works council should have to pay the invoices. In our view Arriva should have honoured the lawyer's claim.

In an earlier dispute between Equant and its European Works Council, the Amsterdam Court of Appeal ruled differently. This court held that Equant would have to pay the costs of an expert hired by the EWC despite the fact that Equant had ceased to have a European Works Council.[9] The background of this dispute was the following. Pursuant to an agreement entered into in 1997, Global One had established a European Works Council, which called itself 'Global One European Employee Forum' (the 'EEF'). On 1 July 2001 Global One merged with Equant N.V., a subsidiary of France Telecom. In 2002 Equant terminated the 1997 agreement and announced that it would establish a European Works Council at the Equant level. France Telecom, however, objected to the establishment of a European Works Council at the Equant level because it wished to establish a European Works Council at the higher France Telecom level. The EEF in turn took the position that the 1997 agreement had not been terminated lawfully, that the EEF would continue to exist until a new European Works Council had been established and that Equant would have to honour its undertaking to seek the advice of the European Works Council. The court ruled that Equant's termination of the agreement was lawful and that Equant could not be forced to establish a European Works Council at the Equant

level, given that under the European Works Council Act, that obligation lay with France Telecom as the parent company. In the court's view the EEF still existed, but only for the purpose of finalising its activities, which – so the court held – could be understood to include the conduct of legal proceedings such as the one at issue. Equant, therefore, was ordered to pay the court fees and those of the expert engaged.

Client councils and school councils

Hospitals, nursing homes and other institutions in the field of health care must, as a rule, have two participation bodies, each with separate powers of co-determination: a works council to represent the interests of the staff and a client council for the purpose of representing the interests of the patients, inhabitants, etc. (the "clients"). Schools are exempted from the obligation to have a works council. Instead, they must have a school council whose members are elected by and among two groups, the staff and the parents/students.

As is the case with works councils, these client councils and school councils occasionally require legal assistance. There have been several court cases regarding the question who bears the cost of such assistance. One of these cases[10] concerned a lawyer who informed management of an institution that the client council had engaged him and that he would charge € 360 per hour. Management did not respond. Six weeks later the lawyer sent management an invoice. It specified the dates on which he had performed work for the client council as well as details of the services rendered. In a covering letter the lawyer explained that he could not predict how much more he would be invoicing, but that if the legal proceedings that he was pursuing were limited to one legal brief and one hearing, he anticipated that he would bill 50 - 70 more hours at an average rate of € 275. Management responded that it would pay neither the invoice already sent nor any future invoices. The court that adjudicated the dispute regarding the lawyer's fees held that the client council had had a reasonable need to consult a lawyer, that the lawyer had informed management in advance as specifically as he reasonably could how much his assistance would cost and that, therefore, management was under an obligation to pay the lawyer's fees.

Another case concerned a children's hospital where management had unilaterally replaced the existing client council with a new council because some of the existing council's members had resigned and the remainder were parents of **former** patients[11]. Management argued that the "old" council no longer represented the interests of the patients and therefore had to be replaced. The (members of) the old council challenged its replacement all the way up to the Supreme Court, clearly an expensive operation. Not only did these members lose the case in three instances, they were ordered to pay the legal fees out of their own pockets. A similar fate befell the members of the client council of a municipal health care institution that was replaced following a breach of trust between it and management[12].

Health care institutions and schools have tight budgets. Money that goes towards the legal expenses of a client or school council is money that cannot be spent on hospital beds, or school computers, etc. This fact gives management at least a psychological advantage in disputes over legal expenses, as the school council of Prinsehaghe School found out[13]. Although the outcome of this case was determined by a technicality, the court did observe that a school, despite its budgetary constraints, should reserve sufficient funds to allow its school council to enlist adequate legal assistance.

Survey

A survey among chairpersons and secretaries of works councils of listed companies, client councils and school councils revealed that the majority of the members of these participation bodies were unaware of the risk of personal liability for the cost of expert support. Most of the interviewed members of works councils said that this risk would not deter them from seeking legal assistance where necessary. Apparently they take for granted that their management, given the importance of a harmonious relationship with the works council, will not make an issue of the cost of expert support. Most of the interviewed members of client councils and school councils, on the other hand, observed that the risk of personal liability would certainly be a barrier to hiring an expert.

Conclusion and Recommendation

The ability of participation bodies to engage experts is crucial to the quality of co-determination in the Netherlands. It is important, therefore, that expert support to participation bodies is regulated in such a manner that their members are sufficiently confident to be able to enlist support if necessary for the proper discharge of their duties. However, a review of Article 22 WCA and of the case law based thereon reveals that the members of a participation body in some cases do run the risk of being held personally liable for those costs. Notably, the situation in which time pressure makes it impossible for them to inform management in advance of the expected costs and the situation in which costs turn out to be much higher than expected (because the advice involves more work than projected). Although neither problem can be solved by amending Article 22 WCA there are practical ways of minimizing or excluding the risk of personal liability in those cases.

However, in our opinion Article 22 WCA falls short in situations in which the works council's existence is uncertain. For example, in the event of a (supposed) transfer of undertaking in which it is not clear whether the works council has transferred to the acquiring company, or has ceased to exist. The rules in respect of client councils and school councils do not provide for this situation either.

Subject to the outcome of a possible follow-up survey, we feel that a new paragraph should be inserted in Article 22 WCA, to read as follows: *'The provisions contained in paragraphs 1 and 2 apply also in situations in which the members of a former works council have incurred costs in the execution of this body's duties, provided that when they incurred those costs there were still reasonable grounds for them to assume that the works council still existed at that time.'* A similar provision should be inserted in the laws relating to clients councils and school councils.

(Footnotes)

1 E.L.J. Bruyninckx and G.W. van der Voet are lawyers with AKD Rotterdam, where they are members of the specalisation group: Co-Determination Law. E.L.J. Bruyninckx is an EELA member. In addition, G.W. van der Voet is an Employment Law lecturer at Rotterdam Erasmus University (EUR).
2 Where reference is made to a works council this includes a central works council and the committees of a works council.
3 County Court of Delft, 24 April 2009, LJN BI9263.
4 Court of The Hague, 27 January 2010, LJN BL3893.
5 County Court Venlo, 15 July 2002, *JAR* 2002/272.
6 Court of Middelburg, 12 August 2008, LJN BK9710.
7 Court of Leeuwarden, 10 December 2008, LJN BG6737 and Court of Appeal of Leeuwarden, 25 August 2009, LJN BJ6301.
8 ECJ 25 January 2001, case C-172/99 (Liikenne).
9 Enterprise Chamber of the Court of Appeal of Amsterdam, 1 April 2004,

JAR 2004/110.

10 Amsterdam Court of Appeal 29 April 2010, LJN BM 3172.

11 Supreme Court 6 April 2010, *NJ* 2001, 35. Note: the Court of Appeal of The Hague 2 April 2008 LJN BC 8830 ruled differently that a cost award against the former client council was inappropriate, as the council lacked both legal personality and funds.

12 Court of Appeal The Hague 2 April 2008, LJN BC 8830.

13 Amsterdam Court of Appeal 17 July 2008, *JAR* 2008/239.

ECJ COURT WATCH

SUMMARIES BY PETER VAS NUNES

RULINGS

ECJ 4 March 2011 (order pursuant to Article 103(4) of the ECJ's Rules of Procedure), case C-258/10 *(Nicusor Grigore – v – Regia Nationala a Padurilor Romsilva)* **("Grigore")**, Romanian case (WORKING TIME)

Facts

Grigore was a forest warden in the employment of "Romsilva", a government agency. His employment contract provided, in line with the relevant collective agreement and with Romanian law, that his weekly working time consisted of 5 x 8 = 40 hours and that he was free to determine his exact working times. Initially he was charged with supervising one area of forest. Later on, a second area was added to his area of responsibility. He had the right to live in a government-owned house in the forest, free of charge, but declined to make use of this facility. Romanian law provides that forest wardens are personally liable for damage in the forest under their supervision, such as illegally cut trees or illegally hunted wildlife, which they have not reported immediately. This led Mr Grigore to allege that, although his contract obligated him to work no more than 40 hours per week, his liability effectively obligated him to work 24 hours per day, 7 days per week. Accordingly, he claimed payment for overtime, for working on weekends (and for housing costs).

National proceedings

The court of first instance considered that it was necessary, in order to reach a decision, to interpret the Working Time Directive 2003/88 (the "Directive"), in particular Article 2(1), which defines "working time" as "any period during which the worker is working, at the employer's disposal and carrying out his activities or duties, in accordance with national laws and/or practice". Accordingly, the court referred five questions to the ECJ. Question 1 asked whether time during which a forest warden is responsible for damage to the forest, regardless when such damage occurs, qualifies as "working time" within the meaning of the Directive. The second question was whether the answer is different in the situation where the forest warden has a house at his disposal in the forest. The third question was whether making a forest warden responsible in such a way that *de facto* he must work in excess of 40 hours per week is compatible with the Directive. Question 4 dealt with remuneration and question 5 was asked in the event of a negative answer to the first question.

ECJ's ruling

1. The ECJ starts off by explaining the objectives and the importance of the Directive's working times rules (§ 40-41).
2. The ECJ goes on to analyse the three elements of the definition of "working time" in the Directive: (i) the worker is working and (ii) at the employer's disposal and (iii) carrying out his activities or duties. It follows that time is either working time or not working time; there is no intermediate category and the intensity of the work is not relevant (§ 42-43).
3. "Working time" has an autonomous meaning, depending on objective circumstances and not on the interpretation given in the Member States. Moreover, the Directive does not allow for derogation from Article 2 (§ 44-45).
4. It is not clear from the facts submitted to the ECJ whether all three elements of the definition "working time" are present in the case of Mr Grigore. The Romanian government contends that Mr Grigore could carry out his duties within the contractual 40 hours per week. Mr Grigore denies that this was possible given his personal liability for damage to the area of forest under his supervision (§ 46-48).
5. The referring court will need to examine not only whether Mr Grigore was obligated to work in excess of 40 hours per week pursuant to his contract, the collective agreement and the Romanian laws on working time, but also the rules which in practice may have obligated him to do so, in other words, whether it was in reality possible for Mr Grigore to discharge his obligation to supervise his area of forest continuously within his contractual working time (§ 49-52).
6. The relevant criterion when assessing whether a certain period qualifies as "working time" is whether the employee has an obligation to be physically present at a location determined by the employer and to be available there for the performance of duties. Even though Mr Grigore was free to determine his working hours, the fact that he was responsible for the supervision of his area of forest is relevant. Therefore, the referring court will need to examine whether the need to discharge that responsibility is compatible with the Directive (§ 53-58).
7. The fact that a forest warden lives, or has the right to live, at his place of work is not relevant. Any time during which he is free to leave his place of work is not working time (§ 59-70).
8. Given the foregoing, Article 6 of the Directive precludes a situation in which an employee is obligated to work in excess of the daily or weekly limits provided in the Directive (§ 71-79).
9. Whether or not Mr Grigore is entitled to compensation depends not on the Directive but on national Romanian law (§ 80-84).
10. There is no need to answer the fifth question (§ 85-86).

Ruling

- Article 2(1) of the Directive is to be interpreted as meaning that a period during which a forest warden with a contractual eight-hour working day is responsible for supervising a certain area of forest qualifies as "working time" within the meaning of that provision, if the nature and extent of that supervision, combined with his responsibility, require his physical presence at work and if he is at his employer's disposal during such presence. It is up to the referring court to determine whether this is the case.
- The qualification of a period as "working time" does not depend on the availability of lodgings on site if such availability does not imply a requirement to be physically present at the work location. It is up to the referring court to determine whether this is the case.
- Article 6 of the Directive precludes, in principle, a situation in which a forest warden, even though his contract stipulates an 8-hour work day and a 40-hour week, is actually forced to work in excess of those limits. It is for the referring court to examine whether this is the case and, if so, whether Romania has exercised its options to derogate from Article 6.
- The employer's obligation to pay salary for periods during which a forest warden is responsible for supervising an area of forest depends solely on domestic law.

