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INTRODUCTION

This edition includes case reports, ECJ rulings, A-G opinions and an article, covering the following issues:

- the legality of a law allowing successive fixed-term contracts on budgetary grounds;
- may, or must: courts award punitive damages in order to deter future discriminatory behaviour;
- the accrual of paid annual leave (*Schultz-Hoff*-type issues);
- how much salary is to be paid during paid leave;
- does seniority go across following a transfer of undertaking;
- mandatory retirement;
- *forfait jours*;
- whether a rejected job applicant has the right to information on the successful candidates;
- transitional provisions that phase out discrimination gradually;
- the status of "temps";
- the perils of social media.

November 2011

Peter Vas Nunes

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COUNTRY BULGARIA
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Summary
The Bulgarian Labour Code ("BLC") provides for the automatic transfer of employees to the transferee, not only upon legal transfer or merger of (a part of) an undertaking, but also upon temporary changes in the ownership of (a part of) an undertaking by virtue of a rental or lease agreement or a concession. Rental agreements, lease agreements and concessions are various legal forms of transfer of the right to use a property and these are regulated by different statutory provisions than those regulating transfers of undertakings the Bulgarian Supreme Court recently provided an interpretative decision to the effect that the Labour Code enumerates exhaustively which events lead to the automatic transfer of employees.

Facts
The BLC has two provisions that deal with the transfer of an undertaking, Article 123 and Article 123a. Article 123 was originally introduced in 1986 and was amended several times in order to make it compliant with Directive 2001/23. It provides that employees transfer from the transferor to the transferee in the event the (part of the) undertaking in which they work is sold or otherwise transferred permanently. Article 123a, on the other hand, was introduced in 2006 to regulate the employment effects of changes in the use of an undertaking, such as when an undertaking is leased or rented out or a concession is granted or when such a lease or rental agreement or concession expires. In other words, Article 123 aims to regulate permanent business transfers whereas Article 123a aims to regulate temporary transfers.

The issue at stake was whether Article 123a enumerates exhaustively the events that lead to the automatic transfer of employment relationships of employees with their former employers, or the application can be broadened to cover events other than lease, rent and concession. There was confusion on this point. This led the Chair of the Bulgarian Supreme Court to request that the general meeting of the court's Civil Chamber adopt an interpretative decision on the matter.

Judgment
The Supreme Court, interpreting Article 123a(1) grammatically, concluded that the linguistic meaning, the legal terms used in the text and the relationships between them were clear and correct. Therefore, the provision should be interpreted and applied strictly.

Further, the Supreme Court remarked that a logical interpretation of the broad meaning of the provision should be grounded in historical, systematic and teleological considerations, as this was the only way to ascertain whether the clear wording of the provision coincides with underlying legal objectives. Automatic transfer of employment relationships upon a change of employer is traditional in Bulgarian legislation and has existed since 1936. This doctrine is based on the general concept of succession in civil and commercial law.

However, Article 123a is quite new. Examination of the legal development of its text indicates that the legislator has gradually broadened the provision's scope. Initially, the provision referred only to leases. The references to rental and concessions were added later. The changes were a result of the economic situation and were also grounded in a legal understanding of automatic transfer of employment relationships upon the passing of an undertaking or a part thereof to another employer by virtue of a rental agreement and its derivatives – the lease and concession agreement.

The regulation of automatic transfers of employment protects the rights of employees, who are the weaker party in the employment relationship and aims to ensure protection of employment and freedom of work. However, as the decision stated, such protection should not be unlimited and the Bulgarian legislator has defined it by introducing a mandatory provision that exhaustively enumerates the events leading to the automatic transfer of the employment relationship.

The Supreme Court also compared the texts of Articles 123(1) and 123a(1) with international law. According to the Supreme Court's decision, Bulgarian employment legislation has achieved the purposes of the Directive by means of Article 123, which stipulates in full detail the events leading to automatic transfer of the employment relationship upon a change of ownership of the undertaking or a part thereof, the transfer of business from one undertaking to another, including the transfer of assets[1], various types of reorganisation of the undertaking (i.e. by merger, amalgamation, distribution of operations, or the passing of a part of the enterprise to another) and a change to its legal form.

The events referenced in Article 123a(1) fall outside the scope of Article 123(1). The Bulgarian legislator took the decision to regulate on them on the grounds of Article 8 in the Final Provisions of the Directive, which states that the Directive shall not affect the right of Member States to apply or introduce laws, regulations or administrative provisions that are more favourable to employees or to promote or permit collective agreements or agreements between social partners that are more favourable to employees.

Commentary
According to the decision of the Supreme Court, Bulgarian employment law provides for more extensive protection of the rights of employees upon a change of employer than that provided for by the Directive. The BLC regulates the automatic transfer of employment relationships to the "new" employer (transferee) not only upon the legal transfer or merger of an undertaking or a part thereof but also upon temporary changes in ownership by virtue of rental, lease or concession of an undertaking or a part of it. The legislator has separated Articles 123(1) and 123a(1) BLC in order to stress that they are different in scope and have different legal consequences, and that upon the events enumerated in Article 123(1), the ownership of the enterprise is transferred to another employer, whereas the events listed in Article 123a(1) concern only temporary changes in ownership of the enterprise. The employment protection given by these provisions has been settled in a mandatory way and can neither be broadened, nor narrowed. It is for the Bulgarian courts to assess whether a rental, lease or concession agreement is in place on a case-by-case basis.
By way of example, if the government owns an airport it may decide

to grant company A a concession to operate that airport for a period of five years. At the end of the five years the concession expires and a new concession is granted to company B. At the expiration of the concession to company A and the (more or less simultaneous) grant of a new concession to company B to operate the airport for the five years to follow, the employees that have transferred automatically from the government to company A on the occasion of the first concession agreement, will transfer again automatically back to the government and thereafter will transfer automatically from the government to company B. On the contrary, a transfer under Article 123 will be only one way, to the new employer without the possibility for the employees to transfer back to the first employer transferor, unless a transfer event under said Article occurs. In all cases of automatic transfer, be it permanent or temporary, the terms of employment of the employees remain unchanged.

In sum Article 123a will not apply if another type of contract (different from rental, lease or concession agreement) granting the temporary right to use an asset is concluded (such as a contract for use of copyright or a licence to use a patent or trademark), i.e. the employees who perform activities in relation to that asset will not transfer to the other party thereto (user).

Two of the judges presented their specific opinions with regard to the decision. Judge Nadezhda Zekova dissented, as she was in favour of an interpretative decision, given that the Bulgarian courts had made no controversial decisions on matters concerning the exhaustiveness or otherwise of Article 123a(1) BLC.

Judge Emanuela Balevska's view was that the decision failed to provide an answer to the basic question at issue, namely which (if any) events have broadened the scope of Article 123a paragraph 1? She was of the view that the decision simply reiterated Article 123a (1) of the BLC without answering the question.

Subject: transfer of undertaking
Court: Supreme Court of Cassation
Date: 23 March 2011
Case Number: 2/2010
Hard copy publication: Not yet published
Internet publication: http://www.vks.bg/vks_p10_91.htm

(Footnote)

1 In this event a transfer of undertaking would only occur if the transferred assets continued to be used for production purposes and their usage was connected with employees who were to be transferred together with the assets. Provided that the transferred assets were not used for production purposes and no employees were engaged for that purpose, no transfer of undertaking would occur.

2011/35

Resignation notice did not prevent transfer (UK)

COUNTRY UNITED KINGDOM
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Summary
An employee (Mr Marcroft) who had given his termination notice shortly before the business employing him transferred under the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE"), and who did not need to attend the office during the notice period, was nonetheless assigned to the undertaking. Accordingly, he could not assert that his employment had not transferred, thereby preventing the new owners of the business from enforcing a restrictive covenant in his contract.

Facts
Marcroft had been employed in the insurance industry for over 30 years. From July 2008, he had been employed by PMI Health Group Ltd ("PMI") predominantly in the commercial insurance department of its business. His contract contained a post-termination restrictive covenant prohibiting him from approaching clients of PMI whose accounts he had managed or about whom he had acquired knowledge whilst with PMI.

On 15 September 2009, Marcroft submitted notice of his resignation. The notice period would expire on 26 October 2009. On 25 September 2009, he was informed by the directors of PMI that the commercial insurance business would be sold to Heartland (Midlands) Ltd ("Heartland"). However, there was no consultation with Marcroft in relation to the transfer, nor did he receive anything in writing about the transfer. It was agreed that Marcroft need not attend the office during the notice period, but that he would be on call at home. He did not do significant work, but took calls and finalised accounts. Marcroft took no action to object to the transfer, which was completed on 2 October 2009.
After his employment terminated, Marcroft started working for a rival insurance company. PMI's solicitors wrote to him, alleging he had breached his restrictive covenant. Marcroft's solicitors denied this, saying that TUPE had applied to transfer his employment (and the benefit of any restrictions) to Heartland. Heartland then brought proceedings against Marcroft for breach of contract, claiming that his employment had been transferred to it and that it was entitled to sue for breach of the restrictive covenant.

Despite having originally admitted to PMI that TUPE applied and that his contract had been transferred to Heartland, Marcroft now denied this. He asserted that, at the time of transfer, he was not "assigned" to the commercial insurance department, relying on regulation 2(1) of TUPE. This defines "assigned" as meaning "assigned other than on a temporary basis". Marcroft contended that, by handing in notice of resignation on 15 September 2009, he had become assigned to the commercial insurance department "on a temporary basis", so his contract of employment had not transferred. Furthermore, as he spent some time dealing with private health business and other things, Marcroft argued that he was not assigned to the commercial department in any case at the relevant time.

Marcroft also claimed that the transfer of his employment contract to Heartland was inoperative in any event because PMI had not provided him with information which would have enabled him to exercise his right to object to the transfer under TUPE. Marcroft relied on the duty under regulation 13 of TUPE to provide the representatives of the affected workers with certain information and alleged that there had been a conspiracy between PMI and Heartland to avoid the operation of, or to breach, the protective regime of TUPE.

The County Court's Decision

The County Court judge held that Marcroft was assigned to the business of the commercial insurance department at PMI, which had transferred to Heartland. Marcroft himself had agreed that he spent 80% to 85% of his time on commercial insurance business and had no expertise in other areas of insurance with which PMI dealt. The judge found as a fact that, certainly until he handed in his notice on 15 September 2009 and "probably certainly" until 25 September 2009, Marcroft was assigned to PMI's commercial insurance business.

The judge then rejected the contention that, as from the above dates, Marcroft was not assigned to the undertaking transferred on the basis that he had become "effectively an employee without any portfolio" as there was little or no work for him to do. The judge found that PMI were still entitled to rely on him and was satisfied that Marcroft had remained at all times assigned to that department and the part of business which was transferred to Heartland on 2 October 2009.

In relation to the allegation of conspiracy between PMI and Heartland, the judge found that there had been no intentional or deliberate scheme between PMI and Heartland to avoid the operation of TUPE or breach its provisions. The judge further held that it was not a condition for employment to be transferred that the employee had been given notice of the proposed transfer. If it were, unscrupulous employers might fail to give notice in order to frustrate the intention of TUPE, which could not be right. Finally, the judge commented that TUPE provided a specific remedy (of up to 13 weeks' pay) for failure to inform and, in any event, the obligation had been on PMI rather than Heartland.

The Court of Appeal's Decision

Marcroft appealed to the Court of Appeal, submitting that the judge had failed to give proper consideration to the notion of a "temporary" assignment in regulation 2(1) of TUPE. He contended that once he had handed in his notice, his position became temporary without any requirement or expectation that he undertook duties during the currency of his garden leave.

The Court of Appeal stated: *"...it cannot be right, in principle, that an employee is automatically assigned on a temporary basis, thereby losing the protection of TUPE, simply as a result of handing in his notice"*. The Court further held that the fact that the sale of the undertaking was officially confirmed to Marcroft on 25 September 2009 and that it was agreed that he could stay at home on call did not change his position as someone assigned to the commercial department.

In relation to the failure to inform and the alleged denial of the right to object as grounds for rendering ineffective Marcroft's transfer to Heartland, the Court upheld the first-instance judgment. In particular, it held that there was a duty under regulation 13 of TUPE to provide the representatives of the affected workers, not the individual himself, with certain information. (If there is no existing recognised trade union or other appropriate representatives, the employer is under an obligation to arrange elections for representatives.) There was no basis in fact or law for implying a term in the contract of employment that would render the transfer ineffective unless the employee had been provided with information by the employer about the transfer. Marcroft's appeal was accordingly dismissed.

Commentary

This case is unusual in that it concerned an employee seeking to avoid being transferred under TUPE – the key point being, of course, that he was attempting to escape liability for the breach of his restrictive covenant.

The most significant issue raised by the case in legal terms was whether an employee may become assigned to the undertaking merely "temporarily" – thus avoiding transfer under TUPE – either by handing in notice of resignation or by virtue of the garden leave arrangements which followed. The Court of Appeal rejected the argument that an employee's position may change as a result of handing in notice or as a result being on garden leave. As the Court made clear, it cannot be right for employees to lose the protection of TUPE simply on the basis of such factors. Moreover, it would clearly be wrong for employees to lose protection because employers do not inform them about the transfer, either deliberately or otherwise.

Deciding otherwise in this case would have left Heartland, the transferee, with no remedy for Marcroft's breach of restrictive covenant. As the judge at first instance commented, once an employee qualifies for protection under TUPE, this must not only safeguard his rights but also "carry with it any burdens that he has under the contract". The Court of Appeal's judgment therefore provides some reassurance for purchasers of businesses seeking to guard against unfair competitive practices by former employees of the undertaking.

Comments from other jurisdictions

Germany (Martin Reufels): Even if an employee is released from his or her duties during the notice period, he or she is still assigned to the employer and to the establishment. If a transfer of the business takes place during the release period (and during the notice period), this still has the effect that the employment relationship is transferred to the new owner of the business. A German court would have decided this issue in the same way.

A significant issue in this case is the fact that Mr Marcroft is bound by a post-termination restrictive covenant. The transfer of the business in which he previously worked can result in his former employer not being adequately protected. Take the following example. An employee with a post-termination restrictive covenant resigns. Shortly afterwards the part of the business in which he used to work is transferred to a new owner. Unless the covenant is worded in such a manner as to take account of a transfer of undertaking, the employee is free to compete against that new owner. This is because, although the employee is bound by the covenant, this legal biding is vis-a-vis his former employer, not vis-a-vis the new owner of the business.

The Netherlands (Peter Vas Nunes): In 2005 the Dutch Supreme Court decided a case concerning a cleaning lady, Ms Memedovic, in the employment of a cleaning company, Asito. Her job was to work in a police station, along with other cleaners also employed by Asito. Following an incident, she was suspended and told that she would never work in the same police station again. While she was suspended, Asito lost the cleaning contract for the police station in question. The issue was whether she transferred into the employment of the cleaning company that won the contract. The Supreme Court held that she did not, because the tie connecting Ms Memedovic to the transferred part of Asito's business, within the meaning of *Botzen – v – RDM*, had been

permanently severed. The facts in the case reported above strike me as comparable. At the time PMI's business transferred to Heartland, Mr Marcroft had resigned and was no longer actively employed. Thus, the Court of Appeal appears to take different position from that of the Dutch Supreme Court.

Subject: Transfer of undertakings
Parties: Marcroft – v – Heartland (Midlands) Ltd
Court: Court of Appeal
Date: 14 April 2011
Case number: [2011] EWCA Civ 438
Hard copy publication: [2011] IRLR 599
Internet publication: www.bailii.org

2011/36

Transferor's duty to inform employees: Dutch court sets the bar high (NL)

COUNTRY THE NETHERLANDS
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Summary
In an outsourcing situation that would have qualified as a transfer of undertaking, the transferor requested an employee to transfer, not to the transferee, but to a subsidiary of the transferor, on unchanged terms of employment. The employee, unaware of his options and the consequences, accepted. Despite this, several years later, the employee claimed under the transfer of undertakings rules. The court held that in such a situation, the employee can indeed claim that there had been a transfer of undertaking, unless the transferor demonstrates that it informed the employee clearly of his options and the consequences of his choice at the time of the transfer.

Facts
This judgment is a sequel to the Supreme Court case reported in EELC 2009/43.

Mr Bos had been employed by Sarah Lee/DE (SL/DE) since 1980. He worked in a department within the company named Detrex International Forwarding that dealt with SL/DE's logistical affairs. SL/DE decided to outsource its logistics to Pax Integrated Logistics BV ("Pax") as of 28 September 2003.

Mr Bos was presented a letter by SL/DE dated 24 September 2003 informing him that the activities of Detrex International Forwarding were to be terminated in view of the outsourcing to Pax. The letter stated that Mr Bos would become an employee, not of Pax as would normally have been the case, but of Detrex BV ("Detrex"), a subsidiary of SL/DE. The personnel of Detrex, including Mr Bos, would from then on, although being employees of Detrex, work for Pax. SL/DE confirmed that all employment conditions would remain the same. Mr Bos signed the letter as evidence of his approval. This act of signing the letter was later to become the subject of a debate about his rights under the Dutch Transfer of Undertakings Act.

In June 2005 Detrex informed its employees that it would terminate its activities on 1 January 2006. Mr Bos was informed that Pax would become his new employer. Pax would pay the employees compensation to level the difference in the employment benefit package, which was, on average, on inferior terms.
Mr Bos was on sick leave on 1 January 2006 and upon his return he got into an argument with his supervisor because he refused to accept that he had become an employee of Pax. The situation escalated and Mr Bos was put on gardening leave. He did not return to work again. Detrex continued to pay Mr Bos from January until August 2006. Meanwhile Detrex had the employment contract terminated with effect from 1 August 2006 and Pax had its contract with Mr Bos terminated conditionally (namely, on the assumption that it existed) with effect from 8 March 2007.

Mr Bos commenced injunction proceedings, claiming that in September 2003 or, in the alternative, in January 2006 there had been a transfer of undertaking to Pax (which both Detrex and Pax had denied). He took the position that the mere fact that he had signed the letter of September 2003 containing his approval was insufficient proof that he had waived the protection provided under the transfer of undertaking rules. He stated that he had been ill-informed. Because of the inferior employment benefits Mr Bos claimed that Pax owed him for loss of salary and other benefits for the period 1 August 2006 to 8 March 2007, plus statutory interest for overdue payment.

Mr Bos lost the case in two instances. He appealed to the Supreme Court.

The Supreme Court found that SL/DE had an obligation, at the time it outsourced its logistical department to Pax, to inform Mr Bos fully of his options, namely to transfer to Pax on his existing terms of employment or to become an employee of Detrex, also on his existing terms of employment but not pursuant to a transfer of undertaking (see EELC 2009/43). The Supreme Court overturned the Court of Appeal's judgment and remitted the case to another court of appeal, which was instructed to investigate whether SL/DE had informed Mr Bos adequately of his rights at the time it outsourced its logistics department.[1]

The Court of Appeal took the criteria of the Supreme Court into consideration and ruled that, based on lack of evidence, Pax had failed to show that SL/DE had provided Mr Bos with the required information. The fact that Bos had mentioned that he did not want to work for Pax was insufficient for the court to find otherwise. Furthermore, Bos had given a sufficient explanation for his outburst, saying that it had occurred as a result of insecurity regarding his employment situation. The court found Pax responsible for putting Bos on gardening leave and for the fact that he had not worked ever since.

Meanwhile, Mr Bos had filed his claim again, this time not in injunction proceedings but in regular proceedings. He lost again and appealed. By the time the Court of Appeal had to decide a second time, the Supreme Court had delivered its judgment in the injunction proceedings.

Judgment
The High Court of Appeal took the criteria of the Supreme court into consideration and ruled that, based on lack of evidence, Pax had failed

to show that SL/DE had provided Mr Bos with the required information. The fact that Bos had mentioned that he did not want to work for Pax was insufficient for the court to find otherwise. Furthermore, Bos had given a sufficient explanation for his outburst, saying that it had occurred as a result of insecurity regarding his employment situation. The court found Pax responsible for putting Bos on gardening leave and for the fact that he had not worked since.

Commentary

The judgment gives teeth to the transferor's and transferee's obligation to inform their employees in accordance with Article 7 of Directive 2001/23, although the underlying matter is not judged by the transfer of undertaking rules. The criteria used to arrive at the decision derive from general rules of good conduct in the context of employment.[2]

The general rule is that an employee can voluntarily waive his or her right to protection under the transfer of undertaking rules if he or she does not want to accept the transferee as the new employer. The employee will then no longer be employed by the transferor, unless they decide to continue their relationship on the conditions agreed upon.

In the case of a dispute about the waiver, the question is whether or not the employee knew what he or she was doing (including the consequences of his or her actions) and whether or not his or her approval was expressed clearly and without hint of doubt.

SL/DE would have acted as a "good employer", as required under Dutch law, if it had given Mr Bos the choice between either transferring into the employment of Pax on the existing SL/DE terms or transferring into the employment of Detrex under terms agreed upon.

Although I concur with the general outcome of this case as regards the employee, it is notable that it was the transferor that failed to abide by the applicable rules – but the transferee that was held responsible for the consequences.

In any event, the Dutch Supreme Court has set the bar high in protecting employees, which is in line with the bar set by the ECJ, and this seems to reflect the general trend. When considering some of the recent decisions regarding transfers of undertakings it appears that the scope of Directive 2001/23 is influenced by evolving views on some of the basic elements of the Directive, such as the definition of "employee". In this respect the protection of employees is still growing and the obligations of the employer as regards the right to information are increasing.[3]

I am happy for Mr Bos, that Pax has not appealled to the Supreme Court and that, therefore, the Leeuwarden High Court decision is the end of the matter.

Comments from other jurisdictions

Germany (Simona Markert): The German situation is similar to the situation in the Netherlands. In terms of employees´ rights to be informed about a transfer of undertaking the German Federal Labour Court (the "BAG") has also set the bar high (8 AZR 382/05).

In the case of a transfer of undertaking the employment relationships existing at the time of the transfer pass to the transferee. Section 613a (5) of the German Civil Code obligates either the transferor or the transferee to notify employees affected by the transfer in writing prior to the transfer of its date or planned date, the reason for it, its legal, economic and social consequences for employees, and the measures being considered with regard to the employees. The affected employees may object in writing to the transfer of the employment relationship within one month of receipt of the notification. The legal consequence is that the employment relationship stays firmly with the transferor. The one month period only starts once either the transferor or the transferee has fully informed affected employees of their right to transfer to the acquiring company under the same employment terms and conditions.

The German requirements regarding full and correct notification about transfer are more onerous than those required by Directive 2001/23/EC, which only requires information about the transfer to be given if there are no employee representatives.

United Kingdom (Joe Beeston): In the UK, both the transferor and transferee have a duty to inform and consult with appropriate representatives of the employees who will be affected by a transfer of an undertaking. Although there is no minimum prescribed time limit on when this consultation must occur, it should take place "in good time" to allow employees to consider their options before it is too late, i.e. not after the transfer has taken place.

The information that must be provided is about the fact of the transfer, the reasons for it and its legal, economic and social implications. The fact that an employee can object to a transfer and what the implications of that objection would be do not have to be specified. There is no requirement in the UK that an employee intending to object to a transfer should be informed of the consequences of his or her actions. An objecting employee will not transfer, but his or her employment with the transferor is treated as terminating automatically. (This is unless the transferor relocates the employee to another part of its business, which it is under no obligation to do.) Employees who object are therefore deemed to have resigned and will not have a claim for damages or any other remedy, unless the reason for the objection was linked to a proposed detrimental change to employment conditions.

There is no particular form in which an employee must state an objection to transferring and an objection can be communicated either in word or deed. Because the consequences of objecting to a transfer can be so harsh, a tribunal or court in the UK is likely to find that an employee did not object unless the employee used very clear words or actions to indicate an objection. Any ambiguity is likely to be resolved in the employee's favour. However, unlike the Dutch case of Mr Bos, an employee would not have to understand the consequences in order validly to object.

Subject: Transfer of undertaking
Parties: Pax Integrated Logistics B.V. – v – Mr Bos
Court: High Court, Leeuwarden
Date: 26 April 2011
Case number: 200.030.900/01
Hard copy publication: «JAR» 2011/170
Internet: www.rechtspraak.nl, LJN BQ4843

(Footnotes)

1 The proceedings with this other court of appeal have been withdrawn.
2 Article 7:611 Dutch Civil Code.
3 E.g. ECJ 10 September 2009 case C-44/08 *Akavan* – v – *Fujitsu* and ECJ 21 October 2010, case C-242/09 *Albron* – v – *FNV Bondgenoten*.

2011/37

Cypriot court applies Acquired Rights Directive (CY)

COUNTRY CYPRUS
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Summary
One company closed down a restaurant in November and another company reopened the restaurant in April, using the same name and the same equipment, offering identical services and being owned partly by the same owner. The court found this to constitute the transfer of an undertaking.

Facts
Kyriakoulla Polycarpou (the plaintiff) was employed in a restaurant called "Marcos Tavern". The restaurant was owned by a company named Frigg Restaurant Ltd. This company was owned by three shareholders. Let us call them A, B and Z. The company rented premises from Z and his sister, who jointly owned the building in which the restaurant was established. The three shareholders had numerous disagreements. On 20 June 2007 they settled their differences. The settlement provided that A and B would continue to run the restaurant for their own account until 30 November 2007 and that on 1 December 2007 they would transfer their shares to Z (who would thereby become the sole owner of Frigg Restaurant Ltd), that the rental agreement between Frigg Restaurant Ltd and Z and his sister would terminate on that date and that Z and his sister would take over the inventory of the restaurant (furniture, kitchen equipment, etc.), the stock and a valuable cheque.
Accordingly, A and B ran the restaurant for five more months (20 June – 30 November 2007). During this period a representative of Z visited the restaurant on a daily basis to inspect the premises, the equipment and the way the restaurant was being run.
On 27 September 2007 Frigg Restaurant Ltd dismissed all of its employees, including the plaintiff, observing a notice period of two months. Therefore, as of 1 December 2007, the plaintiff was out of a job (as were the other employees). She applied to the the Redundancy Fund, which is the organisation responsible in Cyprus for awarding unemployment benefits in the event of redundancy.
As per the said agreement, Z became the sole shareholder of Frigg Restaurant Ltd on 1 December 2007. He and his sister tried hard to find a new tenant, but they did not succeed. The restaurant was closed during this period and Frigg Restaurant Ltd ceased doing business.
In late December 2007, a company called Sonoro Trading Ltd, the shares of which were owned by Z and a relative, decided to reopen Marcos Tavern on 1 February 2008. Sonoro Trading took over the restaurant's equipment, stock, etc. and hired all of Frigg Restaurant Ltd's former employees except the plaintiff. The reason Sonoro Trading did not hire the plaintiff was that she had found new employment in a new restaurant nearby, which was partly owned by one of Frigg Restaurant Ltd's former shareholders, with whom Z had negative relations. Marcus Tavern provided the same services as it had done until 30 November 2007.
Meanwhile, the Redundancy Fund had turned down the plaintiff's application for unemployment benefits, the reason being that the events described above did not qualify as redundancy but as a transfer of undertaking and that therefore the case was effectively one of unfair dismissal. The plaintiff brought legal proceedings against both Frigg Restaurant Ltd and the Redundancy Fund. She sought compensation for unfair dismissal against Frigg Restaurant Ltd or, alternatively, unemployment benefits from the Redundancy Fund for the period between 1 December 2007 and 1 April 2008 (from which date the said other restaurant hired her).

Judgment
The court found that the plaintiff's dismissal had been unlawful and unfair and awarded her just over € 9,000. It dismissed the claim against the Redundancy Fund. The court reasoned as follows.
As of 1 December 2007, Z was the owner of a company that owned a fully equipped and stocked restaurant. Z could have continued to operate the restaurant. Instead, he decided to dismiss the staff and to keep the restaurant closed. However, it is clear from the facts that his intention all along was to reopen the restaurant when the tourist season began in April. When Sonoro Trading Ltd opened the restaurant in April 2008, it did so in the same building, using the same equipment, under the old name, Marcos Tavern, and provided identical services.
Given that all the restaurants in the area closed down for the winter season (December-March) Z had not suffered any significant loss by keeping the restaurant closed during this period.
Based on these three sets of facts, the court found that Marcos Tavern had retained its identity despite the brief cessation of business and that therefore there had been a transfer of undertaking within the meaning of the Cypriot law transposing Directive 2001/23, Law 104(1)/2000. The court rejected the argument that the plaintiff had been dismissed for economic, technical or organisational (ETO) reasons.

Commentary
This judgment may not seem spectacular to lawyers in other European jurisdictions but it is revolutionary by Cypriot standards, even though there had previously been a handful of cases where Law 104(1)/2000 had been applied. The importance of this judgment is that the court proceeded with a systematic analysis of EU law in relation to Cypriot law. I concur with this judgment, which I expect to have a profound effect on Cypriot business.

Comments from other jurisdictions
Germany (Paul Schreiner): In Germany this case would have been treated quite differently.
On 27 September all employment relationships were terminated. In Germany this would require an operational reason (assuming that the restaurant had more than ten employees). The reason can, in principle, result from a decision to close the shop. Yet it seems that the decision to do so had not been taken by 27 September, because Frigg Restaurant Ltd was apparently searching for a new tenant to run the restaurant. A termination for operational reasons, however, requires that the shop will not be run by someone else in the future, but will actually be closed. Therefore, in the situation at hand, termination would have been considered invalid and void, given that it was not based on a definitive decision to close the shop.
Later on the shop was taken over by Sonoro Trading Ltd and at that point a transfer of undertaking did occur. Since the prior termination of employment had been invalid and void, all of the former employees would have become employees of Sonoro Trading Ltd.

Subject: transfer of undertaking
Parties: Kyriakoulla Polycarpou – v – Frigg Restaurant Ltd and Redundancy Fund
Court: Δικαστήριο Εργατικών Διαφορών – Λάρνακα (Employment Tribunal of Larnaka)
Date: 30 November 2009
Case Number: 1/2008

2011/38

No power for tribunal to apportion liability for unlawful discrimination (UK)

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Summary
The Employment Appeal Tribunal (EAT) held that an Employment Tribunal had no power to apportion liability for damages between respondents where several respondents were found guilty of the same act of race discrimination. Where more than one party is found guilty of discrimination and the damage is "indivisible", liability should be "joint and several" as a matter of law – that is, the claimant is entitled to recover the entirety of his or her loss from any of the respondents.

Facts
In 1999, Ms Sivanandan (the "claimant"), who was a race equality adviser, applied for two positions with a body called Hackney Action for Race Equality ("HARE"), which existed to promote good race relations within the London Borough of Hackney (the "Council"). HARE was partly funded by the Council and had close links to it. It was managed by an executive committee and had a full-time director, Ms Howell. The claimant had been a member of the executive committee of HARE in the past, but there had been a dispute and in the previous year she had started race discrimination claims against it (which she eventually won).

The claimant was interviewed separately for each of the two posts. The interview panels consisted of members of HARE's executive committee together with Ms White, a Council employee.

The claimant was not selected for either job. She brought proceedings in the Employment Tribunal, in which she claimed that her non-appointment was the result of sex and race discrimination and more particularly that she was being victimised because of her previous race claims. The respondents to the claims were:

Ms Howell, Ms White and the other members of each of the interview panels. These were referred to as the "primary discriminators", on the basis that they had made the decision not to offer the claimant the roles.

The executive committee of HARE and HARE (the company) – these were put forward in the alternative as being the employer of the primary discriminators (other than Ms White) and therefore vicariously liable for their acts.

The Council – on the basis that it was Ms White's employer and therefore vicariously liable for her acts.

At an Employment Tribunal hearing in 2003, it was decided that the individual members of the interview panel had been influenced by the claimant's previous race discrimination claims when deciding not to offer her the jobs. The primary discriminators were therefore guilty of race discrimination by victimisation. HARE and the Council were held to be vicariously liable.

The Employment Tribunal's remedies decision
Following a number of appeals, cross-appeals and various delays, there was a remedies hearing in October 2007 by which time HARE had been disbanded. Ms White, the Council employee, was the only respondent to attend. The Tribunal decided that liability should be apportioned between Ms White and all the other respondents. Furthermore, despite not having decided on the total award or the relative responsibilities of the various respondents, it held that the award against Ms White should be limited to £1,250 in respect of injury to the claimant's feelings. This was an unusual decision that could be criticised, but it was never appealed and was not considered by the Employment Appeal Tribunal (EAT) in the procedure described below.

A second remedies hearing was held in November 2008. The Employment Tribunal decided that all the remaining respondents were "jointly and severally" liable to pay the claimant £421, 415. The Tribunal declined to apportion liability as between them. It considered that it would not be just and equitable to make such an apportionment in light of the fact that the Council had a very significant degree of influence over the decisions taken by the interviewing panel.
The Council appealed the ruling that the award should be joint and several, arguing that the factors relied upon by the Tribunal did not support its decision not to make any apportionment.

The Employment Appeal Tribunal's decision
The EAT upheld the decision not to apportion liability, but for different reasons. Whereas the Tribunal had proceeded on the basis that it had discretion to apportion liability and decided not to, the EAT held that there was no power to make such an apportionment as a matter of law. The EAT summarised the relevant legal principles. It noted that unlawful discrimination was a statutory tort (civil offence), so it followed that compensation for loss caused by unlawful discrimination should follow ordinary tortious principles. In particular, the EAT set out the rules applicable in cases of concurrent tortfeasors (i.e. people guilty of committing the same tort or who separately contribute to the same damage):

If there is a rational basis for distinguishing the damage caused by tortfeasor A from that caused by tortfeasor B, the court will hold A and B liable to the claimant for that part only of the damage which is attributable to each of them ("apportionment"). Where this applies, the claimant will have to proceed against each respondent for the part of his loss caused by him or her.

On the other hand, where the same "indivisible" damage is done to the claimant by concurrent tortfeasors, as in the current case, each is liable for the whole of that damage. (This is known as "joint and several" liability.)

The EAT went on to acknowledge that it could be unfair that a single respondent may find himself responsible to the claimant for the entirety of damage for which others were also responsible. The Civil Liability (Contribution) Act 1978 (the "1978 Act") is designed to address this issue. It gives such a person the right to claim a "contribution" from concurrent respondents to the extent the court decides is "just and equitable having regard to that person's responsibility for the damage in question".

The EAT clarified that this provision of the 1978 Act determines the liability of concurrent wrongdoers as between themselves, but it has no impact on the liability as between the respondents and the claimant. The claimant can recover in full against whichever respondent he or

she chooses and it will then be up to that respondent to recover any contribution from the others.

The EAT considered that similar principles applied to discrimination claims. Where more than one person participated in the same act of discrimination or contributed to the same damage by different acts of discrimination (i.e. concurrent discriminators), liability should be joint and several. The EAT agreed with the rationale for joint and several liability set out in the House of Lords ruling in *Barker – v – Corus (UK) plc* [2006] UKHL 20: if someone causes harm, there is no reason why their liability should be reduced because someone else also caused the harm. On that basis, the EAT concluded that the respondents in this case should each be liable for the full amount of the claimant's loss.

The EAT acknowledged that it was departing from established authority and, up to now, employment tribunals had believed they were entitled to apportion liability between concurrent discriminators. This often occurs, for example, where tribunals are dealing with allegations of discrimination against both an employer and its employee, where the employer is vicariously liable. The tribunal tends to make the "lion's share" of the award payable by the employer (on the basis that it has more money), with a smaller sum payable by the guilty employee. This practice has been endorsed by the EAT in previous rulings (*Armitage and others – v – Johnson* [1997] IRLR 162 and *Way – v – Crouch* [2005] IRLR 603).

The EAT in the current case commented in passing that employment tribunals engaging in this practice have proceeded on a misunderstanding of the law. However, the EAT fell short of ruling definitively that the previous authorities had been wrongly decided. Instead, the EAT recommended that employment tribunals only make "split awards" if such an order is positively sought by one of the parties and if there exists a clear legal basis – other than the 1978 Act – to do so.