ECJ 10 March 2011, case C-379/09 *(Maurits Casteels – v – British Airways plc)* **("Casteels")**, Belgian case (FREE MOVEMENT)

Facts

In the course of his employment with British Airways (BA), the Belgian aircraft maintenance mechanic Mr Casteels was based in, successively, BA's establishments in Belgium (1974-1988), Germany (1988-1991),

France (1991-1996) and, again, Belgium (from 1996). In each country, he was affiliated to BA's local pension scheme. Thus, while he worked in Germany, he participated in BA's German pension scheme, pursuant to a German collective agreement. Many years later, he discovered that the time he worked in Germany did not count towards determining his retirement benefits. This was because the German pension scheme provided that someone who leaves the scheme following less than five years of membership does not accrue pension benefits but merely gets his own contributions to the scheme refunded.

National proceedings

Mr Casteels took BA to court in Belgium. He claimed the balance between the retirement benefits to which he was eligible according to BA and the benefits he would have received had his years of service in Germany counted towards determining those benefits. He based his claim on the EU's free movement rules, in particular Articles 48 and 45 TFEU (at that time: Articles 39 and 42 EC). Article 48 provides that the EU shall adopt such measures in the field of social security as are necessary to provide freedom of movement for workers, including aggregation of periods worked in different Member States. Article 45 is the general provision in respect of freedom of movement for workers within the EU.

The Court of Appeal that dealt with the case referred two questions to the ECJ. The first was whether Article 48 TFEU (Article 42 EC) has horizontal direct effect. The second question related to the compatibility with Article 45 TFEU (Article 39 EC) of a pension scheme that (i) fails to take into account years of service completed with the same employer in another Member State and (ii) treats the transfer of an employee to another Member State as a voluntary termination of his employment.

EJC's ruling

1. Article 48 TFEU does not lay down a legal rule. All it does is constitute a legal basis which allows the EU to adopt certain measures. Therefore, it cannot confer rights on individuals. In other words, it has no horizontal direct effect (§ 13-16).
2. Article 45 TFEU applies to a situation such as that at issue. It militates against any measure which, even though applicable without discrimination on grounds of nationality, is capable of hindering or rendering less attractive the exercise by EU nationals of fundamental freedoms (§ 19-22).
3. The German pension scheme at issue has the effect of placing workers such as Mr Casteels, by reason of the fact that they have exercised their right to free movement within the EU, at a disadvantage in comparison with BA's workers who have not exercised that right, for example if they have moved from one BA establishment to another within Germany. The prospect of such a disadvantage is liable to dissuade workers from accepting cross-border assignments (§ 23-29).
4. Since the pension scheme at issue constitutes an obstacle to the free movement of workers which is, in principle, prohibited by Article 45 TFEU, that scheme can be allowed only on condition that it is objectively justified. It is up to the Belgian court to determine whether this is the case, but the arguments advanced by BA in this regard are insufficient (§ 30-33).
5. On construction of BA's German pension scheme in accordance with Article 45 TFEU, Mr Casteels must be regarded as having been in BA's service from 1974 and as not having left BA when he moved to France (§ 34).

Ruling

- Article 48 TFEU has no horizontal direct effect.
- Article 45 TFEU precludes, in the context of the mandatory application of a collective labour agreement and for the determination of entitlement to pension benefits (i) non-inclusion of service years in different Member States and (ii) treating transfer to another Member State as leaving the employer.

ECJ 18 March 2011 (order pursuant to Article 104(3) of the ECJ's Rules of Procedure), case C-273/10 *(David Montoya Medina – v – Fondo de Garantía Salarial* and *Universidad de Alicante)* **("Medina")**, Spanish case (FIXED-TERM WORK)

Facts

Mr Montoya Medina was a professor at the University of Alicante. In the period 10 January 2006 – 29 April 2008 he had a fixed-term contract (*professor ayudante doctor*). Because of this, pursuant to Article 15 of the provincial decree regulating the terms of employment of university staff ("Article 15"), he was not eligible for the three-year length of service increments (*trienios*) to which professors with a permanent contract (*professor contratado doctor*) are entitled. He claimed monetary compensation for not being given the *trienios* he would have had, had he been in permanent employment. He based this claim on the Framework Agreement on Fixed-Term Work annexed to Directive 1999/70 (the "Framework Agreement"), Clause 4(1) of which provides, "In respect of employment conditions, fixed-term workers shall not be treated in a less favourable manner than comparable permanent workers solely because they have a fixed-term contract or relation unless different treatment is justified on objective grounds.

National proceedings

The court of first instance found in the plaintiff's favour, finding that there was no objective justification for the difference in treatment between permanent and fixed-term professors, given that they performed the same sort of work and had the same qualification (PhD). The university appealed and the Court of Appeal referred to the ECJ a question on the compatibility of Article 15 with the Framework Agreement.

ECJ's ruling

1. The ECJ begins by stating that it will apply Article 104(3) of its Rules of Procedure, which allows it to rule on a matter without following the normal procedure in the event a referred question has already been answered in a previous case or where the answer can easily be deduced from the ECJ's case law. In the present case, the answer to the question can be easily deduced from the ECJ's rulings in the cases *Cerro Alonso* (C-307/05), *Impact* (C-268/06) and *Gaviero* (C-444 and 456/09) *[see EELC 2011-1 page 36]* (§ 24-25).
2. The Framework Agreement applies to employees in both private and public service, such as a provincial university (§ 26-28).
3. Given the objective of the Framework Agreement, it must not be interpreted restrictively. It is clear that Clause 4(1) applies to a situation such as the one at issue (§ 29-34).
4. The university alleges that permanent and fixed-term professors form two clearly different categories, with different duties, methods of recruitment and terms of employment that are not limited to the *trienios*. The question is whether these differences make permanent and fixed-term professors not "comparable" within the meaning of Clause 3(2) of the Framework Agreement, which provides that "the term 'comparable permanent worker' means a worker [...] engaged in the same or similar work/occupation, due regard being given to qualifications/skills" (§ 35-36).
5. In order to ascertain whether workers are engaged in the same or similar work, a court must examine whether they must be

considered to be in a comparable situation, taking into account all relevant factors, such as the nature of their work, their academic terms and their working conditions (see *Wiener Gebietskrankenkasse,* case C-309/97). According to the referring court the statutes governing permanent and fixed-term professors are based on the same academic qualifications (PhD), a similar professional experience (three or two years of experience) and duties in both cases consisting of lecturing and research. Although it is up to the referring court to establish whether permanent and fixed-term professors are "comparable" in respect of the *trienios*. This would seem to be the case (§ 37-39).

6. A difference in treatment may only be justified by specific and relevant circumstances. A national and abstract criterion is insufficient. The mere fact that a contract is of a temporary nature cannot justify such a difference in treatment, as that would make the Framework Agreement almost meaningless. It is up to the national courts to determine whether the arguments advanced by the university constitute sufficient justification (§ 45-45).
7. Finally, the ECJ recalls that Clause 4(1) of the Framework Agreement is unconditional and sufficiently precise for it to be invoked by individuals against a governmental entity (§ 46).

Ruling

Clause 4(1) of the Framework Agreement must be interpreted as precluding national legislation which, absent objective justification, reserves the right to *trienios* to professors with a permanent contract.

ECJ 7 April 2011 (order pursuant to Article 104(3) of the ECJ's Rules of Procedure), case C-151/10 *(Dai Cugini NV – v – Rijksdienst voor Sociale Zekerheid)* **("Dai Cugini")**, Belgian case (PART-TIME WORK)

Facts

Dai Cugini is the name of a restaurant. In 2003 it was inspected by the Belgian Social Insurance Authority *Rijksdienst voor Sociale Zekerheid* (RSZ). It found that the restaurant violated certain rules in respect of four of its employees. These rules included an obligation to maintain in its place of business, for inspection purposes, a signed copy of the employment contracts of all its employees, specifying their working times and, in the event of variable working time, their working times for the coming five working days, such specifications to be kept on file for no less than one year. Article 22ter of an Act dated 27 June 1969 ("Article 22ter") provided that absence of the documents evidencing compliance with these obligations shall create a rebuttable presumption that any employees classified as part-time employees are in fact employed on a full-time basis. Accordingly, the RSZ re-assessed the restaurant's social insurance contributions and demanded payment of additional contributions. Dai Cugini objected and applied to the court.

National proceedings

The court of first instance found in favour of the RSZ. Dai Cugini appealed, offering to produce evidence that the four employees in question were truly part-time workers.

The Court of Appeal, although noting that the presumption pursuant to Article 22ter was not relevant in this case, nevertheless referred questions to the ECJ. It did so because Dai Cugini argued that the Belgian legislation burdens employers of part-time staff with such detailed administrative rules, breach whereof is so heavily penalised, that it is incompatible with Directive 97/81 implementing the Framework Agreement on Part-Time Work (the "Framework Agreement"), in particular Clause 5(1)(a) of that Agreement, which provides that the Member States, in the context of the principle of non-discrimination between part-time and full-time workers, shall "identify and review obstacles of a legal or administrative nature which can limit the opportunities for part-time work and, where appropriate, eliminate them".

ECJ's ruling

1. The ECJ declared the questions to be receivable (§ 23-31).
2. The ECJ's ruling focuses mainly, not on Clause 5(1)(a) but on Clause 4 of the Framework Agreement, which provides that "part-time workers shall not be treated in a less favourable manner than comparable full-time workers solely because they work part time unless different treatment is justified on objective grounds". This prohibition merely gives expression to the general principle of non-discrimination, which forms part of the EU's fundamental principles and which may therefore not be construed restrictively (§ 33-36).
3. It is the national court's prerogative to determine whether a rule of domestic law leads to less favourable treatment of part-time workers as compared to comparable full-time workers (§ 37-40).
4. The Belgian government argues that, in order to determine whether part-time workers such as those at issue are comparable to full-time workers, it is necessary to distinguish between workers with a fixed working schedule and those with variable working hours. Within the former category, part-timers are not comparable to full-time workers, who can work overtime but cannot deviate from their schedule. As for workers with variable working hours, Belgian law makes no distinction between full-time and part-time workers. Given these distinctions, the referring court will need (i) to compare full-time workers with fixed working hours to part-time workers with fixed working hours and (ii) to compare full-time workers with variable working hours with part-time workers with variable working hours. If such a comparison evidences less favourable treatment of part-time workers, then that treatment constitutes differential treatment. However, it may still be compatible with Clause 4 if it is objectively justified (§ 41-46).
5. The referring court observes that the administrative rules in question are aimed at combating illegal work. The Belgian government points out that those rules aim primarily at promoting "flexicurity". Both objectives can justify the differential treatment of full-time and part-time employees at issue, provided they meet the proportionality test. It is up to the national courts to determine whether this is the case (§ 42-52).
6. If the national rules at issue are incompatible with Clause 4 of the Framework Agreement, they are also incompatible with Clause 5(1).

Ruling

Clause 4 of the Framework Agreement on Part-Time Work does not prohibit national legislation that obligates employers to maintain for inspection the employment contracts and work schedules of part-time workers if that legislation does not cause part-time workers to be treated less favourably than full-time workers in a comparable situation or if such difference in treatment is objectively justified. It is for the national courts to determine whether this is the case. If those courts find the legislation to be incompatible with Clause 4 then it is also incompatible with Clause 5.