Commentary

There clearly appears to have been a major misunderstanding of the law in this area in previous cases. Given this very clear, reasoned decision on the applicability of joint and several liability in discrimination cases where the claimant suffers "indivisible" damage from different discriminators, it is unlikely that employment tribunals will be able to apportion liability between individual employee discriminators and the vicariously liable employer in future.

Where the employer is solvent, the claimant is likely to proceed against the employer to recover the damages. On the other hand, individuals may increasingly find themselves paying the entirety of damages where the employer has become insolvent.

In cases where the same advocate has defended the (discriminatory) employee and the employer, an apportionment is unlikely to be sought at the remedies hearing (as a conflict of interest would arise). However, in such cases, the employer could rely on the 1978 Act subsequently to seek to recover part of the award from the guilty employee.

Subject: Race discrimination; compensation
Parties: London Borough of Hackney – v – Sivanandan and others
Court: Employment Appeal Tribunal
Date: 27 May 2011
Case number: [2011] UKEAT/0075/10
Hard copy publication: Not yet reported
Internet publication: www.bailii.org

2011/39

No damages for discriminatory dismissal (AT)

COUNTRY AUSTRIA
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Summary

Prior to 1 August 2008, Austrian victims of discriminatory dismissal could (probably) claim nothing but reinstatement. Claims for monetary compensation were always rejected. Even since a change of law in 2008, the courts may still be reluctant to award more than minimal compensation.

Facts

The employee worked as a waitress. In October 2006 a customer grabbed her between the legs and touched her intimately. The waitress shouted at the customer and told him that he was not allowed to touch her and that he should never try to do so again. The manager of the establishment summarily dismissed her. He told the waitress that if a customer drinks two bottles of wine, behaviour like this is "regarded as part of the deal". By not accepting this behaviour, the employee was not what he considered a "real" waitress.

The waitress sued her employer for damages resulting from the loss of her job. As a result of the sexual harassment she was afraid to work night shifts and she failed to find suitable employment in a day job. She claimed compensation in lieu of notice (i.e. the remuneration which would have been paid if proper notice had been given, in her case, two weeks pay) as well as the difference between her former wages and her unemployment benefits for a period of about eight months.

Judgment

The court of first instance (*Arbeits- und Sozialgericht Wien*) ruled that the employee was only entitled to compensation in lieu of notice and not to any additional damages. It reasoned that compensation in lieu of notice is a form of "abstract damages", meaning that it is owed irrespective of actual loss. For this reason, the sum paid as compensation for not observing the correct notice period is seen as constituting full compensation for unjust summary dismissal, however unfair the dismissal may be. In other words, there is no other remedy for unfair dismissal. In the case of the waitress, she would have been eligible for compensation equal to two weeks of salary, were it not that the time limit of six months for raising such a claim had expired, for which reason even that claim was dismissed.

The Appellate Court of Vienna (*Oberlandesgericht Wien*) upheld the lower court's decision but argued differently. It noted that the employee's claim was neither for immaterial damages resulting from the discriminatory dismissal nor for damages resulting from the sexual harassment by the customer. The only thing the employee had applied for in her submission to the court was compensation of material damages resulting from the dismissal. Section 12 (7) of the Austrian Equal Treatment Act (*Gleichbehandlungsgesetz*), as it read at the relevant time, allowed only one type of claim for discriminatory dismissal, namely reinstatement, but this was not something the

employee had claimed. The court cited literature to the effect that additional damages may be claimed, but that loss of income exceeding the compensation in lieu of notice is not seen as damages attributable to the discriminatory dismissal. Given that Austrian law does not require an employer such as the one in this case[1] to give a reason for terminating an employment contract, loss such as that claimed by the waitress, inasmuch as it exceeded two weeks' wages, would also have occurred in the event she had been dismissed for a non-discriminatory reason, and therefore need not be compensated by the former employer.

The Supreme Court (*Oberster Gerichtshof*) upheld the decisions of the lower courts but again took a different approach to justify this result.

According to the Supreme Court it was undisputed that the reason for the dismissal was the way in which the waitress had reacted to sexual harassment by a customer, and it was also beyond doubt that this dismissal was discriminatory and therefore illegal. The Equal Treatment Act, as it stood before it was amended in 2008 provided reinstatement as the only remedy for discriminatory dismissal. However, as the plaintiff had not claimed reinstatement, but only loss of wages exceeding the notice period of two weeks, her claim had to be denied.

The Supreme Court went on to cite existing case law, which did not award remedies other than reinstatement. That case law refers to the government's Explanatory Memorandum to the Bill of Parliament that led to the amendment of the Equal Treatment Act in 2008. The amendment introduced a choice for the employee either to claim reinstatement or to accept termination and claim (material and immaterial) damages. According to the Explanatory Memorandum the amendment was intended to create a significant legal change by giving employees a choice between two options. The Supreme Court therefore assumed that the option just to claim damages did not exist before 2008.

The Supreme Court noted explicitly that it did not consider the employee's argument that reinstatement would lead to an unacceptable situation, as this argument was introduced at too late a stage in the proceedings and therefore constituted an inadmissible alteration of the claim.

The Supreme Court therefore concluded that the exclusivity of the right to challenge a dismissal by claiming reinstatement as a sanction for discriminatory dismissal pre-2008 can only lead to the conclusion that there is no legal basis for any of the claimed damages (neither compensation for notice nor additional damages).

Commentary

From a national point of view this decision is surprising, seeing that any employee who has been dismissed summarily without good reason may claim compensation for notice if he or she does not want to be reinstated or if reinstatement is not an option available because he or she is not covered by the general protection against dismissals (usually because of working in a business with fewer than five employees). It therefore seems that under the pre-2008 law employees who claimed discriminatory dismissal were less well-off than employees who had been dismissed unfairly for a non-discriminatory reason, having not more but fewer options. This is something that does not fit in too well with the Austrian constitutional principle of equal treatment.

From an EU point of view it is also doubtful whether the remedies offered by the pre-2008 Equal Treatment Act were sanctions that met the "effective, proportionate and dissuasive" test as foreseen in EU legislation.

The Supreme Court mentioned in an *obiter dictum* that it might have ruled differently had the employee based her claim on the argument that reinstatement was unacceptable (which in my view would be very much the case here). In that case the Court might have granted some other remedy. However, it is questionable whether, in that event, more than the compensation for non-observance of the notice period would have been granted.

Although the remedy issue is no longer relevant since the amendment to the law on 1 August 2008, new questions have arisen. Under the new legal regime it is not clear how to calculate monetary damages. As the decision reported above illustrates, Austrian courts are reluctant to grant more than remuneration during the notice period, reasoning that employment relationships in Austria may be terminated by giving notice, even without just cause. Some scholars therefore argue that if employees can be dismissed summarily without good reason and cannot claim compensation beyond salary for the non-observed notice period, why should a discriminatory dismissal yield a higher monetary award? Others point out that EU law requires sanctions in the event of discrimination to be sufficiently effective, proportionate and dissuasive and that therefore further compensation is called for. If the latter view prevails, given that I cannot see punitive awards becoming accepted in Austrian practice, claims for immaterial loss will be likely to become increasingly common.

It should be noted that in the case reported above none of the courts dealt with the question of whether the waitress could claim compensation for the sexual harassment by the customer, the waitress having limited her claim to loss of earnings resulting from the dismissal. However, it is by no means certain that a claim for harassment would have been successful.

Comments from other jurisdictions

Germany (Paul Schreiner): In Germany the summary dismissal of an employee must be based on a good reason. In the case at hand, it is hard to find one. Consequently, had the case been heard in Germany, the plaintiff probably would have asked the court to declare the termination invalid.

If a notice of termination is drafted properly, it will usually include the reasons for termination of the employment, even though these do not generally have to be justified unless the employer has more than ten employees. If so, i.e. if there are more than ten employees, the Dismissal Protection Act will apply. However, regardless of whether it applies, the termination in the case reported above can probably be seen as discriminatory and therefore invalid by reason of harassment under the German Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz*, or *"AGG"*). If the termination was invalid, the consequence would be reinstatement. Therefore, it is likely that in Germany the plaintiff in this case could have declared the summary dismissal to have been invalid and void.

Besides the option of obtaining payments during the notice period, the plaintiff would also have been able to claim immaterial damages in accordance with section 15(2) AGG. This provision covers immaterial damages of any kind, including violations of dignity. Claims for immaterial damages are in principle not limited (the only exception being where a job applicant whose application is rejected for

discriminatory reasons can only be awarded up to three months' salary where it is clear that he or she would not have got the job even without the discrimination).

Further, the AGG contains provisions relating to material damages (section 15(1)). Given that the summary dismissal was unlawful in the case at hand, there are no further material damages to be awarded.

United Kingdom (Carla Feakins): Based on the facts of this case, a UK employee could argue that she had been discriminated against on a number of grounds. Firstly the dismissal itself could amount to sexual harassment. Harassment can occur where an employee is treated less favourably by her employer because of her rejection of unwanted sexual conduct, even where the sexual conduct was that of a third party, as was the case here.

Secondly, the employee could argue direct discrimination on the basis that she was treated less favourably than a male waiter in the same situation would have been.

Thirdly, she could argue she had suffered indirect discrimination on grounds of her sex. The test is whether the employer applied a provision, criterion or practice that puts women at a particular disadvantage without justification. For example, a practice that waiting staff must put up with sexual harassment from customers would affect women more than men.

In October 2010 a new cause of action was introduced in the UK by the Equality Act 2010, allowing employees to bring claims against their employer for failure to prevent "third party" harassment. The action is limited to situations where the employer knows that the employee has been harassed in the course of his or her employment on two other occasions – not necessarily by the same person – and the employer fails to take reasonably practicable steps to prevent it. (It is not clear whether the waitress in this case suffered other harassment such as to have enabled her to bring this type of claim.) However, in March 2011 the UK government announced that it will consult on abolishing this particular type of claim, which it has described as "unworkable".
In addition to the various types of discrimination claim in this case, the employee would also have a claim for unfair dismissal.

At the time the case was heard, the only apparent remedy available for a discriminatory dismissal in Austria was reinstatement. In the UK remedies for discrimination are dealt with separately from those for unfair dismissal. UK remedies for unfair dismissal include reinstatement, re-engagement (engagement by the employer to do comparable work) and compensation for financial loss including loss of earnings, which is currently capped at £68,400.

In contrast, tribunals cannot award reinstatement in discrimination claims: the principal remedy is compensation, which is uncapped. Discrimination damages can include awards for injury to feelings and financial losses, including loss of earnings. A loss of earnings award is calculated by putting the employee in the position he or she would have been in if the discrimination had not occurred. In a case of this severity, the court might also decide to make an award for aggravated damages where the employer has acted in a "high-handed, malicious, insulting or oppressive manner".

Subject: Sex discrimination (termination)
Parties: I.S. – v – A.L. GmbH
Court: Austrian Supreme Court (*Oberster Gerichtshof*)
Date: 28 February 2011
Case number: 9 ObA 115/10t
Hardcopy Publication: ecolex 2011, 547
Internet publication: http://www.ris.bka.gv.at/Jus/

(Footnote)
1 Employers with fewer than five employees are not required to give a reason for dismissal. Austria has not ratified ILO Convention 158.

2011/40

Is 37 too old to become a judge? (GR)

COUNTRY GREECE
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Summary
The provision of Greek law that candidates for a position as a judge must be aged under 35 (County Courts) or 40 (all other courts) is age discriminatory but objectively justified.

Facts
A ministerial decree known as Regulation of the Courts and Judicial Officers (the "Regulation") sets an upper limit for judicial appointees. Applicants for the position of County Court judge may not be older than 35. Applicants for a position as a judge in any other court may not be older than 40.

The plaintiff in this case was aged 37 when he applied to become a County Court judge. Knowing that the Regulation stood in the way of an appointment, he asked the Council of State to annul the Regulation on the grounds that it is incompatible with Regulation 2000/78 and also with Articles 4(1), 5(1) and 25(1)(d) of the Constitution, which guarantee equality of citizens before the law, free access to public office (in the sense of free development of personality), and unimpeded access for everyone to social, financial and political life.

Seeing that it usually takes a while for the Council of State to reach a decision, the plaintiff simultaneously applied to the Council of State's "Suspension Committee" with an application for injunctive relief, consisting of a provisional suspension of the Regulation.

The Suspension Committee granted the provisional annulment as requested, following which the plaintiff was allowed to take part in the examinations held for access to the County Courts.

Judgment
The Council of State agreed with the plaintiff that an upper limit for appointments, such as provided in the Regulation, constitutes discrimination on the basis of age. The issue was whether this discrimination was objectively justified as provided in Article 6(1) of Directive 2000/78, which specifically allows "the fixing of a maximum

age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement".

The Council of State noted that the age limits of 35 and 40 in the Regulation serve a legitimate aim, namely the public interest, because they ensure the efficient organisation and operation of the judiciary. Candidates for judicial roles need time to acquire experience, knowledge and skills for their demanding profession. Therefore they need to start their training in time.

Is setting an upper age limit of 35 for County Court judges an appropriate and necessary means to achieve the said legitimate aim? The debate on this question focused on (i) the compatibility of the Regulation with the provisions of Directive 2000/78, and (ii) on the reason for the difference in age limit for County Court judges (35) and other judges (40). The Council of State found this difference to be justified by three things. First, unlike judges in other courts, County Court judges do not receive pre-appointment training at the National School of Judicial Officers. Secondly, County Court judges sit alone. Finally, they usually work in villages far from city centres, where conditions tend to be adverse (i.e. heavy workload owing to the fact that the judges work alone: inadequate administrative staff: lack of materials and technical infrastructure; and distance from supervisor judges and councils).

For these reasons, the Council of State considered that the Regulation passed the proportionality test. The plaintiff, who had been provisionally allowed to participate in the examinations, was removed from the list of candidate judges after this judgment.

As for the constitution, no violation of the protected principles of equal treatment, free access to public office and/or proportionality was proclaimed. In fact, the upper age limit of 35 was judged to be not only appropriate, but also to be the most effective measure based on the intended purpose of proper administration of justice.

The Council of State's judgment was a majority opinion. Seven judges were involved in the decision. Three expressed a dissenting opinion. They found the age discrimination to be disproportionate, arguing as follows. The set age requirement was not proved to be the most appropriate and efficient measure to be taken pursuant to the legitimate aim that was served. All Greek citizens have the constitutional right to enter any public service profession for which they are qualified, regardless of age. There is no objective evidence that raising the age limit of 35 will affect the career structure (judges who start their training somewhat later will not lack efficiency or knowledge, solely for this reason) or the independence of judges. In fact, statistics reveal that increasing the upper age limit for judges has little effect on the career structure or on the independence of the judiciary. This was concluded from official data obtained from the procedures provided for access to the National School of Judicial Officers, where the upper age limit is 40. The dissenters found the distinction between the set age limits for access to the County Courts and the other Courts to constitute a lack of internal cohesion. In other words, the legislator has not adopted a single practice for similar cases, which proves the inner division that exists on the matter.

Commentary

The Council of State has hereby resolved a matter that is important, not only because of the sensitive nature of the subject (age limits), but also because of the distinction between the legal framework and changes in the social and political environment. For example, the financial crisis in Greece is deepening day by day and unemployment levels are unprecedented. In those circumstances, limitations on access to professions must be treated with extreme caution.

The Council of State's assessment focused primarily on whether the national legislator's discretionary right was in line with (legal) interests protected by the Constitution, i.e. was the maximum age limit set for access to judicial posts legitimate in view of the scope of the national law transposing Directive 2000/78 into Greek law? After transposition, the provisions have direct effect. Although one might have expected the Court to have referred the matter to the ECJ, this did not happen because the majority of judges thought the case to be clear and a referral was therefore considered unnecessary. According to a literal interpretation of Article 267 TFEU, courts whose decisions cannot be challenged (i.e. the highest courts) must refer a preliminary question to the ECJ where a matter of interpretation of EU law arises. However, whether or not such a matter arises is for the national courts to decide.

It could be argued that in this case the Council of State should not have limited itself to reviewing whether national law (which set an upper age limit for access to the County Courts) was compatible with Article 6(1) of Directive 2000/78. Instead the inquiry should have been focused on other legal areas as well, such as whether there was a potential breach of the constitutional principle of equal treatment (Article 4 (1)). This was raised as an issue because of the different and more favourable treatment provided to judges working other than in the County Courts. The majority did not take into account the special circumstances under which County Court judges exercise their judicial duties. On the contrary, they focused arbitrarily on the 'rough' similarities between judges of all courts.

The issue raised in this case has been dealt with before in Greece, when another applicant judge protested against the age limit of 40 set for access to other courts than the County Court. In that case, the Council of State judged that the aim of proper administration of justice constitutes a legitimate goal and that therefore the maximum age requirement is not only appropriate but necessary. In that decision the Council had concluded that the national legislator was entirely free to select the qualifications it requires from applicants in order to ensure the proper recruitment of court officers, as this is within its discretion to evaluate the needs to be fulfilled by judicial post-holders. Even the alteration of access terms in prospective contests was considered fully justified and not discriminatory against applicant judges.

Both national and EU case law seem to agree on the *ad hoc* setting of age restrictions, with a view to well balanced social, professional and other criteria. We believe that the age limit of 35, if justified, could have been better explained by evidence to show that it is indispensable for the proper exercise of the demanding duties of County Court judges.

Comments from other jurisdictions

Austria (Andreas Tinhofer): In my view an age-limit of 35 or 40 years for the appointment of judges seems difficult to justify. It would be interesting to know how many years Greek judges are trained before they can sit in a court assuming full judicial powers. There might, for example, be applicants who have acquired a great deal of the necessary qualifications by working as lawyers litigating before the courts.

Cyprus (Natasa Aplikiotou): In contrast to the Greek process for becoming a judge, in Cyprus any person who wishes to become a judge must (a) hold a recognised university law degree, (b) be a qualified

lawyer in Cyprus, registered with the Cyprus Bar Association, (c) have practiced law for six years, and (d) be of high moral character. Applications for available posts must contain evidence to support the above criteria. Candidates must also be successful at interview before the 13 judges of the Supreme Court of Cyprus who make up the Judicial Council and the Council's final decision will be by vote. Further, in order for a person to be appointed as a Senior District Judge or President of the District Court he or she must have practiced law for at least ten years (including permanent positions in legal services) in addition to the aforementioned criteria. With regards to judicial posts within first instance courts exercising special jurisdiction (e.g. the Family Court and the Employment Tribunal), recruitment follows the same procedure as explained above but the required qualifications are contained in the separate laws establishing each Court.

Therefore, great differences exist between the procedures in Greece and Cyprus for becoming a judge. Firstly, in contrast to Greece, in Cyprus there is no School of Judicial Officers. The only requirements for becoming a judge are the fulfillment of the above-mentioned criteria. Secondly, there are no age restrictions in Cyprus with regard to the appointment of judges in any Court.

Based on the above analysis, it seems clear that a 37 year old Greek candidate such as the one in the case described would have been eligible to apply for and participate in the Cypriot procedure for becoming a judge.

Germany (Elisabeth Höller)**:** In Germany there is no specific regulation of age for judicial roles. However, there are general civil service regulations by which access to public services as an official is closed to those above a certain age limit. On 19 February 2009 the Federal Administrative Court ruled that the fixing of age limits requires a normative regulation and cannot be decided by the (federal of local) government. Now, most German federal states operate age limits for officials in public services by means of their Civil Service Law. The age limits vary among the federal states from 35 to 45. In addition, each federal state has regulations for certain career groups (e. g. the police and fire service) that allow for derogations and exceptions.

Since the implementation of Directive 2000/78/EG by the German Equal Treatment Act (the "AGG") the age limits in the various Civil Service Laws have become more problematic. According to the AGG, discrimination on grounds of age is generally forbidden and several courts have been occupied with the question of whether a given age limit for officials is still justified. In most cases the courts have ruled in favour of the state, usually arguing that in the case of a relatively short period of service the pension costs for the official, to which the official is entitled under the German Civil Service Law, are too high. It seems that the temporal relationship between education, work and pension must be adequate. Further possible aims could be a balanced age structure, a degree of continuity and permanence and good financial management.

United Kingdom (Duran Ross): As in Greece, UK law permits what would otherwise be direct age discrimination in situations where it can be objectively justified. More specifically, the less favourable treatment on grounds of age must be "a proportionate means of achieving a legitimate aim". Case law has built up in the UK considering this requirement. The Court of Appeal in *Seldon v Clarkson Wright & Jakes (a partnership)* [2010] IRLR 865 held that whilst employers seeking to justify discriminatory practices do not have to specify social or labour policy aims, a Member State does need to do so. This would include, by extension, the UK's Judicial Appointments Commission. So, in a comparable case in the UK, an age cap for entry to the judiciary should have a social policy aim. (*Seldon* is currently being appealed to the Supreme Court, which may give further guidance.)

The minority opinion expressed in the Council of State's judgment would most likely have been supported by a UK court or tribunal. In *Baker v National Air Traffic Services Ltd* (ET/2203501/07), a rule that individuals aged 36 or over could not apply to become air traffic controllers was held to be discriminatory for three main reasons. It was set with the afterthought of collating evidence to support it, in light of new age discrimination legislation. No correlation between the age bar and the aim of providing sufficiently well-trained air traffic controllers was found to exist. Lastly, other less discriminatory methods could have been adopted to achieve the same end (i.e. the blanket age bar was not proportionate).

The Greek decision does not seem to enquire in detail whether the age bar would in fact meet its intended aim and whether, if it did, it was proportionate. Neither does it discuss whether or not there were other less discriminatory methods of securing the same aim. If the legitimate aim relied upon is based on "the training requirements for the post or the need for a reasonable period in employment before retirement", it is not clear why there should be a difference between County Court and other judges. The reasons given for the different treatment of County Court judges do not seem to relate to that particular aim. On the other hand, if the relevant aim is to ensure the "proper administration of justice", it is not clear how the age limit assists with that.

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Court: Council of State
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Case Number: 851/2011
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2011/41

The inflexible mother (DK)

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Summary
The employer did not act in a discriminatory way by saying, as one of the reasons for dismissing a single mother, that she was not as flexible as the other employees.

Facts
The Danish Act on Equal Treatment of Men and Women prohibits employers from dismissing employees because of their gender. But

is it gender discrimination if an employer dismisses an employee (in part) for being not as flexible about her working hours as the other employees because she is a single mother?

A female call centre employee was dismissed because of a decline in orders and shrinking revenues. She was surprised and asked why she had been singled out. That led to a number of emails between the employee and her employer after the dismissal.

The employer wrote several times to the employee that they needed flexible employees. In the last email the employer wrote that they believed it would be more difficult for her to work odd hours in the weeks when she had to take care of her children. Based on this correspondence, the employee sued the employer for discrimination.

Judgment

In the district court, the employee submitted that she had been dismissed in breach of the Danish Act on Equal Treatment of Men and Women, because of her family status. The employer, on the other hand, argued that the lack of flexibility had nothing to do with her working hours as such, but more with her duties. Her professional qualifications were simply not as good as those of her colleagues (and this was not only due to her inflexibility in working hours). In addition, the employer argued, the Danish Act on Equal Treatment of Men and Women does not prevent employers weighing flexibility in terms of working hours as well, when deciding whose contract should be terminated in the event of a slump in work.

The district court ruled in favour of the employee. The employer had written to the employee that it would be difficult for her to work odd hours (which was contractually agreed) in the weeks that she had to take care of her children. Therefore, the district court held, the selection criteria constituted indirect discrimination because there are more single mothers than single fathers in general. Accordingly, the employee was awarded 26 weeks' pay in compensation.

On appeal, however, the High Court reversed the district court's judgment and ruled in favour of the employer. The employer's reference to the employee's children in one email was not enough to satisfy the High Court that she had been discriminated against within the meaning of the Danish Act on Equal Treatment of Men and Women. The High Court's ruling was based on the explanation given in the notice of termination, the employer's first three emails, the employer's statement in court and the information about the slump in business.

Commentary

It seems fair that the district court's judgment was reversed by the High Court, partly because the district court did not investigate whether the indirect discrimination was reasonably and objectively justified by legitimate (operational) needs.

The case suggests that it would not be discriminatory for an employer suffering a slump in business to include single parents' reduced flexibility to work odd hours as one of several factors when selecting which employees to let go. From a legal point of view, this must be said to be a correct decision. Flexibility in terms of working hours has been recognised as a lawful selection criterion in Denmark. The employee failed to establish that this criterion – if applied – had a gender basis in her case.

It is noteworthy that the High Court found that the employee had not discharged the burden of proof even though the employer had referred to the employee's reduced flexibility in the email correspondence. In earlier cases, the Court had applied the split burden of proof more leniently in favour of employees.

However, the case does not mean that an employee's family status is not protected by the Danish Act on Equal Treatment of Men and Women, which Act implements Directive 2006/54 EC of 5 July 2006. The outcome of the case seems to have been influenced by the fact that the employee failed to convince the High Court that her reduced flexibility had been the deciding factor in the employer's decision to terminate her employment.

Finally, it should be noted that the trade union has applied to the Appeals Permission Board with a petition for leave to appeal to the Danish Supreme Court. If such leave of appeal is granted, a decision from the Supreme Court is expected to take at least two or three years.

Comments from other jurisdictions

Austria (Andreas Tinhofer): This is an interesting case. If the employer could establish during proceedings that the reason for selecting the plaintiff for laying-off was mainly related to her qualifications, an Austrian court would have most likely have come to a similar decision. However, in discrimination cases the plaintiff generally enjoys the benefit of the doubt.

Having said that, if the principal reason for the dismissal was her (presumed) inflexibility as a single parent, an Austrian court would have come to a different conclusion. First, single parents (most of them being female) must not be discriminated against because of their family status. Second, it seems strange to make a general assumption that single parents are less flexible in terms of working odd hours than workers that share their "family burdens" with a partner (who will often also have a job). Third, it may well be the case that Austrian employers tend to be less flexible about adjusting time schedules unilaterally than Danish or certain other employers. It would be interesting to get an ECJ decision on this case.

Germany (Paul Schreiner): In Germany the decision in this case would largely depend on whether or not the Dismissal Protection Act applied. If it did, the employer would have to justify the termination based on operational reasons, personal reasons or reasons relating to the behaviour of the employee. In this case, the employer apparently tried to terminate the employment for operational reasons. As such, the employer would first need to prove that there was no possibility of employing the employee any more because of lack of work.

If it could be proved that there was a redundancy situation, the employer would then have to select whose employment to terminate. The employer would have to undertake a social selection, i.e. assess which employees are the most worthy of protection. In doing so, it must consider age, disability, length of service and whether or not the employees have dependants that need to be cared for. After weighing these criteria, the employer must also work out which employees would suffer least from the termination of an employment.

In the case at hand therefore, the employer needed to show that the social selection had been handled properly. Assuming it was handled properly the question of flexibility would probably only arise if the plaintiff had been found to have had a virtually equal need for protection as another employee, because only then would any additional requirements for social selection be considered by the courts.

Assuming the business was too small for the Dismissal Protection Act to apply, the question would be whether or not the termination was discriminatory. If it were, the termination could be declared invalid and void. The court would have assessed whether there was sufficient evidence to suggest that the termination breached the German Equal Treatment Act. Judging from the facts presented, this might have been the case. A German court would have found that in fact there are more single mothers than fathers taking care of their children. The inflexibility is therefore directly caused by gender. To distinguish between employees on the basis of the flexibility would therefore have been indirect discrimination on the grounds of gender. On this basis a termination might well have been declared invalid and void.

The Netherlands (Peter Vas Nunes): The Dutch Equality Commission has ruled repeatedly that dismissal on the grounds of inflexibility can constitute indirect sex discrimination, which is not always easily justifiable. In the case reported above, the court justified its decision to dismiss the plaintiff by stating, "that it would be more difficult for her to work odd hours in the weeks when she had to take care of her children". I am not certain that the employer would have won this case had it occurred in The Netherlands.

United Kingdom (Susie Jarrold): As in Denmark, employees in the UK have protection against indirect sex discrimination. This is by virtue of the Equality Act 2010, which implements the EC Equal Treatment Directive. Indirect sex discrimination arises where an apparently neutral provision, criterion or practice ("PCP") puts persons of one sex at a disadvantage, despite applying universally. So, in this case, a requirement for employees to be "flexible in their working hours" could indirectly discriminate against women who tend to have greater childcare commitments.

The only defence available to an employer where a PCP is discriminatory is to show that it can be justified as a proportionate means of achieving a legitimate aim. The UK Equality and Human Rights Commission's statutory code of practice, which employment tribunals must take into account where relevant, states that reasonable business needs and economic efficiency may be legitimate aims. The ECJ ruling in *Bilka-Kaufhaus GmbH v Weber von Hartz* [1986] IRLR 317 definitively sets out the approach to be taken in determining whether a PCP can be objectively justified. The PCP must correspond to a real need on the part of the employer, be appropriate with a view to achieving the objectives pursued and be necessary to that end.

In the case of "the inflexible mother", the Danish High Court ruled that employers are entitled to consider flexibility when deciding whose contract to terminate during a slump in work. The approach that would be adopted in the UK in respect of this case would be similar. The facts raise the issue of indirect sex discrimination, but the PCP could potentially be justified if it were found that the business needs relied on by the employer outweighed the discriminatory effect of the PCP on women generally and on the claimant in particular. However the tribunal or court would consider carefully whether there was a real need in that particular job to be flexible about hours and whether the same aim could be achieved with less discriminatory impact.

Subject: The Danish Act on Equal Treatment of Men and Women, which implements Directive 2006/54 EC of 5 July 2006.
Parties: The Danish Union HK acting for A – v – B, represented by C
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"Greedy" plaintiffs and punitive damages

BY: PROFESSOR KLAUS M ALENFELDER[1]

Introduction

The Treaty of Rome contained one provision, Article 119, that dealt with non-discrimination other than on the grounds of nationality. Its objective was not to promote human dignity but to combat unfair competition by Italian companies, which had a tendency to underpay their female workers even more grossly than did their competitors in Germany, France and the Benelux. Now, half a century later, EU law contains a whole raft of provisions aimed at promoting human dignity, amongst other things, through equal treatment in employment. Some of these provisions prescribe equal treatment in general terms (Article 2 TEU, Article 19 TFEU, Article 21 Charter of Fundamental Rights and — through Article 6(2) TEU — Article 14 ECHR and Protocol 12). Other provisions specifically prohibit discrimination[2] on the grounds of gender (Articles 8 and 157 TFEU and Recast Directive 2006/54), race (Directive 2000/43) and religion/belief/disability/age/sexual orientation (Directive 2000/78). The scope of the anti-discrimination rules is still expanding, both in terms of the different strands covered (e.g. agency work) and in terms of material scope (e.g. goods and services). What has caused this rapid evolution? Obviously, the principal driving factor is societal. However, credit must also be given to the Court of Justice of the European Communities/European Union (ECJ). It is fair to say that the EU legislator has to a large extent followed the ECJ rather than the other way round. Much of the EU's equal treatment law is essentially judge-made. Recent spectacular examples are *Mangold/Kücükdeveci* and *Test Achats*.

The anti-discrimination directives aim to effectively guard the core of the European principles, namely human dignity. As Mr Vladimir Spidla, a former EU Commissioner and former Prime Minister of the Czech Republic, said, "What distinguishes us from totalitarian countries is human dignity".[3] The anti-discrimination directives are not just ordinary EU-legislation. They are essential for protecting individuals' dignity against discrimination. Article 1 of the EU Charter of Fundamental Rights is clear: "human dignity is inviolable. It must be respected and protected". In brief, the effective implementation of anti-discrimination laws is of the utmost importance if the European Union wants to remain a beacon of freedom, instead of merely an island of prosperity.

If the EU's equal treatment rules are to have an impact on everyday life, they must be effectively enforceable. They must be capable of eliminating deeply ingrained attitudes, such as the idea that employers need to be protected against "greedy plaintiffs". In my own country, Germany, the case law indicates that such attitudes are still prevalent, and the anti-discrimination rules are still widely ignored. Fortunately, this reluctance is beginning to change, thanks to the ECJ's doctrine – now codified in Articles 18 and 25 of the Recast Directive, Article 15 of Directive 2000/43 and Article 17 of Directive 2000/78 – that compensation for victims of discrimination must be "effective, proportionate and dissuasive". This article attempts to examine that doctrine.

Punitive damages

An employer that discriminates against an employee or a job applicant commits a breach of contract and/or a tort. In either case, the laws of the Member States, so I assume, obligate the employer to compensate the victim. Such compensation can consist of things other than financial compensation, for example, reinstatement or a public apology, but in most cases the victim is interested primarily in money. This article therefore focuses on financial compensation for the victim's loss.

Discrimination can cause material loss, such as the loss of a (potential) job, underpayment and loss of earning capacity. It can also cause immaterial loss, such as hurt feelings or depression. Both types of loss can be compensated, to a certain extent at least, in the form of a monetary award. Such awards are common in all EU jurisdictions, as is evidenced by the cases reported in EELC. However, are they sufficient to deter employers from discrimination or, as the case may be, from continuing a pattern of discrimination in the future? Is a multinational company really motivated to change its policies because a judge in one Member State orders it to pay a few thousand euros? My contention is that it is not and that the ECJ acknowledges this by requiring the courts in the Member States, where necessary, to apply a penalty that has been common in the United States for decades, but which European legislators and courts have seemed reluctant to accept in employment disputes: namely punitive damages. For some reason, we find it perfectly normal for cartels to be ordered to pay hundreds of millions by way of punitive damages, or for tabloids to be ordered to pay huge sums of money to movie stars whose privacy was infringed, but for victims of discrimination in employment we expect employees to be content with puny rather than punitive awards.

Why are punitive awards necessary?

The aim of the EU directives is to guarantee a Europe free from discrimination. In the workplace this means that employees must be hired, paid and promoted based only on facts, not on bias.

Contrary to widely held belief, the elimination of discrimination does not hamper, but actually improves companies' efficiency, for a number of reasons. First, the absence of discrimination makes it easier to recruit the best employees and it enhances the public image of a company. This can open new markets and help to win new clients. The following example makes the inefficiency of decisions based on discrimination evident. Let us suppose that an employer is looking for a mid-level manager. One hundred people send in applications. Using bias instead of facts, the employer rejects 50 women, 10 migrants, 10 disabled people and 15 applicants aged over 50. This leaves no more than 15 applicants to choose from. It is not until the field has thus been narrowed down from 100 to 15 applicants that the employer in this example begins to apply facts to its decision-making. The chances are that it has already rejected the best applicant.

Secondly, there is evidence that companies that have eliminated discrimination have a significantly reduced employee turnover. On average a replacement costs around 125% of one year's wages of an employee in a non-executive position.[4]

Thirdly, by ending discrimination, employers will improve the motivation of their employees. Employees who see that they will be paid and promoted according to their own achievements, will feel fairly treated and will work with more dedication. A study in Germany shows that sick days and motivation are closely related. Employees with higher motivation have on average four sick days less each year than their less highly motivated colleagues.[5] Poorly motivated employees will do just enough, whereas highly motivated ones will show all they can do.

Fourthly, the said EU directives recognise harassment as a form of discrimination. In Germany there are 3.5 million victims of workplace harassment every year.[6] The cost of discrimination and bullying (often referred to in Germany and some other countries as "mobbing" or "straining"[7]) to employers in Germany is estimated to total over € 100 billion per year.[8] This figure is exclusive of the cost of associated social services (e.g. health insurance funds, pension institutions and social security services).

In brief, discrimination is inefficient. However, even supposing discrimination were efficient, would we want to tolerate it? And if we want to accept discrimination for the sake of business figures, what will be next? Child labour? Discrimination is degrading. It is immoral and, what is more, it is against the law.