ECJ 7 April 2011 (order pursuant to Article 104(3) of the ECJ's Rules of Procedure), case C-519/09 *(Dieter May – v – AOK Rheinland Hamburg – Die Gesundheitskasse)* **("May")**, German case (HEALTH AND SAFETY)

Facts

Mr May was employed by the semi-governmental organisation AOK, a regional social insurance (health) authority, from 1966 until 31 March 2009. His terms of employment were regulated by a public law, which provided that paid leave that is unused upon termination of the employment relationship is forfeited. Owing to long-term sickness he was unable to take up his full paid leave, as a result of which he lost 39 days of paid leave (11 accrued in 2006 and 28 in 2007). He claimed payment for those 39 days.

National proceedings

The court of first instance was unsure whether the provision at issue is compatible with Article 7 of the Working Time Directive 2003/88, given that Mr May had a status comparable to that of a civil servant. It therefore referred to the ECJ a question on the meaning of "worker" in said Article 7.

EJC's ruling

1. Article 1(3) of Directive 2003/88 and Article 2(1) of the Framework Directive 89/391 on safety and health in employment, on which Directive 2003/88 is based, both provide that those directives shall apply to "all sectors of activity, both public and private" (§ 18).
2. The ECJ has previously defined the concept of "worker" in Directive 89/391 broadly (§ 19).
3. The concept of "worker" in Article 45 TFEU (on free movement) has an autonomous meaning (§ 21).
4. It is therefore clear that Mr May is a worker in the meaning of Directive 2003/88 (§ 23).
5. For this reason, the ECJ can rule on the case on the basis of Article 104(3) of its Rules of Procedure, i.e. without having to go through the regular procedure (§ 15-16).

Ruling

The term "worker" in Article 7 of Directive 2003/88 includes a person employed by a public authority in the field of social insurance whose terms of employment are governed by the rules for civil servants.

ECJ 10 May 2011 (Grand Chamber), case C-147/08 *(Jürgen Römer – v – Freie und Hansestadt Hamburg)* **("Römer")**, German case, *[see EELC 2010-5 page 44 for Advocate General Jääskinen's opinion]* (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 2001, 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 were:

1. whether the pension in question qualifies as a "state scheme" as provided in Article 3(3) of the Directive, under which "payments of any kind made by state schemes or similar, including state social security or social protection schemes" are excluded from the Directive's scope;
2. if not, whether the pension is exempted from the scope of the Directive pursuant to its recital clause 22, 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.

ECJ's ruling

Questions 1 and 2

1. The ECJ referred to its ruling in *Maruko* (case C-267/06), in which it held that only social benefits that do not qualify as "pay" within the meaning of Article 157 TFEU are excluded from the Directive's scope. A supplementary pension scheme qualifies as "pay", notwithstanding recital clause 22 (§ 29-36).

Questions 3 and 7

2. The ECJ begins by pointing out that, although legislation on marital status falls within the competence of the Member States, the purpose of the Directive is to combat discrimination (§ 38).
3. Direct discrimination occurs where one person is treated less favourably than another who is in a comparable situation. This presupposes, first, that the situations being weighed up are comparable. As noted in *Maruko*, it is required not that the situations be identical, but only that they be comparable, and the assessment of that comparability must be carried out not in a global and abstract manner, but in a specific and concrete manner in the light of the benefit concerned. In *Maruko*, the ECJ held that registered life partnership under German law is to be treated as equivalent to marriage as regards the widow's or widower's pension (§ 39-42).
4. According to the referring court, there is no significant legal difference between marriage and registered life partnership as understood in German law. The main remaining difference is the

fact that marriage presupposes that the spouses are of different gender, whereas registered life partnership presupposes that the partners are of the same gender (§ 43-45).

5. The benefit at issue in *Maruko* was a survivor's pension. The benefit at issue in this case is a supplementary retirement pension. The Hamburg City's pension scheme aims to provide, on retirement, a replacement income which is deemed to benefit the recipient, but also, indirectly, the persons who live with him. Both married couples and life partners have duties towards each other to support and care for one another and to contribute adequately to the common needs of the partnership. In light of these circumstances, the situations at issue could be comparable (§ 46-48).
6. Mr Römer's retirement pension would have been increased if he had married instead of entering into a registered life partnership with a man. That more favourable treatment would not have been linked to his wife's income or to the existence of children. Furthermore, Mr Römer's contributions to the pension scheme were not in any way based on his marital status, since he was required to make the same contributions as his married colleagues (§ 49-51).
7. Accordingly, the Directive precludes national law under which a pensioner with a registered life partner receives lower retirement benefits than those granted to a married, not permanently separated, pensioner if (i) in the Member State marriage is reserved to persons of different gender and exists alongside a registered life partnership which is reserved for persons of the same gender and (ii) there is direct discrimination on the grounds of sexual orientation because that life partner is in a legal and factual situation comparable to that of a married person as regards that pension, which it is for the referring court to determine (§ 52).

Question 5

8. If the Tax Provision is discriminatory, Mr Römer can claim the right to equal treatment against the pension fund without needing to wait for the legislature to make the Tax Provision consistent with the Directive. Did this right already exist between 15 October 2001 (registration of life partnership) and 2 December 2003 (transposition deadline)? In *Mangold* and *Kücükdeveci* the ECJ held that the Directive does not in itself lay down the principle of equal treatment in employment, which derives from various international instruments and from constitutional traditions. Nonetheless, for the non-discrimination principle to apply in a case such as that of Mr Römer, that case must fall within the scope of EU law (§ 54-60).
9. Neither Article 13 FFEU, on which the Directive is based, nor the Directive itself enables a situation such as that at issue to be brought within the scope of EU law in respect of the period before 2 December 2003 (see, by analogy, *Bartsch,* case C-427/06). Moreover, the Tax Provision is not a measure implementing the Directive or other provisions of EU law. Therefore, if the Tax Provision is discriminatory, Mr Römer can only claim equal treatment from 3 December 2003 (§ 61-64). [*Note: this part of the ruling goes against the Advocate General's opinion*].

Questions 5 and 6

10. In view of the answers to Questions 3 and 5 there is no need to answer Question 4.
11. Given that the main proceedings relate to pension paid from 1 November 2001, the *Barber* ruling has no bearing on this case.

Ruling

- The supplementary pensions at issue constitute "pay" within the meaning of Article 157 TFEU and do not fall outside the material scope of the Directive.
- The Directive precludes national law such as the Tax Provision if certain conditions are satisfied (see above).
- If the Tax Provision is discriminatory, Mr Römer can claim equal treatment under the Directive, but not for the period before 3 December 2003.

ECJ 19 May 2011, joined cases C-256/10 and **C-261/10** *(David Barcenilla Fernández and Pedro Antonio Macedo Lozano – v – Gerardo García SL)* **("Fernández")**, Spanish case (HEALTH & SAFETY)

Facts

Fernández and Macedo Lozano operated a stone-cutting machine in a company that produced stone materials from natural stone. The noise level at their place of work exceeded a daily average of 85dB, which is in excess of the level allowed by Directive 2003/10 on the minimum health and safety requirements regarding the exposure of workers to the risks arising from physical agents (noise) (the "Directive"). Their employer provided them with individual hearing protection equipment, thanks to which their noise exposure level dropped to below 80dB. That is the level below which an employer need take no noise prevention measures.

The employment contracts of Fernández and Macedo Lozano were governed by a collective agreement. It provided that *"Persons who work in conditions that are particularly arduous, toxic or dangerous are entitled to receive an extra payment corresponding to 20% of their basic salary"*.

National proceedings

Fernández and Macedo Lozano claimed the 20% extra payment on the basis that they were exposed to a noise level exceeding a daily average of 85dB. Their employer argued that they were not exposed to noise above 80dB. The court of first instance accepted this defence and dismissed the claim. On appeal, the Court of Appeal referred three questions to the ECJ.

The referring court stated that the dismissal of the claim by the court of first instance was consistent with recent case-law of the Spanish Supreme Court, according to which the noise-attenuating effect of individual hearing protection equipment must be taken into account when determining whether a worker is exposed to arduous conditions at his work station. That case-law, interpreting the concept of "arduousness" in the light of the Directive and of the Spanish law transposing it, infers from that legislation that it is intended to protect workers against health risks connected with actual exposure to noise. It follows that, in the Supreme Court's view, there is no arduousness where individual hearing protection equipment allows reduction of the noise reaching the ear to a level of under 80dB.

The referring court was unsure whether the Supreme Court's view is in line with the Directive, which stresses the importance of reducing noise levels at source and provides for hearing protection equipment only as a last resort. The court reasoned that it would undermine the Directive's effectiveness if an employer could escape from the obligation to make the 20% extra payment under the collective agreement simply by making hearing protection equipment available, even in situations where reduction of noise at source is possible.

EJC's ruling

1. The ECJ begins by setting out the employer's obligations under the Directive and, in particular, the hierarchy between those obligations (§ 22-32).
2. If follows from that hierarchy that an employer cannot fulfil its

obligations under the Directive by simply providing its workers with individual hearing protectors in order to reduce their noise level exposure (§ 33).
3. The Spanish Supreme Court's restrictive interpretation of the Directive would undermine the Directive's effectiveness (§ 36-37).
4. Although the Directive does not deal with payments and therefore does not require that failure by an employer to comply with its preventive obligations should be penalised by the obligation to make extra payments, such an obligation does fall within the Directive's objective of protecting workers' health. The Member States' freedom to choose the ways and means of ensuring that directives are implemented does not affect their obligation to ensure that the Directive is fully effective and that individuals can rely on the Directive before the national courts. It follows that national law must be interpreted so as to enable workers to effectively require their employers to comply with the preventive obligations under the Directive (§ 38-42).

Ruling

- The Directive must be interpreted as meaning that an employer in a company in which the workers' daily noise exposure level exceeds 85dB, measured without taking account of the effect of individual hearing protectors, fails to fulfil its obligations by simply providing the workers with such protectors.
- The Directive does not require an employer to make an extra payment to workers who are exposed to a noise level above 85dB, measured without taking account of the effect of individual hearing protectors. However, national law must provide appropriate mechanisms to ensure that such workers can require the employer to take preventive measures.

OPINIONS

Opinion of Advocate-General Bot of 13 January 2011, case C-388/09 *(Joao Filipe da Silva Martins – v – Bank Betriebskrankenkasse – Pflegekasse)* **("Da Silva Martins")**, German case (SOCIAL INSURANCE)

Facts

Regulation 1408/71 (the "Regulation") was adopted in 1971 with a view to coordinating the different national social insurance schemes in order to promote cross-border mobility. At that time it was common for elderly and disabled people requiring personal assistance in respect of hygiene, meals, mobility, household chores, etc. to be taken care of, for example, by relatives and neighbours. The provision of such personal assistance was not covered by compulsory social insurance in any of the Member States. As increasing numbers of elderly people came to lack assistance by relatives, neighbours, etc., some Member States introduced new forms of compulsory social insurance to cover this need. Germany did so in 1995. In that year it introduced the Personal Assistance Insurance Act (*Pflegeversicherungsgesetz*). Employers, employees and retired employees pay a contribution to a health insurance institution (*Krankenkasse*). An employee or former employee who has been insured for a certain minimum period (formerly five years, now two years) and who requires personal assistance is eligible to receive certain monthly payments with which he can purchase any personal assistance he wishes. At the time relevant in this case the "class I" benefits (for those requiring the least intensive assistance) amounted to € 205 per month.

Because such types of social insurance did not exist in 1971, Regulation 1408/71 does not coordinate the Member States' rules in respect of personal assistance insurance schemes. However, in *Molenaar* (case C-160/96) and *Jauch* (case C-215/99) the ECJ qualified personal assistance benefits as sickness benefits within the meaning of Article 4(1)(a) of the Regulation, thereby in effect expanding the Regulation's scope. The new Regulation 883/2004, which replaced the Regulation on 1 May 2010, does cover personal assistance insurance, but it was not yet in place at the time of the dispute in this case.

Mr Da Silva Martins was a Portuguese national who went to work in Germany. He paid personal assistance contributions from 1 January 1995, the date on which the Personal Assistance Insurance Act took effect. He retired in September 1996 and was granted German retirement benefits in the amount of approximately € 700 per month. As a retiree living in Germany, Mr Da Silva Martins remained compulsorily insured under the Personal Assistance Insurance Act. Accordingly, when in August 2001 he began requiring personal assistance, he was awarded class I personal assistance benefits, in the amount of approximately € 205 per month. As from May 2000, he also received Portuguese retirement benefits, in the amount of approximately € 150 per month. Thus, he was in receipt of three state benefits: German retirement benefits, Portuguese retirement benefits and German personal assistance benefits.

In December 2001 Mr Da Silva Martins returned to Portugal. Initially his return was intended to be temporary, but as from 31 July 2002 it became permanent and he deregistered as an inhabitant of Germany. When the relevant German insurance institution, the "BBKK", found this out in February 2003, it stopped paying Mr Da Silva Martins personal assistance benefits and demanded repayment of the benefits paid in the period August-December 2002. This decision was based on provisions in the Personal Assistance Insurance Act to the effect that a retiree who ceases to be an inhabitant of Germany ceases to be compulsorily insured and therefore loses his entitlement to the benefits under the Act unless he continues to be insured on a voluntary basis. Applications for voluntary insurance must be submitted within three months following the cessation of the compulsory insurance. Also, the entitlement to personal assistance benefits is suspended during temporary residence abroad.

National proceedings

Mr Da Silva Martins applied to the social insurance court (*Sozialgericht*) in Frankfurt. It struck down the BBKK's decision, holding that Mr Da Silva Martins had continued to be insured beyond 31 July 2012 on a voluntary basis. However, on appeal this judgment was largely overturned. Mr Da Silva Martins appealed to the Federal Social Insurance Court (*Bundessozialgericht)*, which referred questions to the ECJ. The questions relate to Articles 39 and 42 EC on free movement and to Articles 27 and 28 of the Regulation and whether they override Article 15(2), which provides that, where application of the law of two or more Member States entails overlapping of insurance under a compulsory insurance scheme and one or more voluntary or optional continued insurance scheme, the person concerned shall be subject exclusively to the compulsory insurance scheme.

Opinion

1. It is unclear from the – contradictory – facts in the file whether Mr Da Silva Martins was eligible to receive Portuguese benefits covering the need to purchase personal assistance. The Advocate-General assumes, for the purpose of his opinion, that this is not the case (§ 45-50).
2. Articles 27 and 28 of the Regulation deal with retirees who receive

retirement benefits from more than one Member state. Article 27 does not cover a situation such as that of Mr Da Silva Martins. Article 28 provides that a retiree who is entitled to retirement benefits from two or more Member States and who lives in a Member State in which he is not eligible to receive sickness benefits, is nevertheless entitled to receive sickness benefits from one of the Member States in question if he would have been so entitled had he lived in the other Member State. In the present case, Mr Da Silva Martins satisfies the conditions for receipt of personal assistance benefits under German law. Therefore, given that he is not eligible to receive similar benefits under Portuguese law, Article 28 would, in principle, entitle him to continued receipt of German personal assistance benefits. The question is whether Article 15(2) of the Regulation stands in the way (§ 51-56).

3. The main principle under the Regulation, as formulated in Article 13(1), is that persons to whom the Regulation applies shall be subject to the legislation of a single Member State only. However, there is an exception in respect of voluntary insurance. This is provided in Articles 9(1) and 15(1). Article 9(1) reads:

   "The provisions of the legislation of any Member State which make admission to voluntary or optional continued insurance conditional upon residence in the territory of that State shall not apply to persons resident in the territory of another Member State, provided that at some time in their past working life they were subject to the legislation of the first State as employed or as self-employed persons."

   Article 15(1) provides that Article 13 shall not apply to voluntary or to optional insurance unless there exists in any Member State only a voluntary scheme of insurance. Articles 9(1) and 15(1) clearly indicate that an employee who is insured compulsorily in one Member State can be insured voluntarily in another Member State (§ 57-63).

4. Article 15(2) does not apply. It deals with a different situation and merely aims to avoid a person having to pay twice for the same benefits, once under the compulsory scheme of one Member State and once under the voluntary scheme of another State. The conclusion is that Mr Da Silva Martins had the right to continue his voluntary German insurance despite being compulsorily insured under the Portuguese social insurance laws (§ 64-65).
5. However, is it possible to export the German benefits to Portugal, given the provision under the German Personal Assistance Insurance Act ("Article 34(1)") that the entitlement to personal assistance benefits is suspended as long as the beneficiary lives abroad permanently? Article 34(1) must be read in the light of *Molenaar*, in which judgment the ECJ held Article 34(1) to be in breach of Article 28 (1)(b) of the Regulation. It follows that Mr Da Silva Martins can continue his voluntary personal assistance insurance coverage and can claim payment of the benefits under that insurance scheme (§ 66-74).
6. In addition to the foregoing, the position taken by the German government would mean that the right to free movement in the EU is affected, that Mr Da Silva Martins would have paid contributions towards an insurance scheme from which he would never be able to collect benefits and that he would be treated less favourably than someone in a similar position who remained in Germany (§ 76-81).

Conclusion

A migrating former worker who is compulsorily insured under the social insurance laws of the Member State in which he lives has the right to continue voluntary personal assistance insurance in the Member State where he formerly worked in the event that the risk covered by such personal assistance insurance did not arise in the Member State where he lives.

Opinion of Advocate-General Bot of 5 April 2011, case C-108/10 *(Ivana Scattolon – v – Ministerio dell' Instruzione, dell' Università et della Ricerca)* **("Scattolon")**, Italian case (TRANSFER OF UNDERTAKING)

Facts

Ms Scattolon was a concierge in a state-run school in the Italian town Scorzè. Until 31 December 1999 she was employed by the Scorzè town council, not as a civil servant but as a regular employee. Her terms of employment were based on the collective agreement for employees of town councils and other local authorities (the "Collective Agreement for Local Government"). This collective agreement made salary dependent on (i) the employee's position and (ii) certain supplements. Salary was not influenced by seniority, i.e. employees did not earn more by being employed for a longer period of time.

In Italy, state schools are operated and financed by central government. However, until 2000, certain support services, such as cleaning, maintenance and concierge supervision ("ATH services") were not always performed by employees in the service of central government. In some schools, the "ATH staff" were employed by central government, but in other schools, such as the one Ms Scattolon worked in, central government had outsourced these services to the local or provincial council. The terms of employment of the ATH staff in the employment of central government were governed by a collective agreement for schools (the "Collective Agreement for Schools"). Their salary was largely dependent on seniority. In other words, until 2000 there were two groups of ATH staff in Italian State schools: one group whose terms of employment were governed by the Collective Agreement for Local Government and whose salaries were not determined by reference to seniority and another group whose terms of employment were governed by the Collective Agreement for Schools and whose salaries were determined by reference to their seniority.

In 1999 Parliament passed a law ("Law 123/99") pursuant to which all ATH staff employed by local government transferred into the employment of central government with effect from 1 January 2000. Secondary legislation specified the details of this transfer, one of which was that henceforth the ATH staff who were transferred were governed by the Collective Agreement for Schools. How to calculate their salary under that collective agreement? This was done, not by reference to their actual seniority (which would in Ms Scattolon's case have yielded a higher salary than she previously earned), but by placing them on the salary level that corresponded most closely to their former salary. This led to a great deal of litigation. In 2005 the Supreme Court interpreted Law 124/99 in favour of the plaintiffs, which meant that they had to be paid the same salary as their equally senior colleagues who had always been employees of central government. Simply put: they got a salary increase. This was apparently not what Parliament had intended. In December 2005 it passed an Act, Article 1(218) of which provided that Law 123/99 was to be interpreted as meaning that the ATH staff who had come across from local government were not entitled to more salary than they earned on 31 December 1999. The Constitutional Court initially found this to be illegal retro-active legislation, but in 2009 it reversed this finding and declared Article 1(218) to be constitutional.

National proceedings

In 2005, following the said Supreme Court judgment, Ms Scattolon applied to the local court in Venice demanding to be paid according to the Collective Agreement for Schools on the basis of her full seniority,

i.e. her seniority accrued in the service of both local and central government. The court referred four questions to the ECJ. Question 1 essentially asked whether the transfer of staff from local government to central government qualifies as a transfer of undertaking within the meaning of Directive 77/187 (currently Directive 2001/23) (the "Directive"). Questions 2 and 3 essentially asked whether employees who transfer within the meaning of that Directive retain their seniority. Question 4 essentially asked whether Article 1(218) is compatible with the European Convention on Human Rights and the EU's Charter of Fundamental Rights.

Opinion

1. (Question 1). In *Henke* (C-298/94) the ECJ ruled that the reorganisation of a governmental body or the transfer of governmental tasks between governmental bodies does not constitute a transfer of undertaking within the meaning of the Directive. In view of the circumstances of that case and the wording of the ruling, the reason that the ECJ did not find there to be a transfer of undertaking was not because the entities in question were governmental entities but because the activities in question were of a governmental nature. In the case of Ms Scattolon, the ATH-UGT activities that went across were of a purely commercial nature. There is no reason why such a transaction should not qualify as a transfer of undertaking. In the recent cases of *UGT-FSP* (C-151/09) and *CLECE* (C-463/09), the ECJ found that the transfer of similar services from a private company to a public entity fell within the scope of the Directive (§ 46-55).
2. The Directive applies whenever, in the context of a contractual relation, there is a change in the person or entity that is responsible for the undertaking and has employer's obligations in respect of the employees working in that undertaking. The case law in which this was established applies equally to situations where the transfer is imposed on an organisation by law: see *Collino* (C-343/98) (§ 57-59).
3. A group of employees who perform ATH-activities can constitute an economic entity. The ATH staff in question were not civil servants, they were regular employees. In summary, the transfer of the ATH staff from local government to central government falls within the scope of the Directive (§ 60-68).
4. (Questions 2 and 3). This dispute arose as a result of two contradictory laws. Law 124/99, as interpreted by the Italian Supreme Court, provided that the transferred staff's salaries were to be determined by reference to their seniority. Article 1(218) of a law enacted later provided that their salaries were to equal the salary they earned immediately before the transfer. Article 3(2) of Directive 77/187 (i.e. Article 3(3) of Directive 2001/23) provides that the transferee shall continue to observe the terms and conditions agreed in any collective agreement until the application of another collective agreement: see *Juuri* (C-396/07). It follows that a transferee is not under an obligation to continue to apply the transferor's collective agreement (§ 69-81).
5. In *Collino* the ECJ held that seniority is not in itself a right that goes across following a transfer of undertaking, but that rights based on seniority do go across. Thus, for the purpose of calculating rights of a monetary nature, such as the right to severance compensation or to salary rises, a transferee must take into account the employees' aggregated seniority. However, a transferee may amend the transferred employees' terms of employment following the transfer if domestic law so allows, as long as the transfer is not the reason for the amendment (§ 83-88).
6. The Directive's objective is to avoid deterioration of transferred staff's terms of employment. It is not to entitle them to the same terms as the transferee's own staff. Therefore, the ATH staff who transferred from local government to central government only have the right to salary based on their full seniority if (i) their former salary was based on seniority and (ii) the transferee has not validly amended that right. Ms Scattolon did not satisfy condition (i), given that the Collective Agreement for Local Government did not determine salary on the basis of seniority (§ 89-93).
7. The Directive does not outlaw differences of salary between the transferee's "own" staff and incoming transferred staff. Admittedly, the ECJ's ruling in *Delahaye* (C-425/02) throws doubt on this, but inasmuch as the ECJ's reasoning in *Collino* and *Delahaye* may have been contradictory, its reasoning in *Collino* should prevail (§ 94-102).
8. In summary, in a situation such as that of Ms Scattolon, in which her salary was not principally determined on the basis of seniority, and in which her terms of employment become governed by the transferee's collective agreement under which salaries are determined by seniority, the Directive does not require the transferee to take her full seniority into account when calculating her salary, even if its collective agreement provides that salary is based on seniority (§ 103).
9. (Question 4). Articles 6 and 13 of the European Convention on Human Rights and Article 47 of the EU Charter of Fundamental Rights guarantee the right to an effective remedy and a fair trial. Does the ECJ have the right to rule on whether Article 1(218) is compatible with these provisions? The Advocate-General answers in the affirmative (§ 104-121).
10. Article 47 of the Charter is to be interpreted in the same way as the European Court of Human Rights interprets Article 6(1) of the ECHR. This implies that the ECJ must examine, first, whether the Italian Parliament interfered with pending court proceedings and, then, if this is the case, whether parliament had a compelling reason of public policy justifying its interference (§ 122-126).
11. In this case there was interference by Parliament in pending proceedings (§ 127-131).
12. If it was Parliament's intention in 1999 that the integration of the terms of employment of the two groups of ATH staff – those employed by local government and those employed by central government – should be cost-neutral, then Parliament's interference may have been justified. This is for the national courts to determine (§ 133-143).