Effective, proportionate and dissuasive

Sabine von Colson and Elisabeth Kamann applied for vacancies that had been advertised for positions in a men's prison. Their applications were rejected because the operator of the prison, the German province Nordrhein-Westfalen, wanted exclusively male employees. The court found that the province had violated the law implementing Directive 76/207 and that therefore Ms Von Colson and Ms Kamann were eligible to be compensated with "damages in respect of the loss incurred by the worker as a result of his reliance on the expectation that the establishment of the employment relationship would not be precluded by such a breach (of the principle of equal treatment)" in accordance with paragraph 611 A(2) of the German civil code. The damages amounted to 7.20 German marks, i.e. less than € 4, being each of Ms Von Colson's and Ms Kamann's travelling expenses from their home to the place where they were interviewed. However, the court was unsure whether German law was compliant with Directive 76/207. One of the questions it referred to the ECJ was "what sanction applies where there is an established case of discrimination in relation to access to employment?" The ECJ replied – in 1984 – that, "although [...] full implementation of the directive does not require any specific form of sanction for unlawful discrimination, it does entail that that sanction be such as to guarantee real and effective judicial protection. Moreover it must also have a real deterrent effect on the employer. It follows that where a member state chooses to penalise the breach of the prohibition of discrimination by the award of compensation, that compensation must in any event be adequate in relation to the damage sustained".[9] I have underlined the words "moreover" and "also" because they seem to imply that there are two components to the sanction to be applied by the courts: "judicial protection", that is to say, compensation of the victim's loss and a deterrent, that is to say, a monetary award over and above the extent of the victim's loss.

The ECJ revisited its doctrine in 1990 in the *Dekker* case and in 1993

in the *Marshall* case.[10] *Marshall* concerned a sex-discriminatory dismissal. The ECJ reaffirmed that measures appropriate to restore equality in the event the principle of equal treatment is breached "must be such as to guarantee real and effective judicial protection and have a real deterrent effect on the employer".

In 1997, in its *Draehmpaehl* judgment[11], the ECJ held that "if a Member State chooses to penalize breach of the prohibition of discrimination by the award of compensation, that compensation must be such as to guarantee real and effective judicial protection, have a real deterrent effect on the employer and must in any event be adequate in relation to the damage sustained". This passage seems to add a third requirement, in that compensation must not only (i) guarantee judicial protection and (ii) have a deterrent effect, but must also (iii) be adequate in relation to the damage sustained.

In brief, sanctions for discrimination must be *effective, proportionate and dissuasive*. What does this mean? How does the need for a deterrent effect relate to the adequacy requirement? How does "dissuasive" relate to "proportionate"? I will try to provide an answer, but first, let me analyse the "judicial protection" requirement.

Judicial protection

"Real and effective judicial protection" within the meaning of *Von Colson/Dekker/Marshall/Draehmpaehl*, as I see it, means that the victim's loss must be compensated in full. This loss can consist of:
material damages e.g.:
- lost earnings;
- legal costs;
- loss of earning capacity;

immaterial damages.

Let me investigate each of these components.

Lost salary

There is no cap on compensation for lost earnings in terms of the duration of the loss.[12] Allow me to illustrate this with the following hypothetical example. Tony is fired on reaching his 45th birthday because he is "too old". He had wanted to retire at age 65. His annual salary was € 60,000. His maximum material loss, if we ignore lost pay raises and losses in retirement income, is 20 years x € 60K = € 1,200,000. If Tony finds another job, the money he earns there has to be taken into account. In theory, Tony could sue for € 60,000 each year (or for € 5,000 every month) for the next 20 years, minus his earnings elsewhere. This would lead to decades of lawsuits. Instead, the court can estimate the future loss and award a one-off payment. This is a more reasonable solution than spending decades on litigation. The problem with this approach, however, is that it involves making an estimate as to how long the victim's employment would have lasted had the discrimination not occurred. A case – one out of many, but a rather insightful one – where a court was called on to make such an estimate is the English case of *Vento*-v-*Chief Constable* of *West Yorkshire*.[13] In that case, which concerns a policewoman who lost her job at age 30 as a result of sexual harassment, the court calculated the income she probably lost as a result of the harassment at £165,829. It did so "on the basis that there was a 75% chance of Ms Vento working in the police force for the rest of her career".

In brief, what *Vento* tells us is, first, that although estimating the likely duration of lost earnings is a subjective matter, in essence no more than educated guesswork, it is an exercise that needs to be undertaken. Secondly, making a serious estimate of probable lost earnings will in many cases, as in *Vento*, lead to a high level of compensation.

In Germany the theory is similar. In the event a job and hence the income that goes with the job is lost, the lost income must be compensated on the basis of an estimate.[14] In making this estimate, one of the determining factors is how long employees such as the victim commonly tend to retain their job. This is as Parliament intended it to be when it debated the Anti-Discrimination Act on 29 June 2006.[15] In determining how long the victim would probably have retained his or her job, the courts have reduced the victim's burden of proof. In 1994 the *BAG* ruled that the relevant statutory provisions reduce the victim's burden of proof "not only in respect of the amount of damages but also in respect of the question of whether there are damages at all".[16] In 2000 the *BGH* held[17]: "when determining a victim's likely professional development in the absence of the event that caused the loss, Article 252 BGB requires the court to make an estimate based on the normal course of events, taking account of the specific circumstances of the case, in particular as they relate to the victim's education and professional experience. Although it is up to the victim to provide the court with as concrete facts and arguments as possible, this requirement must not be overstretched [...]. In the event no facts can be established that allow the court to determine with any measure of certainty whether the victim's career would in all likelihood have been successful or not, the court will need to proceed from the assumption that the victim's professional success would have been average [...] Article 287 (1) ZPO requires the court to determine whether a loss has occurred and how serious that loss is, taking account of all of the circumstances of the case and the court's own convictions. This provision of the law does not merely reduce the victim's burden of proof but also its duty to present all the facts supporting his claim. Even where relevant facts are lacking the court must make such an estimation, provided sufficient facts have been established to enable the court to do this [...]".

Normally we use a formula that is called the Kattenstein Formula as a means to estimate loss from discrimination. This formula is based on 14 million data sets. It takes into account, *inter alia*, the normal staff turn-over rate, deduction of accrued interest and lost promotion.[18] The following example illustrates how the Kattenstein Formula can be used to determine a claim:

Monthly wage (€):	5,000
Age:	45
Retirement age:	65
Interest rate p.a.:	2.50 %
Estimated salary index-linkage p.a.:	3.60 %
Lost pension accrual p.a.:	0.27 %
Salary increase due to promotion p.a.:	0.47 %
Probability of keeping the job p.a.:	86 %
Remaining duration of employment (months)	240
Volume of employment:	100 %
Reduction for unemployment pay I:	59.80 %
Reduction for unemployment pay II (€):	800
Claim for damages:	**€ 233,960.48**

Legal costs

Under German law there is no compensation for legal costs in the first instance in the Labour Courts.[19] Directive 2006/54 provides (and Directive 76/207 previously provided) that "Member States shall introduce into their national legal systems such measures as are

necessary to ensure real and effective compensation or reparation in accordance with the applicable national rules". In applying this Directive, the ECJ has stressed that the compensation awarded to victims of discrimination has "to be made good in full".[20] This includes full compensation for legal costs. Given this case law, the German provision excluding compensation for legal costs may not stand up if challenged in the ECJ.

Loss of earning capacity and career opportunities

Besides lost salary and legal expenses, a victim of discrimination may be confronted with loss in the form of reduced productivity and/or loss of abilities.

Damages for these factors can be expected in cases of intensive and degrading bullying.[21] They can be permanent or long-lasting. Hence the financial losses may be higher than the lost salary. The damage can be determined by an expert in a way similar to the way immaterial damages are determined in cases involving bullying.[22]

Let me give an example. Tony is 45 years of age and works as a mid-level manager (salary: € 60,000). He has been bullied by his superiors and colleagues for five years because of his religion. He is the only Roman Catholic in the company. Finally, he collapses and his doctor advises him to leave the company. He suffers from depression, he feels insecure and avoids meeting people. His achievement potential is down by 50 percent. His doctor expects these handicaps to be permanent. He loses the ability to work in an executive position, e.g. as the head of a department, and his achievement potential is permanently down to 50 percent. After four years he finds a new job, again at an annual salary of € 60,000. His estimated loss of earnings according to the Kattenstein Formula is € 233,960 (see table above). However, this sum equals only around four years' wages. The permanent loss of abilities is not taken into account. The employee "sells" his abilities and efficiency in his job. If these "goods" are damaged he loses economic value. This means: no salary or lower salary. This material loss has to be compensated in full. Here Tony loses any chance of promotion and bonuses.

Immaterial damages

Compensation for immaterial damages is mainly for psychological suffering. The amount to be awarded depends on the severity of the discrimination and its psychological and medical impact.[23]

In Germany, when determining the extent of immaterial damages, the courts have for a long time taken into account the need for the damages to have a dissuasive effect. This approach is technically incorrect. A distinction needs to be made between immaterial damages, the purpose of which is to compensate primarily for the injustice done, focusing on the victim and his or her sufferings, and on the other hand, the preventive effect of an award for damages, where the focus is on the defendant and on potential future perpetrators of discrimination. It strikes me as erroneous to lump compensation for the victim and preventive effect together in one award for "immaterial damages". Both elements need to be separated.

It may be that the idea of punitive damages is alien to many in Germany, but this is precisely what the EU directives and the ECJ's case law require. German case law in respect of privacy protection (see below) is more in line with the EU's rules, even though it avoids qualifying the awards in question as being "punitive". Rather, the courts refer compensation for immaterial damage and awards aimed at prevention jointly as "compensation". This lack of precise terminology needs to be redressed. Only when the different elements of an award are identified can the award be determined in accordance with the European rules.

Therefore, the suffering of the victim needs to be compensated and then a sum should be added which is enough to guarantee a deterrent effect. The required sum can be determined by an expert.[24]

Deterrent

One can distinguish between two types of deterrent:

- measures aimed at dissuading the perpetrator of the discrimination from continuing or repeating his behaviour (specific prevention) as the case may be;
- measures aimed at dissuading other employers from discriminating against their employees in a similar manner (general prevention).

Interpretation of "deterrent effect" and "dissuasive"

Neither the ECJ's judgments in *Von Colson*, *Marshall* and *Draehmpaehl* nor Directives 2000/43, 2000/78 and 2006/54 provide any hint as to what is meant by "deterrent effect" and "dissuasive". One way to determine what they mean is to look them up in a dictionary or thesaurus (synonyms of "deter" being warn, frighten or intimidate) or to investigate the contexts in which these expressions are used.

One field where the concept of deterrent effect is often applied is international politics. There, the concept has been defined as "the use of threats by one party to convince another party to refrain from initiating some course of action". Clearly, whatever the exact meaning of deterrent in a legal context, it is something serious – more than a slap on the wrist.

EU anti-trust law

An idea of the meaning of "deterrent effect" can, perhaps, be derived from the law and case law on Regulation 2003/1 and its predecessor Regulation 17. These regulations deal with violations of EU anti-trust law. Article 23(2) of Regulation 2003/1 allows the Commission to impose fines on companies for infringement of the competition rules, up to a certain maximum related to total turnover in the previous year. In fixing the amount of the fine, "regard shall be had both to the gravity and to the duration of the infringement". In its 1983 judgment in the *Pioneer case*, the ECJ held that "it was open to the commission to raise the level of fines so as to reinforce their deterrent effect".[25] In 2005 the ECJ held that the need to ensure the deterrent effect of the fines is one of the factors in assessing the gravity of the infringement.[26] In 2006 the Commission adopted "Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003". Its introduction states that "fines should have a sufficiently deterrent effect, not only to sanction the undertakings concerned (specific deterrent) but also in order to deter other undertakings from engaging in, or continuing, behaviour that is contrary to Articles 81 and 82 of the EC Treaty (general deterrent)." The guidelines relate the fine to each of the infringing parties' turnover. This allowed the Commission to impose, *inter alia*, the following fines:

2001: € 462 million against Hofmann-La Roche[27]
2004: € 497 million against Microsoft[28]
2006: € 280 million against Microsoft[29]
2008: € 899 million against Microsoft[30]
2009: € 1,060 million against Intel[31]
2011: € 320 million against Thyssen-Krupp[32]

Is it far-fetched to compare discrimination to competition transgressions? Clearly there are major differences. A company that infringes the anti-trust rules faces two separate sanctions: claims for compensation for lost profits lodged by the victims (judicial protection); and a fine imposed by the European Commission (and/or the domestic cartel authority) in the public interest (general and specific deterrents).

The victims of anti-trust behaviour cannot claim more than their actual, proven loss. Unlike their American counterparts they cannot claim treble damages. This is why the European Commission, as a sort of third party, imposes fines. This difference alone makes anti-trust law hard to compare with anti-discrimination law. In discrimination cases there is no third party similar to the European Commission that can impose a fine[33], let alone any regulation or other EU or national legislation. Perhaps this difference is attributable to the fact that discrimination in employment as a rule involves no more than a few easily identifiable victims[34] whereas violation of the anti-trust rules usually affects the general public or an amorphous group of companies whose identity need not have been known in advance.

Be this as it may, the rationale behind the EC's power to impose fines on anti-trust malfeasance is the same as that behind the requirement that the Member States sanction discrimination by means of (effective, proportionate and) dissuasive measures. For this reason, the fines levied against cartels can serve as inspiration for plaintiffs in discrimination cases.

Infringement of personal rights

In Germany a number of higher courts have had to decide cases where personal rights were infringed.[35] The judgments in question did not award any compensation for loss. Rather, they stressed the importance of a deterrent in order to guarantee human dignity, given that without such deterrence, personal rights (which serve to protect human dignity) would wither away.

The courts stressed that the award had to have a preventive effect on the perpetrator. Moreover, the judgments stated that the courts must take into consideration the intensity of the infringement and the financial advantage gained by the perpetrators. The idea of prevention and deterrence was new at the time, but when the Bill of Parliament that in 2006 led to the new Anti-Discrimination Act was debated, its Explanatory Memorandum referred to two of these judgments.[36]

In other cases in which immaterial damages (physical or psychological pain) were awarded, the judgments did not provide a deterrent, but simply awarded compensation to the victim. The courts in those cases rejected the idea of deterrent compensation. Consequently, the amounts awarded were very limited.

Following the said two judgments, starting in 1996, the German civil courts affirmed the need for dissuasive compensation in cases where personal rights were violated by the media. Well-known examples are where the courts awarded:

- € 1,200,000 for the publication of a photograph of Boris Becker without his consent.[37]
- € 400,000 for publication of fictitious articles and faked photos of Crown Princess Viktoria of Sweden.[38]
- € 256,000 for publishing nude pictures of a German singer after she had revoked her agreement.[39]
- approximately € 80,000 for imitating a German singer for a commercial.[40]
- approximately € 79,000 for the use of a picture of Boris Becker for an advertisement.[41]
- €76,000 for publishing a photograph of Princess Caroline's five-year old daughter.[42]
- approximately € 75,000 for publishing a nude picture of a German author.[43]
- € 70,000 for alluding to a 16 year old student's purported involvement in commercial pornography by a German TV host in his show.[44]
- € 70,000 for re-enacting a scene in a Marlene Dietrich film – The Blue Angel – for a commercial, this sum being awarded to Marlene's heirs.[45]

At present, the concept of actual dissuasive compensation is a new, if not alien, concept for most German Labour Courts.

In the cases referenced above the courts awarded the plaintiffs far higher sums than what is usually awarded for psychological pain under German law. Why? Because in these cases the perpetrators attacked the core of the German Constitution: human dignity (personal rights). This core has to be effectively guarded against any attack by whomever. Therefore the compensation has to act as a deterrent in order to prevent further attacks (general and specific prevention). Any discrimination is an attack on the victim's human dignity – just as any libellous media coverage is. Hence I feel that the German judgments referenced above are directly applicable in discrimination cases.

Since Article 1 of the EU Charter of Fundamental Rights uses the same words as Article 1 of the German Constitution, the German verdicts offer an indication of how "deterrent effect" in the anti-discrimination directives could and should be interpreted, particularly given that this interpretation is consistent with the EU interpretation of deterrence under anti-trust law.

The victim's perspective

Having reviewed legislation and case law, let me now turn to a practical issue, namely that, without high compensation, why should a victim care to make a claim? German victims of discrimination face many obstacles:

- the Anti-Discrimination Act is a relatively new law with unclear interpretations;
- victims are faced with years of legal battles (potentially three instances and five years of litigation);
- they have to prove things only they themselves have seen and heard;
- in many cases they will be denounced as liars, as being paranoid, as being greedy;
- some of my own clients have had to take tranquilizers before even being able to read letters from their former employers and their lawyers;
- they lose their jobs, for example because things often tend to get rather unpleasant in the work place;
- they have a hard time finding a new job because their references are damaged;
- if they win, they are awarded no more than token compensation, frequently something in the region of € 1,000 to € 2,000.

Why make the effort?

Honouring international obligations

Another aspect of this issue is the relevance of the international treaty obligations, e.g. CEDAW[46], CRPD[47], European Convention on Human Rights[48] and of course the Universal Declaration of Human Rights.[49] These treaties have been ratified by most member states of the EU. They are binding on these countries. Every judge has to respect them while interpreting national law.

Punitive damages on the perpetrators of discrimination may be deemed draconic or too harsh by some, but we have to consider the applicable UN treaties which are commitments to be honoured. These treaties state that every kind of discrimination must be eliminated and that discrimination is a direct attack on human dignity. The Universal Declaration of Human Rights states: "the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world".[50] In Article 2 of the Declaration it says: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".[51] Article 8 even guarantees effective remedies: "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law".[52]

Consequently, the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) emphasises: "that all Member States have pledged themselves to take joint and separate action, in co-operation with the Organisation, for the achievement of one of the purposes of the United Nations, which is to promote and encourage universal respect for and observance of human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion".[53]

Discrimination "is a violation of the inherent dignity and worth of the human person". as the UN Convention on the Rights of Persons with Disabilities states.[54] Thus, every state party must take all "appropriate measures to eliminate discrimination" in order to end any kind of discrimination.[55] And to this end the state party must "take measures to the maximum of its available resources".[56] The government must ensure "effective legal protection against discrimination" (emphasis by the author) and must "guarantee [...] equal and effective legal protection against discrimination".[57]

The UN stresses the importance of ending discrimination, which shows that the state parties must end discrimination by all legal means. But – as we can clearly see – the state parties have widely ignored this obligation. Just to give one example: female employees in Germany still have slim chances of being promoted and on top of that they receive around 23% less salary than their male colleagues.[58]

The most effective way is to ensure a real deterrent. Hence, punitive damages have to be awarded. The severity of this demand equals the harshness and impact of denying a human being his or her innate dignity.