Conclusion

- The Directive applies to the transfer of ATH-employees from local to central government.
- In a situation such as the one at issue, in which the transferor's collective agreement does not determine salary principally on the basis of seniority but the transferee's collective agreement does do so, the Directive does not obligate the transferee to pay the transferred employees on the basis of their full seniority.
- Article 47 of the Charter does not preclude legislation such as Article 1(218), provided that the Italian government demonstrates that the intention of Article 1(218) was to integrate the salaries of the two groups of ATH staff on a cost-neutral basis.

Opinion of Advocate-General Sharpston of 12 May 2011, case C-177/10 *(Francisco Javier Rosado Santana – v – Consejería de Justicia y Administración Pública de la Junta de Andalucía)* **("Santana")**, Spanish case (FIXED-TERM WORK)

Facts

Mr Rosado Santana was employed by the provincial Ministry of Justice on a fixed-term basis for 16 years (1989-2005). In 2005 he became a "career" (i.e. permanent) civil servant under a contract of indefinite

duration. In December 2007 the Ministry announced that selection tests would be held under the internal promotion system (the "competition notice"). The competition notice stated that candidates were to meet certain requirements, one of which – the only one relevant in this case – was to have 10 years' service as a career civil servant at a certain level (the "disputed criterion"). Despite not satisfying this requirement (Mr Rosado Santana had only been a career civil servant for two years, not ten), he was allowed to sit for the exam. He passed it and his name was included on the list of successful candidates for promotion. However, when he applied for a promotion, his classification as a successful candidate was annulled (the "decision at issue") on the ground that he did not satisfy the disputed criterion, given that his period as a fixed-term worker was not taken into account in determining whether that criterion had been met. Mr Rosado Santana brought proceedings, challenging the disputed criterion.

National proceedings

The court to which Mr Rosado Santana applied referred five questions to the ECJ. Questions 2, 3 and 4 essentially ask the ECJ to rule on the applicability to the facts of this case, and the interpretation of Clause 4 of the Framework Agreement on Fixed-Term Work annexed to Directive 1999/70 (the "Framework Agreement"), which provides that, "in respect of employment conditions, fixed-term workers shall not be treated in a less favourable manner than comparable permanent workers solely because they have a fixed-term contract or relation unless different treatment is justified on objective grounds." Question 1 relates to the interaction of national and EU law. Question 5 raises issues relating to the availability of remedies under national law where EU law is infringed.

Opinion

1. The Advocate-General dismisses the first of two formal objections raised by the Spanish government. He also rejects the second objection, which is that the dispute does not concern an "employment condition" within the meaning of Clause 4 (§ 26-36).
2. Temporary and "career" civil servants must be regarded as "comparable" for the purposes of Clause 4 (§ 41-42).
3. The Spanish government and the Commission contend that the Directive is not applicable to a person who has ceased to be a fixed-term worker. The Advocate-General finds this a too narrow approach, which would defeat the Directive's objective of improving the working conditions of fixed-term workers. Time spent as a fixed-term worker should be taken into account in calculating promotion eligibility in the same way as a comparable permanent worker (§ 43-50).
4. It is clear that the condition at issue is an "employment condition", which expression is to be interpreted broadly (§ 51-55).
5. It follows from *Del Cerro Alonso* (Case C-307/05) that the concept of "objective grounds" in Clause 4 must be understood as not permitting a difference in treatment between fixed-term and permanent workers on the basis that the difference is provided for by a general, abstract norm, such as a law or collective agreement. On the contrary, that concept requires the unequal treatment at issue to be justified by the existence of precise and concrete factors, characterising the employment condition to which it relates, in the specific context in which it occurs and on the basis of objective and transparent criteria. It is up to the national courts to determine whether there are such factors, but in this instance it is clear that, even if they existed, they were not expressed with the requisite transparency. It follows that the competition notice contravened Clause 4 of the Framework Agreement (§ 56-67).
6. The national court is bound to apply the ECJ's interpretation of the Framework Directive, even where the Spanish Constitutional Court has ruled that differences in treatment between temporary and career civil servants are not contrary to the Spanish constitution (§ 69-76).
7. Under Spanish law, a person who wishes to challenge the conditions applying to a selection procedure must do so within two months of the date on which notice of the procedure was published. In the case of Mr Rosado Santana, the notice was published in the Official Journal of 16 January 2008 but he did not bring proceedings until 8 June 2009, which was too late. Can the Spanish government rely on this fact, where the basis of the challenge is that rights under EU law have been contravened? (§ 81-82).
8. The principle of equivalence, which requires that a national law be applied without distinguishing infringements of EU and national law, does not seem to have been infringed (§ 81-82).
9. The national law must not be such as to render the exercise of rights conferred by EU Law impossible or excessively difficult (the principle of effectiveness). Two months is a short period, but not too short (§ 83-85).
10. Can it be said that the time at which the two-month period started, namely the date of publication of the competition notice in the Official Journal, contravenes the principle of effectiveness and that that period should not have commenced until Mr Rosado Santana was informed of his ineligibility for promotion? "I do not think so" is the Advocate-General's reply, adding: "In reaching that conclusion, I am conscious that it leaves unaddressed the possibility of Mr Rosado Santana having been badly, and possibly wrongly, treated as a result of the sequence of events following his participation in the competition procedure. To notify him that he was successful in that procedure and subsequently to inform him that he was ineligible to apply for a post is, to put it at its kindest, unfortunate" (§ 86-94).

Conclusion

- Clause 4 of the Framework Agreement is infringed where a competition notice makes eligibility for promotion dependent on a period of service and excludes periods spent as a fixed-term civil servant without laying down any objective grounds as the basis for such an exclusion.
- The national court is bound to apply the ECJ's interpretation of the Framework Agreement, even where the Spanish Constitutional Court has ruled that differences in treatment between temporary and career civil servants are not contrary to the Spanish Constitution.
- The two-month time bar at issue does not contravene the principles of equivalence and effectiveness.

Opinion of Advocate-General Cruz Villalón of 19 May 2011, case C-447/09 *(Reinhard Prigge and others - v – Deutsche Lufthansa AG)* **("Prigge")**, German case (AGE DISCRIMINATION)

Facts

The collective agreement for Deutsche Lufthansa pilots provides that their employment terminates at age 60 (the "contested provision"), following which they are entitled to certain compensation until their normal retirement age, which is 63. Three pilots – Prigge et al – challenged the termination of their employment.

National proceedings

The court of first instance and the Court of Appeal rejected their claim. The Federal Labour Court asked the ECJ whether Directive 2000/78

(the "Directive") and/or the general EU principle of non-discrimination on grounds of age must be construed so as to preclude a collective agreement that, in the interests of air safety, sets an age limit of 60 for pilots.

Opinion

1. Directive 2000/78 introduced four new strands of non-discrimination law: religion/belief, disability, age and sexual orientation. Age is different from the three others. One difference relates to the exceptions allowed by the Directive. There are two exceptions that apply to all four strands – Article 2(5) and Article 4(1) – and there is one (Article 6) that relates exclusively to age. Article 2(5) exempts measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others (the "safety exemption"). Article 4(1) allows, in certain circumstances, differential treatment on the grounds of a genuine and determining occupational requirement. The third exception – in Article 6 – applies exclusively to age. Article 6(1) (first sentence) states that "Member States may provide 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, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary." (§ 31-40).
2. The fact that the contested provision forms part of a collective agreement is relevant, given the right of collective bargaining enshrined in Article 28 of the Charter of Fundamental Freedoms (§ 41-46).
3. Clearly, air safety falls within the scope of the safety exemption. However, Article 2(5) of the Directive requires a measure in respect of safety etc. to be "laid down by national law". This is stricter than the wording "Member States may provide" as provided in Articles 4(1) and 6(1). This means that an exemption from the age discrimination prohibition based on the safety exception must be based on national law and that a collective agreement is an inadequate basis (§ 51).
4. Moreover, Article 2(5) makes clear that an exemption from the prohibition against age discrimination must be "necessary" for, *inter alia*, public security. The fact that it contributes to public security is insufficient (§ 52).
5. Finally, decisions in the field of public security should be reserved to national governments. Social partners have no business deciding whether the safety exemption applies (§ 53).
6. In summary, the provision in the collective agreement that pilots' contracts terminate at age 60 cannot be justified on the basis of Article 2(5) of the Directive (§ 54).
7. Can it be justified on the basis of Article 4(1), i.e. as a genuine and determining occupational requirement? The requirements under Article 4(1) are strict, namely (i) that the objective of the differential treatment is legitimate; (ii) that the difference in treatment is based on a "characteristic related to" the grounds for the discrimination, in this case age; and (iii) that the characteristic forms a "genuine and determining" occupational requirement that is, moreover, proportionate (§ 55-56).
8. Clearly, the objective in this case, namely air safety, is legitimate and the difference in treatment between pilots over and under 60 is based on characteristics, namely physical and mental competences, related to age. But is it a genuine and determining occupational requirement? The adjectives "genuine" and "determining" clearly need to be interpreted strictly (§ 57-60).
9. The only case in which the ECJ has so far accepted application of Article 4(1) was in *Wolf* (C-229/08). In that case, the ECJ accepted as legitimate a maximum hiring age of 30 for certain firemen. Given the ECJ's observations in *Wolf*, there is no objection on principle to accepting Article 4(1) as a basis for including airline pilots in the category of persons covered by Article 4(1). The problem, however, is that that is neither within the meaning nor the scope of the contested provision (§ 61-63).
10. The rules laid down by the Joint Aviation Authorities restrict the activities of pilots aged between 60 and 65. This is an indication that pilots require certain physical and mental characteristics that pilots aged over 60 may not have. However, neither the international nor the German rules prohibit pilots from flying aircraft altogether. In fact, the rules of the Joint Aviation Authorities as well as the internal rules of other airlines belonging to the Lufthansa Group explicitly allow pilots to continue flying aircraft until age 65, albeit with certain restrictions. This fact prevents an age limit of 60 from being exempted under Article 4(1) of the Directive. It would seem that 65, not 60, is the age at which pilots must cease to fly aircraft. Being younger than 60 cannot therefore be a "genuine and determining" occupational requirement (§ 64-68).
11. This leaves Article 6(1) of the Directive as the sole article that could justify the contested provision. The first question to be addressed in that regard is whether the contested provision has a legitimate aim. The only aim mentioned by the referring court in its reference to the ECJ relates to air safety. However, it is worth examining whether the freedom to negotiate collectively could also be a legitimate aim (§ 70-71).
12. Article 6(1) of the Directive twice uses the expression "include". It makes reference, for example, to "a legitimate aim, including legitimate employment policy" and to differences in treatment which "may include, among others". Although this makes clear that the possible justifications listed in Article 6(1) are non-exhaustive, the type of justification is limited. As is evident from the ECJ's ruling in *Age Concern* (C-388/07) only justifications in the field of social policy are legitimate. This is logical, as this is the area in which social partners negotiate collective agreements (§ 72-75).
13. Air safety has no connection to social policy or employment policy. This means that it cannot justify age discrimination under Article 6(1). Article 2(5) could afford a justification, but as mentioned above, the contested provision does not satisfy the requirements of that provision. Given that the referring court specifically refers to air safety as the sole aim of the contested provision, the debate could end there. However, in order to provide the referring court with a useful answer, it is worth examining another possible justification (§ 76-77).
14. Can the freedom to negotiate collectively serve as a legitimate aim of social policy? Since its rulings in *Palacios* (C-411/05) and *Rosenbladt* (C-45/09) the ECJ has accepted provisions in a collective agreement that link the automatic termination of employment to the start of retirement benefits as legitimate objectives of social policy, inasmuch as those provisions, even if only implicitly, aim to create employment for a younger generation. To understand these rulings fully and logically, one must take into account that the provisions in question were the result of collective bargaining. It is for this reason that the Advocate-General proposes to accept that under certain circumstances the freedom to bargain collectively can in itself qualify as a legitimate social policy objective (§ 78-82).
15. If there is one element that distinguishes the present case from previous ECJ rulings on compulsory retirement, it is that, contrary to other collective agreements, the collective agreement for Deutsche Lufthansa pilots lets employment terminate at an age

that differs from the logical date, in this case the age at which a pilot loses his licence, namely 65. However, there is no need to examine whether there is a discriminatory element distinguishing pilots from other employees (§ 83-84).

16. Is the contested provision proportionate? The fact that there is an inconsistency between the collective agreement for Deutsche Lufthansa and the collective agreements for other Lufthansa airlines is not relevant in this regard. What is relevant is the lengthy period between 60 and 65, namely five years. This makes the contested provision disproportionate. A reduction of employment by as much as five years exceeds the margin of appreciation available to social partners (§ 86-93).

Conclusion

- A collective agreement that lets the employment of pilots terminate automatically at age 65 is not a measure laid down by national law which, in a democratic society, is necessary for public security within the meaning of Article 2(5) of the Directive.
- Such automatic termination cannot be based on Article 4(1) of the Directive in respect of genuine and determining occupational requirements.
- Article 6(1) of the Directive does not preclude automatic termination of a pilot's employment before the age at which he loses his pilot's licence (65), provided his retirement benefits become due at that age or he is offered suitable compensation allowing him to bridge the gap between the loss of his job and the start of his retirement benefits. Whether this is the case is a matter for the national courts to determine.
- In any case, a provision such as the contested provision, that advances mandatory retirement by as much as five years, is incompatible with the Directive.

Opinion of Advocate-General Trstenjak of 16 June 2011, case C-123/10 *(Waltraud Brachner – v – Pensionsversicherungsanstalt)* **("Brachner")**, Austrian case (SEX DISCRIMINATION)

Facts

This case concerns the Austrian Old Age State Pension Act (*Allgemeine Socialversicherungsgesetz*) the "ASVG". It includes a provision that pensions are increased on 1 January each year by a percentage to be determined by the government. The increase as of 1 January 2008 was 1.7%. However, in that year pensions above a certain level ("750+ pensions") were increased by more than 1.7%, as shown in the following table:

pensions between € 746.99 and € 1,050 per month	+ € 21 (= more than 1.7%)
pensions between € 1,050 and € 1,700 per month	+ 2%
pensions between € 1,700 and 2,161.50 per month	between + 2% and + 1.7%
pensions above € 2,161.50 per month	+ € 36.75

Simultaneously, the ASVG was amended in respect of supplementary old-age benefits. These are means tested supplements paid to individuals whose net income, together with their other income and that of their spouse/partner, is below a certain level. This level was increased from € 726 to € 747 (+ 2.8%). Contrary to the ASVG, the supplementary old-age benefits scheme is not contributory but financed out of general government revenue.

The reason for the one-time extra increases in pensions and supplementary old age benefits as of 1 January 2008 was to combat extreme poverty amongst senior citizens.

Ms Brachner became entitled to an old age pension in 2007 at the age of 60, which in Austria was the normal retirement age for women, that for men being 65 (but note that the amount women receive is less). On 1 January 2008 her pension was increased from € 368.16 to € 374.42 per month (+ 1.7%). She was not eligible for supplementary old-age benefits on account of the means test. She found it unfair, and indirectly discriminatory for women that her pension was increased by no more than 1.7%, whereas that of 750+ pensioners was increased by a higher percentage, particularly as she was not eligible for supplementary benefits. Accordingly, she claimed a pension increase of € 21 = € 389.16 per month.

National proceedings

The court of first instance found in favour of Ms Brachner. The Court of Appeal reversed this decision. Ms Brachner appealed to the Supreme Court. It asked the Constitutional Court to nullify the amendments to the ASVG inasmuch as they distinguished between pensions below € 747 per month ("←750 pensions") and 750+ pensions, arguing that this distinction (the "disproportionate increase") was incompatible with the equality principle under Austrian law. The Constitutional Court turned down the Supreme Court's request (and 143 similar requests from other courts). Despite this, the Supreme Court was unsure whether the disproportionate increase was compatible with Article 4(1) of Directive 79/7. This provision states that "The Principle of equal treatment means that there shall be no discrimination whatsoever on ground of sex either directly, or indirectly by reference in particular to marital or family status, in particular as concerns [...] the calculation of benefits, including increases due in respect of a spouse and for dependants [...]". The referring court suspected that the disproportionate increase might be gender-discriminatory, given that it is unfavourable for 25% of the male pensioners and for 57% of the female pensioners. The court therefore referred three questions to the ECJ: (1) do annual pension adjustments fall within the scope of the Directive? (2) if so, does Article 4 of the Directive preclude awarding ←750 pensioners a lesser increase than the 750+ pensioners if this, in the absence of objective justification, is disadvantageous for 25% of the male and for 57% of the female pensioners? (3) if so, can such a disadvantage be justified by the lower retirement age and/or the longer life expectancy of female pensioners and/or by the fact that the supplementary old-age benefits are increased disproportionately even though they are means tested?

Opinion

1. Question 1: in order to fall within the scope of the Directive, a benefit must be based on legislation that aims to provide protection against one of the risks referred to in Article 3(1), namely illness, disability, old age, accidents at work/occupational illness and unemployment. Contrary to the view taken by the Irish government, not only old-age pensions themselves but, equally, annual increases thereof aim to provide such protection. Therefore, the first question must be answered in the affirmative (§ 55-60).
2. Question 2: the disproportionate increase is formulated in a sex-neutral manner. Thus, it is not directly sex discriminatory. Whether it is indirectly discriminatory depends on the extent to which it is disadvantageous for women. According to the ECJ's case law this is the case where a measure, albeit formulated in neutral terms, works to the disadvantage of "far more" women than men (*Lewen*, C-333/97, § 34) or of "a much higher percentage" of women than

men (*Wippel*, C-313/02, § 43). It is up to the referring court to determine whether this is the case (§ 66-67).

3. The referring court observes that within the group of female pensioners 57% receive a pension below € 750 per month. That is almost 2.3 times higher than the percentage of male pensioners within the same group (25%). The ECJ has never provided guidance as to where the threshold for indirect discrimination lies in terms of a percentage. It has, however, delivered a number of judgments in which percentages were at issue: *Hill and Stapleton* (C-243/95), in which 99.2% of the clerical assistants working on a job-share basis were female, *Schröder* (C-50/96), in which 95% of those in part-time employment were women, *Voss* (C-300/06), in which 88% of the part-time teachers were female and *Schönheit* (C-4 and 5/02), in which 87.9% of the part-time workers were women. It is practically impossible to fix a specific percentage, as the relative effect of a measure depends on the circumstances in each particular case (§ 68-70).
4. The Advocate-General concurs with the referring court that a measure that is disadvantageous for more than twice as many women as men exceeds the threshold above which a measure must be said to be indirectly discriminatory (§ 71-72).
5. The Austrian government counters that the effects of the disproportionate increase of the supplementary old-age pension benefits should be taken into account. This is wrong, for two reasons. First, the ECJ tends to assess a measure in isolation, without considering the positive effects of a social security scheme. In the second place, many ←750 pensioners are not eligible for the supplementary benefits because they or their partner have other income. In fact 47% of the female pensioners and only 14% of their male counterparts fall within this category of ineligible ←750 pensioners. This means that the disproportionate increase of the supplementary benefits cancels neither the unequal treatment of women as compared to the 750+ pensioners nor the unequal treatment of women within the category of ←750 pensioners (§ 73-75).
6. The conclusion is that the second question must also be answered affirmatively (§ 76-77).
7. Question 3: the Austrian government had advanced three arguments in favour of objective justification of the disproportionate increase: (i) women retire at a lower age (60) than men (65), (ii) they collect pension for a longer period of time, and (iii) the disproportionate increase in the supplementary benefits (§ 78-81).
8. (re i). Member States have the right to legislate different retirement ages for men and women, given that Article 7 excludes this aspect from the Directive's scope. It is, in principle, justified that contributory pension schemes link benefits to the duration and the amount of contributions. The ASVG therefore appears to be non-discriminatory inasmuch as it offers female pensioners a lower monthly pension. However, the annual increase in pensions is not linked to the contributions. It is aimed at maintaining pensioners' purchasing power by adjusting their pensions to the increased cost of living. Argument (i) therefore fails (§ 82-85).
9. (re ii). The group of 750+ pensioners includes women. This proves that there is no link between the period during which pensioners collect their pension on the one hand and the lower increase of the ←750 pensions in comparison with 750+ pensions on the other hand (§ 86-88).
10. (re iii). The aim of the supplementary benefits is legitimate, but how do those benefits relate to the ordinary pensions? Until now, the ECJ has accepted that means-tested supplements aimed at guaranteeing a minimum income are excluded from the Directive's scope. This can justify not granting Ms Brachner supplementary benefits, but it cannot justify giving her a lower pension increase than that given to the 750+ pensioners (§ 89-102).

Conclusion

- a system of annual index-linkage of pensions falls within the scope of the Directive;
- Article 4 of the Directive precludes giving pensioners with a low pension a lower pension increase than that given to pensioners with a high pension, unless such different treatment is objectively justified;
- such differential treatment cannot be justified by the lower retirement age for women, nor by the fact that women collect pensions for a longer period of time or the fact that supplementary benefits that are conditional on other income are granted to pensioners with a low pension in a situation where the pensions granted to other pensioners are increased unconditionally.

Opinion of Advocate-General Trstenjak of 16 June 2011, case C-155/10 *(Williams and others – v – British Airways plc)* **("Williams")**, UK case (PAID LEAVE)

Facts

British Airways pilots are paid (i) a fixed salary, (ii) £10 per planned flying hour ("flying pay supplement" or "FPS") and (iii) £2.73 for every hour that they are away from the place where they are based ("time away from base allowance" or "TAFB"), of which 82% is treated as compensation for expenses and therefore untaxed under UK tax law and 18% is treated as taxable remuneration.

Pursuant to an agreement entered into between British Airways and the pilots union BALPA, the payment pilots receive during their periods of paid annual leave is based exclusively on their fixed salary. Ms Williams and a number of other BA pilots claimed payments based on their fixed salary, their average FPS and 18% of their average TAFB.

National proceedings

The courts of first and second instance found in favour of the plaintiffs, but the Court of Appeal reversed their judgments, following which the case went to the Supreme Court. It considered that the outcome of the case depended on the correct interpretation of EU law, in particular Article 7(1) of the Working Time Directive 2003/88 ("Article 7") and to almost identical provisions in (i) a more specific earlier directive on working time in civil aviation and (ii) domestic UK law.