How to calculate punitive compensation

After these preliminary remarks we now have to determine the right amount. What kind of sum is necessary to guarantee a real deterrent? Let me give an example:

The perpetrator has a turnover of € 10 billion. The court awards compensation of € 10,000, which is 0.001% of the turnover. To grasp what this means for such a company we have to compare it with numbers that normal people such as judges and lawyers can understand. The easiest way is to relate this example to average income, which in Germany is around € 30,000 per year. This is the "business volume" of an average citizen and 0.0001% of this is 3 cents. How can such a sum be a deterrent? Nonetheless this seems to be precisely what some judges (without reasoning their decision) think.[59]

As noted before, sanctions for discrimination must not only be effective (judicial protection), they must also be proportionate and dissuasive. Surely this means that the deterrent part of an award needs to be tailored to the perpetrator's circumstances.

A real deterrent for employers could be to award victims of discrimination compensation equalling 1 or 2% of their annual turnover. However, this could lead to extremely high and disproportionate sums. A suggestion to solve this problem could be to award a minimum of one year's salary or one year's average income (in Germany: approximately € 30,000) for each element of discrimination. This suggestion was supported in the German parliament (*Bundestag*) at the time the Bill that led to the Non-Discrimination Act was debated.[60] Given that there were no other suggestions during the parliamentary debates, it could be argued that it was the "will of the legislator" that German victims of discrimination should be awarded no less than one year's salary. Moreover, the ECJ decided in 1997 that three months' wages are insufficient as "deterrent compensation" in a situation where a job applicant is rejected on discriminatory grounds, unless the company provides evidence that the applicant would have been rejected anyway.[61]

If the (average) income is too low, sums greater than one year's wages are necessary. For example in some EU member states the average income is so low that it would not hurt a big international company. The question therefore remains whether one year's salary is really a deterrent, especially when applied to big enterprises.

Examples from Germany

In the past, German judges awarded low sums (around 1.5 months' wages) for discrimination. This clearly is insufficient. Now the courts are slowly increasing the amounts. Several courts have awarded 6 to 12 months wages.[62]

Some of my own cases[63] (aggregate amounts):

- € 500,000: gender and age discrimination, employer's offer of a settlement, 2009, discrimination during employment
- € 250,000: gender discrimination, employer's offer of a settlement, 2011, discrimination during employment
- € 200,000: gender discrimination, settlement, 2011, discrimination during employment
- € 200,000: age discrimination, settlement, 2008, discrimination during employment
- € 135,000: age discrimination, settlement, 2010, discrimination during employment
- € 100,000: age discrimination, settlement, 2009, discrimination during employment
- € 100,000: age and gender discrimination, settlement, 2005, discrimination during employment
- € 80,000: age and gender discrimination, settlement, 2010, discrimination during employment

- € 75,000: ethnic discrimination, settlement, 2011, discrimination during employment
- € 75,000: age discrimination, employer's offer of a settlement, 2011, discrimination during employment
- € 70,000: gender discrimination, proposal of the court, 2011, discrimination during employment
- € 50,000: gender discrimination, settlement, 2009, discrimination during employment
- € 50,000: discrimination of disabled people, settlement, 2008, discrimination during employment
- € 34,000: workplace harassment, settlement, 2011, discrimination during employment
- € 33,000: discrimination on grounds of belief, settlement, 2008
- € 30,000: bullying, judgment, 2009, in addition to compensation for the loss of the job and outstanding salary, discrimination during employment
- € 25,000: age discrimination, settlement five years after the end of employment and in addition to compensation for the loss of the job, 2010, discrimination during employment
- € 23,000: gender discrimination (14.5 months' wages), settlement, 2009, discrimination against an applicant 11 months' wages as compensation and continuation of a fixed-term employment contract: gender discrimination during employment[64]

In most cases the settlements included a confidentiality clause. I am therefore restricted in what I can write. I can, however, give the following examples:

Mrs L.
Mrs L worked in a nursing home as a senior nurse. She was praised for her excellent work. Then a new manager took over. From the first day he started to bully her. He revoked most of her managerial authority, even though she had proved herself to be outstandingly efficient. He ignored her warnings regarding health risks to patients. He wrongly accused her of having removed documents and he offended her with misogynistic statements. Finally he terminated her contract. She required medical treatment for several years for, *inter alia,* clinical depression.

We filed the case in 2008, applying for compensation both from her employer and from the manager personally. In 2009 the judge awarded our client compensation of € 30,000, adding that additional compensation would be payable in the event any future harm should arise. Both the company and the manager were liable for all damages.

The judgment stressed the need for both general and specific prevention. The company was relatively small, employing around 40 people, and was situated in a less affluent region of Germany (the Eastern part). For that reason € 30,000 was seen as being sufficiently dissuasive. On appeal, a confidential settlement was reached.[65]

Mrs M.
Mrs M worked as a physiotherapist. She had a one-year fixed-term contract. At the end of the year she was pregnant. She told her boss about it and he told her that, because of the pregnancy, he would not offer her a permanent contract, adding, "surely you will understand that." Well, she did not understand that and asked my firm to sue her employer. The boss had been accommodating enough to give his reasons not only to my client (who, as the plaintiff, was not allowed to testify) but to her husband as well. The company hired another physiotherapist. This was a clear case of direct gender discrimination (maternity).

As per her request, the court awarded her a permanent contract, immaterial damages (of 11 months' wages) and her full salary for the period between dismissal and judgment.[66]

Mr X.
Mr X worked for 20 years for a German corporation. When he turned 60, he was asked to resign and enjoy life. He did his work as well as before, but the employer wanted to give the company a "younger face". The employer demoted him from middle management and a plush office to a cubicle near the entrance of the building and he was instructed to review unimportant data and to write superfluous reports. Finally, at 63, we filed an application to the court. One year later the employer paid him € 200,000. Our client had to promise eternal confidentiality.

Blacklisting
An effective way to combat discrimination in the workplace would be to blacklist discriminatory companies and to bar them from applying for public sector tenders and subsidies. This would force the companies to abstain from discrimination in order to avoid such severe consequences. In the United States such a blacklist already exists. It is managed by the Office of Federal Contract Compliance Programs (OFCCP).[67]

Even more effective would be to require a certificate attesting to non-discriminatory practice from any company that wishes to take part in a public sector tender or asks for subsidies. Why should tax payer' money be spent on discriminatory companies by awarding them public tenders and subsidies? The government, at least, should uphold the notion of a society free from discrimination. Surely doing business with perpetrators, and even awarding them subsidies, is hypocritical, as it involves passing legislation against discrimination whilst at the same time supporting discriminatory companies.

Conclusion
Discrimination is immoral. It is a direct attack on human dignity and it is inefficient as well. Low awards are useless and encourage discrimination. At the same time such awards discourage victims. Only full compensation for all material and immaterial damages as well as punitive damages will end discrimination. A meaningful deterrent must be "painful" and only high sums will guarantee an end to discrimination. The European directives and the ECJ's rulings clearly show the way forward. With these, effective protection against discrimination is possible, but now the courts need to fulfil these obligations. Protection against discrimination is therefore in the hands of judges. Will they deter the perpetrators or the victims? Low levels of compensation will result in a high level of discrimination. It is therefore up to each and every court to decide for itself whether to be an accessory to the perpetrator or protector of the victim.

(Footnotes)

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2 Where this article does not indicate otherwise, I use the expression "discrimination" to mean unjustified, illegal discrimination.
3 3rd German Anti-discrimination Congress, Bonn, 18 July 2008: see www.dgadr.org.

4 Sabrina Benner, Risiken der Diskriminierung, 2008, p. 44; Olaf Arlinghaus/Kerstin Eickmeier, Praxishandbuch Turnaround Management: Liquidität sichern, Kosten senken, 2007, p. 172.
5 The Gallup Organization, Engagement Index 2004, p. 74.
6 Markus Ramacher, Das Allgemeine Gleichbehandlungsgesetz unter Berücksichtigung der Kosten von Diskriminierung und Mobbing in der Bundesrepublik Deutschland, 2011, p. 36.
7 In Germany, Italy and perhaps other countries as well, "mobbing" is used as a synonym for workplace harassment. Normally this is defined as degrading behaviour lasting at least six months and occurring several times each week. "Straining" is a similar term which describes comparable behaviour of at least a single occurrence which puts a particular onus on the victim for at least six months. Both phenomena have to occur in conjunction with the victim's workplace duties. See Prof. Dr. H. Ege: Oltre il Mobbing. Straining, Stalking e altre forme-di conflittualità sul posto di lavoro, Franco Angeli, Milano, 2005, p. 70; "straining" acknowledged in judgements of Italian Labour Courts: Bergamo, 21 April 2005, file number: 711/02 R.G.; Sondrio, 22 July 2006, file number: 264/2004 R.G.
8 € 148 billion: Markus Ramacher, Das Allgemeine Gleichbehandlungsgesetz unter Berücksichtigung der Kosten von Diskriminierung und Mobbing in der Bundesrepublik Deutschland, 2011, p. 66; more than Ð 100 billion: Marina Anselm, 17.08.2006, Die Welt, www.welt.de/print-welt/article146192/Die_hohen_Kosten_der_Angst.html.
9 ECJ 10 April 1984, case 14/83 (Von Colson), at § 23.
10 ECJ 8 November 1990, case 177/88 (Dekker), ECJ 2 August 1993, case C-271/91 (Marshall)
11 ECJ 22 April 1997, case C-180/95 (Draehmpaehl)
12 In Germany: Berlin Higher Labour Court, 26 November 2008, case 15 Sa 517/08.
13 Court of Appeal (Civil Division), 20 December 2002 re *Vento v Chief Constable of West Yorkshire Police* [2003] IRLR 102.
14 See Article 252 BGB and Article 270 ZPO. Case law: BAG 12 November 1985, case 3 AZR 576/83; BGH 6 June 2000, case V1 ZR 172/99; BAG 29 September 1994, case 8 AZR 570/93.
15 Plenarprotokoll 16/43 S. 4151, 4152 f.
16 BAG 29 September 1994, case 8 AZR 570/93.
17 BGH 6 June 2000, case VI ZR 172/99
18 Klaus Michael Alenfelder, Materieller Schaden wegen Diskriminierung, Zeitschrift für Antidiskriminierungsrecht ZfAD, 2/2007, p. 5 – 8, http://www.dgadr.org.
19 See Article 12 a ArbGG.
20 ECJ 2 August 1993, case C-271/91 (*Marshall II*, § 26).
21 Prof. Dr. H. Ege: *Oltre il Mobbing. Straining, Stalking e altre formedi conflittualità sul posto di lavoro*, Verlag Franco Angeli, Mailand, 2005, p. 70; acknowledged in certain judgments of Italian Labour Courts: Bergamo, 21 April 2005, case 711/02 R.G.; Sondrio, 22 July 2006, case 264/2004 R.G.
22 Harald Ege "La valutazione peritale del danno da Mobbing", 2002; acknowledged in judgments of Italian Labour Courts: Agrigento, 1 February 2005, case 2700/2003 R.G.C.; La Spezia, 4 July 2005, case 503/2004; Sondrio, 9 March 2006, case 194/2004 R.G.; Sondrio, 22 July 2006, case 264/2004 R.G.; Bergamo, 8 August 2006, case 1785/2001 P. G.; Bergamo, 14 June 2007, case 882/03 R.G.
23 Harald Ege, "La valutazione peritale del danno da Mobbing", 2002.
24 Harald Ege "La valutazione peritale del danno da Mobbing", 2002; acknowledged in judgments of Italian Labour Courts: Agrigento, 1 February 2005, case 2700/2003 R.G.C.; La Spezia, 4 July.2005, case 503/2004; Sondrio, 9 March 2006, case 194/2004 R.G.; Sondrio, 22 July 2006, case 264/2004 R.G.; Bergamo, 8 August 2006, case 1785/2001 P. G.; Bergamo, 14 June 2007, case 882/03 R.G.
25 ECJ 7 June 1983, joined cases 100/80-103/80 (*Musique Diffusion francaise and others – v - Commission*), at § 104.
26 ECJ 28 June 2005, joined cases C-189/02, C-202-02, C-205/02 and C-208/02 (*Dansk Rotindustri*) at §260.
27 European Commission 21 November 2001, OJ L 6 p.1
28 European Commission 24 May 2004, OJ L 32 p. 23
29 European Commission 12 July 2006, OJ C 138 p. 10
30 European Commission 27 February 2008, OJ C 166 p. 20
31 European Commission 13 May 2009, OJ C 227 p. 13
32 ECJ 13 July 2011, joined cases T-138/07, T-141/07, T-142/07, T-145/07, T-146/07, T-144/07, T-47/07, T-148/07, T-149/07, T-150/07, T-154/07, T-151/07
33 In most, if not all, European countries unlawful discrimination is subject to criminal prosecution. However, discrimination in employment is rarely prosecuted.
34 The recent Supreme Court decision in the WalMart class action (Supreme Court of the United States, 20 June 2011, no. 10-277 re *Wal-Mart Stores Inc. - v - Dukes Ltd*) demonstrates that the victims of discrimination in employment, even if the discrimination is structural, do not constitute a sufficiently homogenous group to qualify as a "class".
35 Federal Constitutional Court (*Bundesverfassungsgericht*) 8 March 2000, case 1 BvR 1127/96; Federal Civil Court (*Bundesgerichtshof*) 5 December 1995, case VI ZR 332/94, misleading press article about breast cancer of Caroline of Monaco; 12 December 1995, case VI ZR 223/94, photos of a child of Caroline of Monaco were taken and published without her consent.
36 Both judgments were in cases where Princess Caroline was the plaintiff: see *Bundesgezetsblatt* Drs. 16/1780 page 46.
37 Munich County Court, 22 February 2006, case 21 O 17367/03; revised by the Federal Civil Court for other reasons (freedom of the press was deemed more important than the infringement of the rights of the person by means of a normal and very small photograph), 29 October 2009, case I ZR 65/07.
38 Hamburg Appelate Court, 30 July 2009, case 7 U 4/08.
39 Hamburg County Court, case 324 O 280/01.
40 Karlsruhe Appelate Court, 30 January1998, case 14 U 210/95.
41 München County Court I, case 21 O 12437/99.
42 Federal Civil Court, 06 October 2004, case VI ZR 255/03.
43 Hamburg County Court, case 324 O 68/01.
44 Hamm Appelate Court, case 3 U 168/03.
45 München Appelate Court, 17 January 2003, case 21 U 2664/01.
46 UN Convention on the elimination of all forms of discrimination against women, 18 December 1979.
47 Convention on the Rights of Persons with Disabilities, adopted on 13 December 2006, which entered into force on 3 May 2008.
48 European Convention on Human Rights,
49 The Universal Declaration of Human Rights – UN, 10.12.1948.
50 The Universal Declaration of Human Rights, Preamble.
51 The Universal Declaration of Human Rights, Article 2 (1).
52 The Universal Declaration of Human Rights, Article 8.
53 International Convention on the Elimination of All Forms of Racial Discrimination (CERD), 21 December 1965, which entered into force on 4 January 1969.
54 Convention on the Rights of Persons with Disabilities, Preamble (h); Convention on the elimination of all forms of discrimination against women, Preamble.
55 Convention on the Rights of Persons with Disabilities, Article 4(1)(e); Convention on the elimination of all forms of discrimination against women, Article 11(1).

56 Convention on the Rights of Persons with Disabilities, Article 4(2); similar: Convention on the elimination of all forms of discrimination against women (CEDAW), Article 2(b).
57 Convention on the Rights of Persons with Disabilities, Article 5(2); similar: Convention on the elimination of all forms of discrimination against women (CEDAW), Article 2(c).
58 http://www.dw-world.de/dw/article/0,,6482088,00.html.
59 See, e.g., Wiesbaden Labour Court, 18 December 2008, case 5 Ca 46/08.
60 During the final debate on the Bill on 29 June 2006 the MP Sylvia Schmidt (SPD) said that in such cases dissuasively high awards for immaterial damages, by which she meant punitive damages, should be "no less than the equivalent of an annual salary and in no event less than € 30,000"; Christine Lambrecht, Legal Expert to the SPD group of the German Parliament, session 29 June 2006, plenary minutes 16/43 p. 4036, 4037; Silvia Schmidt, Member of Parliament, 29 June 2006, plenary minutes 16/43 p. 4151, 4152 f.
61 *Draempaehl – v - Urania Immobilienservice* OHG 22 April 1997, case C-180/95, at § 26. Only in cases of discrimination of against applicants who would have been rejected anyway because of poor qualifications would three months' wages be deemed sufficient.
62 E.g. Hamm Higher Labour Court, 26 February 2009, case 17 Sa 923/08; Neumünster Labour Court 09 December 2009, case 3 Ca 1055 b /2009; bullying: 12 months wages: Cottbus Labour Court 08 July 2009, case 7 Ca 1960/08.
63 Most cases in co-operation with my colleague Frank Jansen, Bad Hersfeld, www.goeb-jansen.de.
64 Neumünster Labour Court, case 3 Ca 1055 b/09, 2009.
65 Cottbus Labour Court, file number: 7 Ca 1960/08, 8 July 2009. For a news article about the case in German see: www.lr-online.de/regionen/forst/Forsterin-durchleidet-Mobbing-Martyrium-in-DRK-flegeheim;Article 1052,2601305,0.
66 Labour Court Neumünster, case 3 Ca 1055 b/09, 2009.
67 www.epls.gov.

2011/43

Paid leave lost if not taken in time (LUX)

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Summary
Employees do not lose their entitlement to annual paid annual leave in the case of sickness, but must take the leave before the end of the legal carry-over period. If not, they lose the entitlement, unless they can prove that they were not able to take the leave.

Facts
The plaintiff had been employed by the defendant since 2002. From late 2005 until early 2007 she did not work on account of maternity leave and subsequent parental leave. She returned to work on 1 February 2007. On 1 March 2007 she called in sick, remaining on sick leave for exactly one year. On 1 March 2008 she returned to work on a part-time basis, but on 16 July 2008 she called in sick again and on 24 September 2008 her contract ended. In summary:

late 2005 - 31 January 2007	leave
February 2007	work
March 2007 - February 2008	sick
1 March - 15 July 2008	work
16 July - 24 September 2008	sick

The plaintiff filed a claim for unfair dismissal, wage arrears, redundancy pay, notice pay and untaken paid annual leave. This case report focuses on the claim as it related to paid leave.