The first question related to the freedom of Member States to determine the level of payment during paid leave. The second and third questions asked whether such payment must correspond to the worker's "normal" pay or whether it may be less. The fourth and fifth questions asked whether, if a worker is entitled to continued payment of his "normal" pay during leave, how such pay is to be calculated.

The plaintiffs and the Commission argued that during holiday leave a worker is entitled to his "normal" pay, calculated by reference to a representative period before the leave. British Airways argued that the Directive lays down no requirements with respect to the nature and level of payments during leave, provided that the level is sufficiently high not to deter workers from actually taking leave. The Danish government took a slightly more nuanced view.

Opinion

1. The Advocate-General's answer to the first question is that holiday pay must be calculated in accordance with national legislation and/

or practice, provided that the Member States ensure that their national implementing rules take account of the limits laid down by EU law including the principles outlined in the ECJ's case law (§ 55).
2. The ECJ's case law on Article 7 is that it constitutes a "particularly important principle" aimed at enabling workers "to rest and enjoy a period of relaxation and leisure". In *Robinson – Steele* (cases C-131 and 257/04), the ECJ held that the Working Time Directive treats entitlement to annual leave and to holiday pay as "two aspects of a single right", also holding that the term "paid annual leave" in Article 7 means that for the duration of annual leave normal remuneration must be maintained. Although *Robinson – Steele* dealt with a different issue, this principle was restated in *Schultz-Hoff* (cases C-350/06 and 520/06) (§ 44-47).
3. In its recent rulings in *Parviainen* (case C-471/08) and *Gassmayr* (case C-194/08) the ECJ interpreted Article 11(1) of Directive 92/85 as meaning that a pregnant worker is not necessarily entitled to continued payment of her full average pay. However, that provision, which refers to the maintenance of "a payment", is not comparable to Article 7 (§ 49).
4. ILO Convention 132, which is relevant for the interpretation of Article 7, provides that a worker must, during his holiday, receive "at least his normal or average remuneration" (§ 50).
5. It is necessary to ensure that a worker does not suffer any disadvantages as a result of deciding to exercise his right to annual leave (§ 51).
6. The Member States have broad discretion in determining what constitutes "normal" remuneration (§ 58-67).
7. The ECJ has consistently given the term "pay", as used in Article 157 TFEU (on equal treatment for men and women), a broad definition. Article 157 TFEU (formerly Article 141) defines "pay" as including "any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment from his employer" (§ 69-71).
8. There is no need to examine whether the untaxed 82% of the TAFB qualifies as "pay" (§ 76).
9. The TFS and the 18% taxed portion of the TAFB qualify as "any other consideration" within the meaning of Article 157 TFEU (§ 77-84).
10. There are two ways to determine what "normal remuneration" is. One is to determine what the worker in question would have earned had he worked rather than being on leave. The other is to make reference to an earlier period. It is up to the Member States to establish the correct approach (§ 82-85).

Conclusion

- Article 7 is to be interpreted as meaning that holiday pay must be calculated in accordance with national legislation and/or practice.
- Holiday pay must, in principle, be determined in such a way as to correspond to the worker's normal remuneration.
- In a situation in which the level of remuneration varies, a worker is entitled to holiday pay corresponding to his average earnings, the calculation whereof must be based on a sufficiently representative reference period.
- Such calculation must take into account (i) supplements usually due to the worker as part of his remuneration and (ii) any restrictions in respect of limits on the activity in question (in this case, the maximum number of flying hours allowed per year).

Opinion of Advocate-General Mazák of 21 June 2011, case C-257/10 *(Försäkringskassan – v – Elisabeth Bergström)* **("Bergström")**, Swedish case (SOCIAL INSURANCE)

Facts

Mrs Bergström was a Swedish national. She and her husband resided, worked and were insured for social security in Switzerland from 1994 to 1 September 2008. Following the birth of a daughter, the family moved back to Sweden. Mrs Bergström remained unemployed in order to take care of her daughter. She applied for parental benefits under Swedish law, claiming that she was entitled to such benefits based on the income she had earned during her employment in Switzerland.
Swedish law has two categories of parental benefits: basic benefits (SEK 150 per day) and more generous benefits at the same level as sickness benefits. Parents are eligible for these more generous benefits if they have been insured for sick leave benefits at a certain more than minimal level for at least 240 consecutive days prior to the child's birth.
Mrs Bergström was awarded basic parental benefits. Her application for higher benefits was turned down. Initially the argument was that in order to qualify for such benefits, the applicant must have lived in Sweden on at least the last of the said 240 days. Later, this argument was dropped and replaced by the argument that Mrs Bergström had no income basis in Sweden.

National proceedings

Following a number of court decisions, the Court of Appeal (*Regeringsrätten*) referred two questions to the ECJ, both related to the Agreement on the free movement of persons between the EU and Switzerland (the "Agreement") in combination with Regulation 1408/71 on the coordination of social security laws (the "Regulation"). Question 1 asked whether a qualification period for income-related childcare benefits (in this case, the 240 day period) can be completed in its entirety through employment and insurance in Switzerland. Question 2 asked whether income earned in Switzerland is to be equated with domestic income in the determination of entitlement to income-related childcare benefits.

Opinion

1. Contrary to the Swedish government's view, Mrs Bergström's situation falls within the scope of the Agreement (§ 27-34).
2. The debate on Question 1 focuses on the interpretation of Article 72 of the Regulation in respect of "family benefits". Article 72 provides that, "where the legislation of a Member State [*to which Switzerland is to be equated*] makes acquisition of the right to benefits conditional upon completion of periods of insurance [...], the competent institution of that State shall take into account for this purpose, to the extent necessary, periods of insurance [...] completed in any other Member State, as if they were periods completed under the legislation which it administers." Does this provision merely deal with the aggregation of insured periods or does it also mean that periods completed in another Member State do not necessarily have to be added to periods completed in the home state? Based on the principle of free movement, the Advocate-General argues in favour of the second approach (§ 35-49).
3. Unlike the provisions in respect of sickness and maternity, old-age and invalidity, occupational accidents/disease and unemployment, there is no specific provision in the Regulation governing the calculation of family benefits. May a Member State apply less favourable treatment to its own nationals than to other EU citizens? The Advocate-General notes that the circumstances of Mrs Bergström do not constitute a purely internal Swedish situation.

The principle of non-discrimination on the basis of nationality prohibits indirect discrimination that affects migrant workers more than workers who have remained in one Member State (§ 50-60).

4. If, in Mrs Bergström's case, only income earned in Sweden were to count towards her eligibility for parental benefits, that would primarily place nationals of other Member States (and Switzerland) at a disadvantage. Such a situation would be indirectly discriminatory on the basis of nationality (§ 61-63).
5. However, in order to remedy this discrimination, it is not necessary to grant Mrs Bergström benefits based on her Swiss income. It is sufficient to base those benefits on the income she would have earned had she remained in Sweden, that is to say the income a worker in Sweden in a comparable profession, with comparable professional experience and qualifications, would have earned (§ 64).
6. The Advocate-General rejects the Swedish government's argument that unless parental benefits are related to actual insurance contributions, the financial balance in the Swedish social security system would be seriously upset (§ 65).

Conclusion

- The Swedish competent institution must take into account Mrs Berström's entire insured period in Switzerland.
- Mrs Bergström's Swiss income need not be equated with Swedish income in the determination of parental benefits. Rather, Swedish income levels should be taken as a point of reference.

PENDING CASES

Case C-572/10 (*Clément Amedée – v – France*), reference lodged by the French *Tribunal Administratif de Saint-Denis de la Réunion*) on 8 December 2010 (SEX DISCRIMINATION)

Is the Civil and Military Pensions Code indirectly discriminatory, within the meaning of Article 157 TFEU, against the biological parents of children, given the proportion of men liable to fulfill the condition relating to a break in their career for a continuous period of at least two months and, if so, is such discrimination justifiable?

Case C-40/11 (*Yoshikazu Iida – v – City of Ulm*), reference lodged by the German *Verwaltungsgerichtshof Baden-Württemberg*) on 28 January 2011 (FREE MOVEMENT)

The referring court asks questions relating to the right of dependent relatives of third country nationals to free movement within the EU and, in particular, how Directive 2004/38 (amending Regulation 1612/68) relates to the Charter of Fundamental Rights.

Case C-78/11 (*Asociación Nacìonal de Grandes Empresas de Distribution (ANGED) – v – FASGA* and others), reference lodged by the Spanish *Tribunal Supremo* on 22 February 2011 (PAID ANNUAL LEAVE)

Does Article 7(1) of Directive 2003/88 preclude national legislation which does not permit interruption of a period of leave so that the full period – or the remaining period – can be taken at a later time if a worker is temporarily incapacitated when he is on leave?

Case C-122/11 (*European Commission – v – Belgium*), order sought by the Commission on 8 May 2011 (SOCIAL SECURITY)

The Commission claims that Belgium discriminates on the basis of nationality by making the right to index-linkage of pensions conditional upon residence of certain countries.

Case C-132/11 (*Tyrolean Airways – v – its works council*), reference lodged by the Austrian *Oberlandesgericht Innsbruck* on 18 March 2011 (AGE DISCRIMINATION)

Do Article 21 of the Charter of Fundamental Rights and Articles 1, 2 and 6 of Directive 2000/78 preclude a national collective agreement which, in making grade classifications under the collective agreement, and thus determining the level of remuneration, discriminates indirectly against older workers by taking account only of skills and knowledge acquired as air stewards or stewardesses with one airline but not the substantively identical skills and knowledge acquired with another airline within the same group? Does this also apply to an employment relationship which was entered into before 1 December 2009?

Can a national court treat as void and disapply a clause of an individual employment contract which indirectly infringes Article 21 of the Charter of Fundamental Rights, the general legal principle of European Union law relating to the prohibition of age discrimination, and/or Articles 1, 2 and 6 of Directive 2000/78 EC?

Case C-141/11 (*Karl Torsten Hörnfeld – v – Posten Meddelande AB*), reference lodged by the Swedish *Södertörns Tingsrätt* on 21 March 2011 (AGE DISCRIMINATION)

Can a national rule which, like the 67-year rule, gives rise to a difference in treatment on grounds of age be legitimate even if it is not possible to determine clearly from the context in which the rule has come into being or from other information, what aim or purpose the rule is intended to serve?
Does a national retirement provision such as the 67-year rule, to which there is no exception and which does not take account of factors such as the pension that an individual may ultimately receive, go beyond what is appropriate and necessary in order to achieve the aim pursued?

Case C-152/11(*Johann Odar – v – Baxter Deutschland GmbH*), reference lodged by the German *Arbeitsgericht München* on 28 March 2011 (AGE DISCRIMINATION)

Do the prohibitions on age discrimination and disability discrimination in Directive 2000/78 preclude the exclusion from social plan benefits employees who are financially secure because they are entitled to a pension? Do they preclude a scheme that favours redundant employees who are over 54 by calculating their compensation differently from that of the other redundant employees?

Case C-157/11 (*Giuseppe Sibilio – v – Comune di Afragola*), reference lodged by the Italian *Tribunale di Napoli* on 31 March 2011 (FIXED-TERM WORK)

Does Directive 1999/20 on fixed-term work apply to "socially useful" and "publicly useful" workers?

Case C-161/11 (*Cosimo Damiano Vino – v – Poste Italiane SpA*), reference lodged by the Italian *Tribunale di Trani* on 1 April 2011 (GENERAL NON-DISCRIMINATION)

Does the general Community principle of non-discrimination and equality preclude national rules (such as that laid down by Article 2(1)a of Legislative Decree No 368/2001) which introduced into the national legal order an "acausal" case that places employees of Poste Italiane SpA at a disadvantage, and, in relation to that company, other undertakings in the same or other sectors?

If so, is the national court required to disapply (or not to apply) the national rules that are contrary to Community law?

ECtHR COURT WATCH

Summaries by Paul Diamond, barrister (UK)

ECtHR 3 February 2011 *Siebenharr – v – Germany* (Application No 18136/02) (RELIGION), Decision awaited in *McFarlane – v – United Kingdom* (Application No 36516/10), and *Ladele – v – United Kingdom* (Application No 51671/10) (RELIGION).

Introduction
The European Court of Human Rights (ECtHR) has recently considered, or will be considering these cases, which have both a direct and indirect impact on employment law.

In *Siebenhaar – v – Germany*, the European Court considers the position of the Church as an employer. What is unusual is that this case is now the third such case against Germany in less than six months (Both *Obst – v – Germany* (Application No 425/03) and *Schuth – v – Germany* (Application No 1620/03) were decided on 23 September 2010, see EELC 2010-5).

On 12 April 2011, the European Court accepted two cases from the United Kingdom on the place of religious rights in the employment context. In both *McFarlane* and *Ladele*, an employee who is a practising Christian refused to preside over a civil partnership service for homosexuals on the premise that they would be facilitating their lifestyle.

It is because of the increasing sensitivity of this issue that the subject should be addressed. Further, it is prudent to note the upcoming cases from the United Kingdom because of their likely widespread impact on employment practice throughout Europe.

The issue of an employee's religious rights in the workplace is becoming contentious across Europe and it further appears that the Christian faith is particularly problematic. This is likely to be because of twin factors, which appear contradictory. The first is the increasing secularism within the EU and the consequent displacement of Judeo-Christian values; the second is the increasing importance of religion in a multi-faith Europe.

Facts
In *Siebenhaar,* a Church worker employed in the day care centre (Kindergarten) of the Protestant Parish of Pforzheim was dismissed because of her membership of the *Universal Church of Humanity.* The primary issue was her religious belief, which was held incompatible with that of her employer. Ms Siebenhaar was not only a member of another Church (religious organisation), but was responsible for an introductory course to that Church. After losing in the Labour Court, she appealed to the Labour Court of Appeal, to the Federal Labour Court and finally submitted a complaint to the Constitutional Court. She was unsuccessful at every level (except for the Labour Court of Appeal) and her claim was dismissed. Thereafter, she made an application to the ECtHR under Article 9 for breach of her of her freedom to manifest her religion.

In *McFarlane,* a marriage counsellor was concerned that providing directive sex therapy to a same sex couple would violate his religious conscience and in *Ladele,* a marriage Registrar declined to preside over a civil partnership as this was contrary to her religious conscience. Both Mr McFarlane and Ms Ladele were model employees, who simply sought exemption from an employer's order because of their religious beliefs. The employer in both cases could have allocated the work to another employee. Both Mr McFarlane and Ms Ladele failed before the Employment Tribunal, Employment Appeal Tribunal and the Court of Appeal. Both applicants made an application to the ECtHR under Article 9 for breaches of freedom to manifest religious belief.

ECtHR' s judgment in Siebenharr
In *Siebenharr*, the ECtHR had to examine whether the balance struck by the German labour courts was satisfactory. The issue was between the applicants' freedom of religion under Article 9 ECHR on the one hand and the rights of the employer to protect its identity and reputation on the other. The main question addressed by the ECtHR was whether the national courts in Germany had correctly balanced the conflicting interests of the employer and employee.

The ECtHR held that the German courts had correctly balanced the interests of the employer and employee. However, the Judgment of the Court under Article 9 was confusing and contradictory to its decision in *Schuth.*

Further, the ECtHR gave the German courts a broad *margin of appreciation* because of the lack of consensus within the Council of Europe as to the importance of religious rights and how best to protect them. It has to be noted that this approach is regrettable as it will no doubt facilitate conflicting and contradictory judgements by the Member States of the Council of Europe in relation to an increasingly important right of the Convention.

The ECtHR held that a Church employer was entitled to require that employees refrain from activities that were incompatible with the objectives of the employer. In particular, it was recognised that the Protestant Church needed to maintain its credibility both in the eyes of the public and with parents of children at the Kindergarten (who would be concerned about any undue influence of a teacher on their children). The ECtHR also considered the young age of the applicant, her length of employment and the fact she was aware (or should have been aware) that her membership of the *Universal Church of Humanity* conflicted with the interests of her employer.

Whilst, this decision is consistent with *Obst*, it is difficult to reconcile with *Schuth* where the Court found a violation of Article 8 whereby Mr Schuth was dismissed in consequence of an affair and new family. In *Schuth,* the failure to consider other means of preserving the reputation of the Church should have been considered. However, in *Siebenhaar*, there was no evidence that her service provision to the children was anything other than professional.

Whilst it is clear that Church autonomy is important to freedom of religion, which includes the right that employees should hold the same religious views as their employer (Article 4(2) of *Directive 2000/78* specifically provides for this), one might think that the activities of Mr Schuth would be more damaging to the reputation of the Church than those of Ms Siebenhaar.

The cases of *McFarlane* and *Ladele* will give the ECtHR an opportunity to consider the place of religious rights in the workplace. Clearly there is a clash between the values of Christian morality and modern sexual

mores. However, it is to be noted that in both cases the wishes of Mr McFarlane and Ms Ladele could have been accommodated by a simple screening process.

It is because of these inconsistent decisions, and the importance of the religious rights of employees, that these cases from the United Kingdom give the ECtHR an opportunity to resolve this issue on a principled basis.

Commentary

Clearly, a balance needs to found between an employer's interests and the religious rights of employees. The problem is further heightened by the (natural) desire of employers to restrict their employee's activities or rights to free speech where they feel these are damaging to their enterprise.

In *Vogt – v – Germany* (Application No 17851/91), the applicant was dismissed from her position as a teacher on account of her membership of the Communist Party: such membership was deemed incompatible with the *'duty of political loyalty'* placed on all civil servants by the then Federal Republic of Germany. The Court found a violation of Article 10 and that individuals could not lose their Article 10 rights by virtue of employment (as a civil servant). The Court held the dismissal disproportionate as the Communist Party was a lawful organisation and there was no evidence that Ms Vogt did anything other than act as a professional teacher.

On the other hand, in *Rommelfanger – v – Germany* (Application No 12242/86), the ECommHR upheld the dismissal of a doctor by a Catholic hospital for his expression of opinion in support of abortion (which was contrary to the position of the Catholic Church). There was a specific contractual clause of loyalty. The doctor had publically expressed his opinion in a letter to the magazine *'Stern'*. The Commission examined the issue and upheld the position of the German Courts (that the dismissal was justified), in particular, because of the fact that his expression was public and the Catholic Church was *'an organisation based on certain convictions and value judgments'*.

The field of religious rights is becoming increasingly important in employment law and requiring added sensitivity by employers. Where the employer owes special duties to the public (police, civil service or judiciary), or the employer is an 'ideological organisation' (such as the church, gay rights groups or political parties) it appears that a *'proportionate' 'duty of loyalty'* can be imposed and an employee can be dismissed for public or private activities incompatible with the objective or reputation of the employer.

Where the employer is a commercial undertaking, the principle is likely to be *'reasonable accommodation'* of the religious rights of an employee. However, this is subject to other neutral norms of feasibility, cultural norms, relations between the sexes, and relations between other groups. This area is clearly going to be an increasing area of controversy and is likely to be further clarified by the decisions in *McFarlane* and *Ladele – v – United Kingdom.*

TRANSFER OF UNDERTAKINGS

Status of Directive 2001/23

2010/42 (FR) no horizontal direct effect
2010/74 (AT) employer can invoke vertical direct effect

Is there a transfer?

2009/5 (MT) contracting out cleaning is a transfer despite no assets or staff going across
2009/22 (BE) collective agreement cannot create transfer where there is none by law
2009/41 (GE) BAG follows *Klarenberg*
2009/42 (UK) EAT clarifies "service provision change" concept
2010/1 (FR) Supreme Court drops "autonomy" requirement
2010/4 (SP) Supreme Court follows *Abler*, applying assets/staff mix
2010/5 (LU) court applies *Abler* despite changes in catering system
2010/6 (IT) Supreme Court disapplies national law
2010/27 (NL) assigned staff not an economic entity
2010/40 (NO) Supreme Court applies comprehensive mix of all *Spijkers* criteria
2010/73 (CZ) Supreme Court accepts broad transfer definition

Cross-border transfer

2009/3 (NL) move from NL to BE is transfer
2011/3 (UK) TUPE applies to move from UK to Israel

Which employees cross over?

2009/2 (NL) do assigned staff cross over? *Albron* case
2010/24 (NL) temporarily assigned staff do not cross over
2011/1 (FR) partial transfer?
2011/2 (FR) partial transfer?
2011/20 (NL) activity transferred to A (80%) and B (20%): employee transfers to A
2011/27 (HU) pregnancy protection in transfer situation

Employee who refuses to transfer

2009/20 (IR) no redundancy pay for employee refusing to transfer
2009/21 (FI) transferee liable to employee refusing to transfer on inferior terms
2009/23 (NL) agreement to remain with transferor effective
2011/18 (AT) no general "*Widerspruch*" right in Austria

Termination

2010/2 (SE) status of termination prior to transfer
2010/41 (CZ) termination by transferor, then "new" contract with transferee ineffective

Which terms go across?

2009/4 (NL) terms closely linked to transferor's business are lost
2010/3 (P) transferee liable for fine levied against transferor
2010/25 (FI) voluntary pension scheme goes across
2010/56 (CZ) claim for invalid dismissal goes across
2010/75 (AT) not all collective terms go across

Duty to inform

2009/43 (NL) transferor must inform staff fully
2010/42 (FR) no duty to inform because directive not transposed fully
2011/4 (GE) *Widerspruch* deadline begins after accurate information given

Miscellaneous

2009/1 (IT) transfer with sole aim of easing staff reduction is abuse
2010/23 (AT) transferee may recover from transferor cost of annual leave accrued before transfer
2010/26 (GE) purchaser of insolvent company may offer transferred staff inferior terms
2011/19 (AT) employee claims following transferor's insolvency

DISCRIMINATION

General

2009/29 (PL) court must apply to discriminated group provision designed for benefit of privileged group
2010/9 (UK) associative discrimination (*Coleman* part II)
2010/11 (GE) attending annual salary review meeting is term of employment
2010/12 (BE) *Feryn*, part II
2010/32 (CZ) Czech court applies reversal of burden of proof doctrine for first time
2010/62 (GE) court asks ECJ to assess compatibility of time-bar rule with EU law
2010/78 (IR) rules re direct discrimination may be applied to claim based solely on indirect discrimination
2010/83 (UK) employee barred from using information provided "without prejudice"
2011/24 (GE) how much compensation for lost income?
2011/25 (GE) statistics alone insufficient to establish presumption of "glass ceiling"

Job application

2009/27 (AT) employer liable following discriminatory remark that did not influence application
2009/28 (HU) what can rejected applicant claim?
2010/31 (P) age in advertisement not justified
2010/84 (GE) court asks ECJ whether rejected applicant may know whether another got the job and why

Gender, termination

2009/6 (SP) dismissal of pregnant worker void even if employer unaware of pregnancy
2009/10 (PL) lower retirement age for women indirectly discriminatory
2010/33 (HU) dismissal unlawful even though employee unaware she was pregnant
2010/44 (DK) dismissal of pregnant worker allowed despite no "exceptional case"
2010/46 (GR) dismissal prohibition also applies after having stillborn baby
2010/60 (DK) dismissal following notice of undergoing fertility treatment not presumptively discriminatory
2010/82 (AT) dismissed pregnant worker cannot claim in absence of work permit
2011/21 (UK) redundancy selection should not favour employee on maternity leave

MISCELLANEOUS