The court of first instance dismissed the claim for wage arrears, redundancy pay and notice pay on the grounds that the defendant had not dismissed her but that her contract had terminated automatically (*de jure*) pursuant to a provision of the Social Insurance Law[1]. The court awarded compensation for untaken paid leave accrued in 2006/2007 but not for leave accrued in 2008. The plaintiff appealed.

Judgment
The Court of Appeal upheld the lower court's judgment in respect of wage arrears, lay-off pay and notice pay. As for the claim for compensation for untaken paid leave, the Court of Appeal ruled as below.

The court began by noting that, following termination of the employment contract, payment of compensation in lieu of paid annual leave can only be claimed if the employee provides evidence that he or she was prevented from taking leave.

When the plaintiff returned to work on 1 February 2007, she had two days of paid leave owing to her from 2005 and 25 (her annual accrual) from 2006, making a total of 27 days.[2] Given that the plaintiff was not sick during the entire month of February, she would have been able to take off 20 days had she wanted to. Therefore, she lost 20 of the days she had carried over from 2005/2006 (even though she worked during this period), leaving a balance of seven "old" days. She accumulated 25 "new" days in 2007, so that at the end of that year she would normally have had a balance of 32 days of untaken paid leave. As the plaintiff had taken 2 days off in February 2007 and 5 days off in April 2007, the balance was 25 days[3].

Given that the plaintiff was not sick in March 2008 (20 working days[4]), she would have been entitled to take 20 days off in that month had she wanted to. Therefore, she lost 20 out of her 25 days of paid leave carried over from 2007, leaving a balance of 5 days. The reason for this is that Luxembourg law allows accrued paid leave to be carried over from one calendar year to the next in only four situations (i.e. first year of employment, leave not taken on account of the employer's needs, maternity leave and parental leave) and, if it is carried over for one of those reasons, it must be taken before 31 March of the next year. Admittedly, none of the four situations foreseen in the law had arisen. However, the court found that the ECJ's case law in combination with Article L.233-6 of the Luxembourg Labour Code (i.e. sick leave must be equated to days worked) called for the application of a similar system. For this reason, the plaintiff was entitled to compensation of (only) 5 days of untaken paid leave carried over from 2007.

As for 2008, the court disapplied Luxembourg law insofar as it does not entitle an employer whose contract ends *de jure* to the same compensation for unpaid leave as employees who have been dismissed. The court reasoned that the ECJ's case law and ILO Convention 132 stand in the way of not compensating for untaken paid leave in the event of *de jure* termination.

Commentary
The present ruling is extremely interesting since it shows for the first time how to deal with the requirements of the *Stringer*- and *Schulz-Hoff* case law on the one hand, and the legal carry-over period on the other. Moreover, the present matter contains various legal bases for carrying over annual paid holiday under Luxembourg law: maternity leave, parental leave and sickness. Only the last is not expressly foreseen by Luxembourg Labour Law, but the Court of Appeal decided to apply the lessons drawn by the ECJ's case law. In this regard, the ruling has to be welcomed.

Apart from the above-mentioned cases, Luxembourg law entitles the employee to carry over annual paid leave in two other situations: first, when the employee did not acquire all of his proportional annual paid leave during the first year, based on the fact that an employee is entitled to annual paid leave only after three months of work; second, when an employee is prevented from taking annual leave because of the needs of the company or the wishes of other employees. In this respect, the judgment also has the merit of clearing up one discussed issue since the *Stringer*- and *Schutz-Hoff* case law: the payment of compensation for untaken annual paid leave is not automatic but dependent on proof that the employee was prevented from taking annual leave during the legal carry-over period that runs until 31 March of the following year.

In addition, we agree with the extension of the entitlement to untaken annual paid leave for cases of automatic termination of the employment contract based on ILO Convention 132. In fact, under Luxembourg law, the employment contract ends by operation of law after 52 weeks of sickness based on a reference period of 104 weeks. Deciding differently would have been illogical and would have breached the principle that sick leave must be assimilated with worked time.

Conversely, this judgment seems very unfair as far as the employee's rights are concerned. In terms of the 20 days of annual paid leave for 2005 and 2006, there is little objection that could be made to the court's decision to deprive the employee of this. In fact, Luxembourg law expressly provides a carry-over of untaken holiday for maternity and parental leave. The employee could therefore have expected to lose her rights to this if she failed to use it before 31 March 2007.

However, as regards the untaken annual paid leave for 2007, it seems artificial to recognise the employee's right to carry over her entitlement to annual paid leave until 31 March 2008, and then to let her lose 20 days of annual paid leave because she could not prove that she was prevented from taking it during that time. In fact, in 2008 – before the *Stringer*- and *Schultz-Hoff* case, the Luxembourg Courts still categorically refused to allow any carry-over of untaken holiday by reason of sickness (most recently, Court of Appeal, 8 January 2009, n°33410). In reality, in that time, the employee could not even have known that she had a right to take her holiday for 2007 after 31 December of that year.

For the same reason, the 7-day surplus of 2005 and 2006 should not have been compensated by days off. It would have been more logical to compensate these 7 days financially, since the employee did not even know of her right during that time. The same could be said about the surplus of 2007 that was carried over to 2008. In all, the Court deprived the employee of at least 22 days of annual paid leave. This retroactive application of the ECJ's case law is not very satisfactory and may be explained by a reluctance to give the EC Working Time Directive 2003/88/EC horizontal effect.

Comments from other jurisdictions

United Kingdom (Joe Beeston): In the UK, the Working Time Directive is implemented by the Working Time Regulations 1998 ("WTR"). Workers are entitled to 5.6 weeks annual leave a year, in relation to which the WTR provide that:

- 4 weeks must be taken in the leave year in which they fall due; and
- 1.6 weeks can be carried over to the next leave year if this is provided for in an employment contract or other "relevant agreement".

In addition, as in Luxembourg, an employer in the UK cannot make a payment in lieu of annual leave except on termination of employment. The WTR do not currently say what should happen if an employee is sick and unable to take holiday in the relevant leave year.

Before the ECJ decision in *Stringer*, it was assumed in the UK that employees who could not take holiday because they were sick would lose accrued holiday at the end of the holiday year because it could not be carried over to the next year. Since *Stringer*, the UK courts have been struggling to decide what they should do to give effect to the decision. The position we seem to have arrived at currently is this:

Workers on sick leave continue to accrue holiday.
If workers on sick leave want to take holiday they may do so. They should request it from their employer in the normal way and will receive holiday pay, not sick pay, for this period.

Although the WTR do not prevent an employer from insisting a worker takes holiday whilst sick, the ECJ decision in *Pereda* would not be consistent with this, so employers should not try to compel workers to use up holiday whilst sick.

Although, again, the WTR do not provide for holiday to be carried over to the next leave year, the courts have decided that this must be allowed to give effect to *Stringer* if the worker was prevented from taking the holiday by sickness.
If the worker returns to work and has a sufficient opportunity to take holiday before the end of the holiday year, he or she would not be able to carry it over. There are, as yet, no court decisions on what would be sufficient time, but the periods in this Luxembourg case seem very short.
On termination of employment the worker is entitled to be paid in respect of accrued holiday pay. This would include accrued holiday carried over from previous holiday years. However, there are various arguments about the limitation periods for bringing the claim that might prevent a worker from recovering holiday pay if the claim is not brought in time.
There are still some contradictions between the WTR and the ECJ rulings in *Stringer* and *Pereda*. However, recent decisions suggest that UK employment tribunals and courts are taking their lead from the ECJ decisions and the UK government is currently consulting on amending the WTR.

Subject: carry-over of annual paid holiday
Parties: Mrs X - v - Y.
Court: Labour Court of Appeal
Date: 31 March 2011
Case number: n° 35911

(Footnotes)

1 Article 14(2) of the Luxembourg Social Insurance Law provides that an employment contract terminates automatically on the date that an entitlement to statutory sick pay is exhausted, which is after 52 weeks of sickness in any given period of 104 consecutive weeks.
2 In fact, she had 33 days of paid leave from 2005 and 2006, but she took six days off at the end of January 2007.
3 The judgment is contradictory on this point since the Court declared that the plaintiff had been on sick leave since 1 March 2007. It has to be assumed that the plaintiff was fit for work for 5 days in April.
4 In fact, March 2008 had 21 working days.

2011/44

Dismissal for Using Social Media at Work – Is It Fair? (UK)

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Summary
The Employment Tribunal dismissed an employee's claim for unfair dismissal where the employee had made negative comments on Facebook about a customer who subsequently complained to the employer. Whilst the employee had a right to freedom of expression under Article 10 of the European Convention on Human Rights, her employer's action was justified because of the risk of damage to their

reputation. The dismissal fell within the range of reasonable responses available to a reasonable employer.

Facts

This case concerns Miss Preece who was employed by JD Wetherspoons Plc as a pub manager between 18 May 2009 to 14 June 2010. Preece and a colleague were involved in an incident in which they were threatened by a group of customers, particularly by two customers. As a result, Preece ejected them. She had handled the matter in line with the training given to her by her employer. Reacting to abusive telephone calls received from someone believed to be the daughter of one of the customers, Preece started a Facebook discussion on the incident whilst she was at work. During the discussion she made abusive comments about the customers and named the customers stating that she "hoped Sandra would break a hip". (Sandra being one of the customers.)

The employer's staff handbook included a policy on email, Internet and intranet use. It stated that employees should not make any contribution to online diaries, including Facebook, which lowered the reputation of the company or its customers. The company reserved the right to take disciplinary action and stated that any breach of the policy would amount to gross misconduct.

The customer's daughter complained about the comments to the employer, stating that the comments were offensive and very public. The employer carried out a disciplinary investigation during which Preece admitted that with her actions she breached the company's Internet policy. She thought that the privacy settings prevented all of her 646 "friends" from viewing her entries, and that only between 40 – 50 "close friends" would have been able to see them. In fact, all of her 646 Facebook friends were able to see the entries, including the customer's daughter.

Preece's employer took the view that Preece's Facebook entries breached the company's policy and lowered the reputation of Wetherspoons. As a consequence Preece was dismissed for gross misconduct. Her internal appeal was unsuccessful. This led to her claim for unfair dismissal and another claim for unlawful deduction of wages, at the Employment Tribunal.

Preece argued that her comments did not mention her employer or the pub she worked in by name; therefore she could not have brought her employer into disrepute. And, as the comments were restricted to close friends, they were not in the public domain.

Judgment

The Employment Tribunal considered whether Preece had been fairly dismissed and whether her right to freedom of expression had been infringed. Preece herself did not raise the latter issue, but the Employment Tribunal had to consider the infringement of freedom of expression in accordance with s3 of the Human Rights Act 1998. Under this legislation, tribunals must read and give effect to UK legislation in a way which is compatible with the rights laid down in the European Convention.

The Employment Tribunal dismissed her claim and the claim for unlawful deduction of wages (unpaid bonus). It was held that her comments were in the public domain, in spite of her belief about the privacy settings on her Facebook account. She had a right to freedom of expression under Article 10 ECHR, but the employer's action was justified under Article 10(2) ECHR, because the comments could damage its reputation.

The Tribunal also found that the employer had conducted a reasonable investigation into the allegation of gross misconduct and had a genuine belief about the nature of the employee's conduct and reasonable grounds to sustain that belief. The decision taken by the employer fell within the range of reasonable responses available. Preece had been using Facebook during her shift, but even if she had used it after work, so the tribunal stated, the employer might still have been entitled to reach the same decision.

Commentary

This decision is a reminder to employers that they need a carefully drafted social media policy, covering all possible circumstances, to successfully defend themselves against unfair dismissal claims. Employees should be given copies of the policy and it should be explained to them.

In my opinion, the Employment Tribunal's decision is correct. JD Wetherspoons had a policy in place and Preece was fully aware of her company's policy. The Employment Tribunal also reasoned that her actions were brought into the public domain; Preece's own thoughts or beliefs about the private nature of the entries did not change this. This reasoning makes sense: Facebook is a public social media tool. Preece's argument that her communications were not public seems weak in this respect. Arguably, even if she had only communicated to 50-60 "close Facebook friends", this also could be interpreted as "public" entries.

Even though the Tribunal felt that a written warning may have been appropriate, the Tribunal was unwilling to find the dismissal as outside of the range of reasonable responses. In my view, whilst the decision to dismiss might seem harsh, the reputation of the employer was at stake.

The decision may appear to be inconsistent with *Stephens v Halfords plc ET/1700796/10*. In that case, the employee won his claim for unfair dismissal. Mr Stephens was a manager at Halfords store and was fully aware of the company's policy which prohibited making comments on social networking sites that were not in the best interests of the company or encouraged dissent.

However, the key difference between this case and Preece was that Stephens removed the comment he had made from Facebook, after realising he was in breach of the company policy. The Tribunal held that no reasonable employer would have taken the step to dismiss in these circumstances. The Tribunal's view appears to be that whilst a clear social media policy may be in place, the reaction of employers has to fall within the band of reasonable responses.

The Preece decision is consistent with the Tribunal's decision in *Gosden v Lifeline Project Ltd ET/2802731/2009*. In this case, the Tribunal held that it was fair to dismiss an employee who sent an offensive racist and sexist email from his home computer to a co-worker's home computer. The email was sent out during working hours and the employee was fully aware of the equal opportunities and Internet Usage policies. The Tribunal concluded that as the decision fell within the band of reasonable responses, it was reasonable for an employer to regard the email as an act that could damage the employer's reputation.
In February 2011, The Court of Horsens, in Denmark, made a similar decision to Preece v Wetherspoons. The Court held that a derogatory comment made on LinkedIn by an employee entitled the employer to summarily dismiss him. The Court held that he had violated his duty of loyalty by making the comment.

The damage to an employer's reputation is a real concern and the cases highlighted provide an insight as to how the Employment Tribunal (and possibly other courts) will judge cases involving the use of social media at work.

Comments from other jurisdictions

Czech Republic (Natasa Randlova): Under the Czech Labour Code, employees are prohibited from using an employer's production equipment and other means necessary for work performance, including computer technology and the employer's telecommunication equipment, for their personal needs without the employer's consent. Therefore, it is not necessary for the employer to issue a policy restricting such usage of its equipment. If the employee spends his or her working time using social media, this is considered to be a breach of the employee's legal obligations related to work performance. However, other factors, such as the circumstances and intensity of the breach, employee's length of service and position will be relevant in determining what action should be taken against the employee, i.e. whether the employee should be summarily dismissed or a notice of termination or warning letter served. Summary dismissal is considered to be the last resort and therefore the employer must give careful consideration to all of the circumstances prior to taking such a decision.

Freedom of expression is a basic constitutional right of every person and is accepted as an element of employment law relationships. In order for such expression to be legitimate it must be appropriate in its content and form and, at the same time, the employee must not breach his or her obligation not to act contrary to the employer's justified interests and not to cause harm to the employer (either moral or material). In my view, in the case described above, these obligations were clearly not fulfilled. In those circumstances, under Czech law, based on an assessment of all relevant factors, there would probably be grounds for at least a notice of termination, or even summary dismissal.

Ireland (Georgina Kabemba): As judgments in England and Wales hold persuasive authority in Ireland due to our mutual common law systems, this case is an important precedent that Irish adjudicators may refer to in the expanding area of social media in employment case law.

Subject: Unfair dismissal, freedom of expression
Parties: Preece – v – JD Wetherspoons Plc
Court: Employment Appeal Tribunal
Date: 18 January 2011
Case Number: ET/2104806/10
Hardcopy publication: not yet available
Internet publication:
http://uk.practicallaw.com/6-505-8064?q=preece

2011/45

No unilateral change of working time (CZ)

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Summary

A contract that specifies the employee's number of working hours per week (in this case, 37.5) and/or her work schedule (in this case, a variable three-shift schedule) limits the employer's ability to make use of its statutory right to determine those terms of employment at its own discretion.

Facts

The plaintiff was a call centre operator whose contract provided that she was employed on a three-shift work schedule for 37.5 hours per week. This meant that she worked alternately on a daytime shift, an evening shift and a night shift, and that she was paid a supplement[1] for the night work on top of her base salary.

In March 2006 the plaintiff was informed that she was being switched from a three-shift to a two-shift work schedule (i.e. daytime and evening shifts only) and that, accordingly, her weekly number of hours would rise to 38.75. As a result, her work schedule would change, she would no longer work night shifts and she would not receive a supplement for night work. The reason given for this change was that night shifts were being assigned to less experienced operators.

The plaintiff objected to the change, which was at odds with her contract, and she continued to work according to her original work schedule. Her employer saw this as a severe breach of her duties and dismissed her, giving notice. When she continued to refuse to work in accordance with her new work schedule during the notice period, she was dismissed again, this time summarily. The employer gave as its reason for this measure the plaintiff's repeated absences from her newly scheduled shifts.

The plaintiff took her employer to court, alleging that both of her dismissals were invalid. She based her claim on the fact that her employer had not been entitled to change her work schedule unilaterally, that therefore her original work schedule had remained in force and that she had not breached her obligations. The reason for her absence on the new shifts was simply because she was still, quite legitimately, working to the old shift pattern.

The court of first instance and the Court of Appeal found in favour of the employer. They referred to Article 81 of the Czech Labour Code, which provides expressly that the employer may determine the working times and the start and finish times of shifts at its discretion. The weekly number of working hours in the contract was considered to be no more than a statement of the limits included in the Labour Code for individual shift schedules, given that according to Article 79, workers employed on the basis of a three-shift schedule may not work in excess of 37.5 hours per week, and workers employed on a two-shift schedule may not work longer than 38.75 hours per week. The plaintiff appealed to the Supreme Court.

Judgment
The Supreme Court overturned the Court of Appeal's judgment. It acknowledged that the law gives the employer a discretionary right to determine working times (e.g. the beginning and end of shifts, shift schedules and rests between shifts). However, where the parties have agreed in their contract to certain working times, as in this case, that agreement overrules this discretionary right. In that case, precedence must be given to Article 40 of the Labour Code, which provides that the contents of an employment relationship (i.e. what has been mutually agreed) may only be amended by mutual agreement, not by one of the parties unilaterally.

Based on this reasoning, the Supreme Court concluded that the employee was entitled to demand an assignment of work within the agreed working times from the employer. Further, it ruled that she was not in breach of her duties by not accepting the new schedule.

The Supreme Court referred the case back to the Court of Appeal for a reassessment in light of its ruling.

Commentary
This is a landmark ruling. It has settled a long-standing controversy that has caused trouble to many employers. It also serves as a lesson to employers not to specify working times in employment contracts. Had the contract in this case been silent on working times, the employer would have had the right to switch the plaintiff from a three-shift to a two-shift schedule at its discretion and to increase her weekly working time accordingly.

Employers in the Czech Republic are advised to draft their employment contracts in a non-specific manner as regards working time. Even, for example, a provision that the employee is hired on the basis of 40 hours per week needs to be considered carefully, as it limits the employer's ability to introduce shift work (where the maximum number of working hours per week is less than 40). Whereas under the Labour Code rules the employer could require the employee to perform shift work without any further requirements, in this case the consent of the employee and a written amendment to the employment contract was necessary.

Czech law does not allow for a clause in an employment contract that gives the employer the right to amend its terms unilaterally. Therefore, with respect to certain terms such as working hours, the less a contract says, the better it is from an employer's perspective.

Comments from other jurisdictions
Austria (Andreas Tinhofer): In Austria, the number of regular weekly working hours and their allocation must be agreed between the parties. There is no legal requirement for such an agreement to be in writing. Therefore, if a certain working time scheduled has been established, in practice the employment courts will often supplement the employment contract in accordance with what has been agreed. Employers can, however, preserve some flexibility by inserting a specific clause into the employment contract. Even then any (unilateral) change to working hours must be justified by business reasons that are not outweighed by the individual interests of the employee concerned. The change must also be notified at least two weeks in advance.

In businesses with a works council the allocation of working hours can also be regulated by the works agreement. A works agreement is concluded between the employer and the works council at the plant level. A change of shift-patterns to the detriment of the employee could also be challenged by the employee if the works council has not given its approval beforehand.

Denmark (Jakob Arffmann): In Denmark, it is not advisable to allow the employment contract to be silent on working time as working time is an essential term of employment under the Danish Statement of Employment Particulars Act, which implements Directive 91/533/EC on employers' obligations to inform employees of the conditions applicable to the contract or employment relationship. Consequently, the employment contract must reflect the agreed (essential) terms of the employment, including working time. If working time cannot be specified because of the nature of the work, the contract should attest to this.

Germany (Paul Schreiner): In Germany the situation would be comparable Czech Republic. In principle, it is the employer's right to determine when, where and in what way the work must be done. However, the employer's rights may be reduced by specifying those things in the employment contract. To ensure that an employment contract does not have this effect, German employers usually put a clause in the contract stipulating that the description of the duties is not binding and that the employer reserves the right to transfer the employee to a different position, to ask him or her to perform different tasks in a different location or to change working times.

Working time itself, however, is not subject in the discretion of German employers. The employment contract must stipulate a weekly working time and if the employee wants to be able to change this unilaterally, it must also contain a provision giving it that option. Usually the parties to the contract agree that the employer can ask the employee to work overtime, but a reduction in working time is rare, though possible in principle. The German BAG (German Federal Court) has found that an employment contract can stipulate that working time can be reduced by the employer by up to 25 % at its discretion if the contract so provides.

Poland (Marek Wandzel): The decision of the Polish court would probably be the same, given the well-established principle that if the parties have stipulated a term of the contract, this can only be altered by mutual agreement or by means of a unilateral alteration notice by the employer with notice. This could include changes to the working time of an employee. In Poland the question of severance pay would also arise if the employee's contract was terminated following an employee's refusal to accept new working times given in an alteration notice. Since the alteration to working time in this case was made for reasons not attributable to the employee (i.e. in this case, it was the employer that made the decision to assign night shifts to less experienced operators) it would be up to the court to decide if the proposed new working times were fair. If they were fair, but the employee still failed to accept the proposed change, he or she would not be entitled to severance pay.

Subject: unilateral amendment of terms of employment
Parties: Ing. H. Z. (employee) – v – Kooperativa pojišťovna a.s., Vienna Insurance Group (employer)
Court: Supreme Court of the Czech Republic
Date: 10 May 2011
Case Number: 21 Cdo 1395/2010
Hardcopy publication: Not yet available
Internet publication: http://www.nsoud.cz/

(Footnote)

1 There is no shift supplement under Czech law, only a supplement for night work, i.e. work from 10 p.m. to 6 a.m.

2011/46

Numerous fixed-term contracts: difference between "continuous" and "successive" employment (IR)

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Summary
Under the Protection of Employees (Fixed-Term Work) Act 2003, the Labour Court was required to determine whether a former employee of the Irish Civil Service (Mr Beary), who had numerous fixed-term contracts between 2002 and 2008, was entitled to a permanent contract of employment.
The Court also addressed an issue which arose as to whether Ireland had complied with its obligations in implementing Clause 5 of the Framework Agreement annexed to Council Directive 1999/70/EC. The issue arose because the objective of Clause 5 is to combat the abuse of "successive" fixed-term contracts, whereas the 2003 Act is directed at preventing the unlimited use of "continuous" fixed-term contracts.

The Labour Court determined that there was incompatibility between the Framework Agreement and the 2003 Act because although *"all periods of employment which are continuous are necessarily successive, not all employment which is successive is necessarily continuous"*. The Court concluded that while the former employee had become entitled to a permanent contract, there were objective grounds for not giving the contract.

Facts
Between September 2002 and October 2008, Beary was included on annual panels from which temporary clerical officer vacancies were filled. The temporary vacancies arose due to the absence of clerical officers primarily due to illness, maternity leave, term time leave or special projects. During the years Beary was employed on a series of 14 fixed-term contracts. The periods of employment ranged from 12 weeks to 26 weeks with breaks in employment ranging from none to 35 weeks.

Beary originally worked on a temporary placement with the Revenue Commissioners[1] from September 2002. This first contract was for a period of 18 months. Thereafter, he obtained 3 further fixed-term contracts up to February 2004, after which followed a break in employment of 35 weeks until he received a further fixed-term contract with effect from 26 October 2004. Thereafter, Beary's employment history was outlined as follows:

Commencement of Assignment	End of Assignment	Duration of Assignment	Purpose of Assignment	Break until next Assignment
26/10/04	25/02/05	18 weeks	Project	2 weeks
14/03/05	15/07/05	18 weeks	Parental leave	4 weeks
15/08/05	16/12/05	18 weeks	Parental leave	24 weeks
06/06/06	01/09/06	13 weeks	Term Time	4 weeks
02/10/06	02/03/07	22 weeks	Maternity Leave	1 week
12/03/07	01/06/07	12 weeks	Maternity Leave	No break
05/06/07	31/08/07	13 weeks	Term time	7 weeks
22/10/07	18/04/08	26 weeks	Maternity Leave	4 weeks
19/05/08	01/11/08	24 weeks	Maternity Leave	No further assignment

During each period of employment the Revenue Commissioners issued Beary with a fixed-term contract specifying either the purpose or duration of the assignment. At the end of each period, the Revenue Commissioners issued Beary with an end-of-employment tax certificate (P45), which allowed him to take up other employment elsewhere or to claim social welfare benefits.

When Beary was not offered a further contract in November 2008, he claimed, inter alia, that by reason of his employment history he became entitled to a contract of indefinite duration as per sections 9(1)[2] and 9(3)[3] of the Protection of Employees (Fixed-Term Work) Act 2003 (the 2003 Act). Beary argued that he was in the "continuous" employment of the Revenue Commissioners within the meaning of section 9(5), which provides that whether an employee has been continuously employed is determined by reference to the First Schedule of the Minimum Notice and Terms of Employments Acts 1973-2005. In essence, Beary argued that the breaks between the various assignments should be regarded as periods of lay-off[4], and therefore did not affect Beary's continuity of employment.

The Revenue Commissioners argued that Beary's employment was not sufficiently continuous to entitle him to a contract of indefinite duration. They argued that Beary's employment was terminated following each period of employment. In relation to Beary's argument that such breaks should be regarded as periods of lay-off, the Revenue Commissioners relied on section 11 of the Redundancy Payments Act 1967 which requires a reasonable or legitimate expectation that the employment will resume and further that the employee must be put on notice to that effect. They argued that they provided no expectation of work at the end of each assignment and issued Beary with a P45 which allowed him to take up work elsewhere if he so wished.

Judgment
The Labour Court heard the case on appeal from the Rights Commissioner[5]. The Court addressed, inter alia, the issues of the anomaly between European and Irish law in the referencing of "continuous" and "successive" contracts, legitimate expectation and objective grounds.

European and Irish law anomaly: "continuous" vs. "successive"
The first issue the Labour Court had to address was the fact that the objective of Clause 5 of the Framework Agreement annexed to the Directive was to combat the abuse of successive fixed term contracts,

whilst section 9 of the 2003 Act was directed at preventing the unlimited use of continuous fixed-term contracts. The Court referred to the ECJ ruling in the case of *Adeneler v Ellinikos Organismos Galaktos*[6] stating that a Member State cannot purport to implement the Directive by confining its application to successive contracts which are also continuous *"since this would amount to an unwarranted limitation on the effectiveness on the rights enshrined in the Directive"*. The Labour Court followed this, outlining that *"Clause 5.2(a) of the Framework Agreement left it open to the Oireachtas (the Irish Parliament) to provide an outer temporal limit beyond which renewed contracts would not be regarded as successive. The legislator chose not to do so and it is not now open to the Court, by way of interpretation, to import such provision into the statute"*.

The Labour Court noted that it was obliged to interpret and apply the relevant national law, as far as possible, in light of the wording and purpose of the Directive and Framework Agreement. This suggested that the Court should seek to interpret the expression *"continuous"* as coterminous with the expression *"successive"*. The Court further outlined that *"it would seem that the concept of successive employment arises where a person is engaged to do the same job intermittently. Hence it could reasonably be said that where a person's employment is terminated because there is no longer work available for him or her to do, and it is envisaged at the time of the termination that his or her service will be required again in the future, and they are in fact re-engaged, the employment could be regarded as continuous."*

The Labour Court accepted that the ECJ case of *Vassilakis – v – Kerkyras*[7] was authority for the proposition that a Member State might provide in domestic law that contracts which are separated in time by three months or more are not to be regarded as successive for the purpose of implementing Clause 5. However, the Court outlined that the case was not an authority for the proposition that, in the absence of a national statutory provision to that effect, contracts which are separated by more than three months cannot be regarded as successive.

Legitimate expectation

In the period of the first panel, from June 2003 to June 2005, Beary worked for a total of 85 weeks out of 131 weeks. Beary was in employment at the time of the constitution of the next panel, from June 2005 to June 2006. In that period Beary worked 18 weeks out of a total of 52 weeks. Beary was not employed at the time of the constitution of the next panel. However, due to his position on the previous panel, Beary was entitled to be included on the panel from June 2006 to June 2007. In that panel, Beary worked for a total of 43 weeks. Beary's employment was renewed twice after this date: on 6 June 2006 and 2 October 2006. In the final panel from June 2007 to June 2008, Beary worked until 31 October 2008 and worked a total of 62 weeks during the 73 week period.

The Court found that by retaining Beary on the panel, the Revenue Commissioners held out the prospect of further employment and on each occasion, that prospect was in fact realised. The Court found that all of the breaks during the period of June 2003 to October 2008 should be regarded as periods of lay-off. Therefore Beary was continuously employed by the Revenue Commissioners for this period. As Beary entered into employment with the Revenue Commissioners prior to the passing of the 2003 Act, his claim was dealt with under section 9(1) of the Act. It was found that Beary completed his third year of continuous fixed-term employment on 31 August 2005 and that the renewal of Beary's contract for a further fixed-term on 2 October 2006, contravened section 9(1) of the Act. The contract therefore became one of indefinite duration by operation of section 9(3), unless it could be objectively justified under section 9(4) of the 2003 Act.

The Court also considered the type of contract that Beary would become entitled to if section 9(3) of the Act applied. Beary contended that he should be entitled to a contract of indefinite duration as a permanent full-time clerical officer on the same terms and conditions as apply to all other clerical officers. The Court noted that in the entire period from 2003 to 2008 Beary's total number of hours and weeks worked was essentially of a part-time nature. The Court referred to the Irish High Court decision of *Minister for Finance v McArdle*[8] where it was held that where a fixed-term contract becomes one of indefinite duration, the resulting contract is identical to the original fixed-term contract in all respects other than the circumstances in which the contract will come to an end. In light of this, the Court stated by operation of section 9(3) Beary would not be entitled to a full-time but to a part-time contract.

Objective grounds

The Court then considered the question of whether the renewal of Beary's contract could be justified on objective grounds. Section 7(1) of the 2003 Act requires that an objective justification must be *"...for the purpose of achieving a legitimate objective of the employer and such treatment is appropriate and necessary for that purpose"*. The Court referred to the decision of the ECJ in *Bilka-Kaufhaus GmbH v Weber Von Hartz*[9] and the three-tiered test. This requires firstly, that the measure meets a *"real need"* of the employer; secondly, the measure must be *"appropriate"* to meet the objective which it pursues and finally, the measure must be *"necessary"* to achieve that objective.

The Court also referred again to *Adeneler v Ellinikos Organismos Galaktos*[10] where the ECJ stated that the objective grounds relied upon must relate to real and concrete circumstances concerning the work to which the contracts relate. In this regard, the Revenue Commissioners argued that Beary was employed to provide cover for temporary absences of permanent staff and that such cover was a legitimate aim and a proportionate response. However Beary argued that the Revenue Commissioners employed a large number of temporary staff and this showed a real and permanent need for staff to provide cover for temporary absences. The Court was satisfied that there were objective grounds which justified the Revenue Commissioners' failure to appoint Beary to a permanent full-time position.

Conclusion

The Labour Court concluded that Beary was continuously employed on successive fixed-term contracts during the period in question, notwithstanding the break in employment of 35 weeks. Therefore the contract he received in October 2006 could be deemed to be one of indefinite duration unless it was justified on "objective grounds". The Labour Court accepted that Beary was employed to provide cover for temporary absences of permanent staff which was a legitimate aim, and the use of fixed-term contracts was an appropriate and proportionate response to that need. Therefore, Beary's claim to a contract of indefinite duration failed.

Commentary

This case is an important one in Ireland regarding the Protection of Employees (Fixed-Term Work) Act 2003. The Labour Court's determination clarifies the anomaly which has existed between Council Directive 1999/70/EC and Clause 5 of the annexed Framework Agreement, with that of the legislation transposing the Directive in Ireland. With the rights of fixed-term workers being examined with

ever-increasing regularity before the Irish statutory bodies, this determination is a welcome one for providing a comprehensive and contemporaneous clarification for legal practitioners.

The combined duration of the 14 fixed-term contracts spanning over 6 years and the legitimate expectation of the former employee meant that he was entitled to a contract of indefinite duration. However, this was still outweighed by objective grounds. The outcome therefore illustrates that an employment practice widely conducted by public sector employers whose finances are under severe pressure, is still afforded some protection by the Courts. It would be very interesting to see if an employer in the private sector presenting the same set of circumstances as this case would be as successful in pleading objective grounds.

Comments from other jurisdictions

Czech Republic (Natasa Randlova): According to the Czech Labour Code an employment relationship between the same parties may be agreed for an indefinite period of time or for a fixed term. A fixed term may be agreed for a period not exceeding two years from the date of commencement of the employment. The same applies to each extension of the employment for a fixed term agreed within the mentioned period between the same parties. If there has been a period of at least six months (24 weeks) since termination of a previous employment, that previous employment (even if for a fixed term between the same parties) will not be taken into consideration. However, this limitation of two years does not apply in certain specific situations stipulated by law, one of them being the replacement of temporarily absent employees, for example, to enable them to take maternity leave, parental leave, or to hold a public office. In such cases, the fixed term may be agreed for the period of the temporary absence.

A proposed amendment to the Labour Code, due to become effective as of 1 January 2012, introduces a substantive amendment to the conditions for fixed term employment. There will be a maximum duration of fixed term employment of three years, with a maximum of two repetitions (a "repetition" being considered to be any extension of the employment relationship). In practice, this amendment will mean that fixed term employment will be possible three times, for a total period of nine years, beginning with the start of the first employment for a fixed term (i.e. three years + 1st repetition for three years, followed by 2nd repetition for three years). However, the old exceptions to this rule (e.g. temporarily absent employees) will no longer be possible.

Under both the current and newly introduced law, if the conditions have not been fulfilled, and the employee notifies the employer prior to expiry of the agreed term in writing that he or she insists on further employment, the employment is deemed to have been concluded for a indefinite period of time. Both the employee and the employer may apply to the court within two months of the date the employment was due to expire for a determination as to whether the conditions stipulated for fixed term employment are met.

Subject: Protection of Employees (Fixed-Term Work Act 2003)
Parties: William Beary – v – Revenue Commissioners
Court: The Labour Court
Date: 28 January 2011
Determination Number: FTD112/2011
Hardcopy publication: Not yet available
Internet publication: www.labourcourt.ie

(Footnotes)

1 Department of the Irish Civil Service, responsible for tax collection.
2 Section 9(1): "...Where on or after the passing of this Act a fixed-term employee completes or has completed his or her third year of continuous employment with his or her employer or associated employer, his or her fixed-term contract may be renewed by that employer on only one occasion and any such renewal shall be for a fixed term of no longer than one year."
3 Section 9(3): "Where any term of a fixed-term contract purports to contravene subsection (1) or (2) that term shall have no effect and the contract concerned shall be deemed to be a contract of indefinite duration."
4 A lay-off period is a concept from Irish redundancy law. It is a period during which "an employee's employment ceases by reason of his employer being unable to provide the work for 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".
5 In the originating hearing, the Rights Commissioner's decision was that Mr Beary was not entitled to a contract of indefinite duration on the basis that his continuity of service had been broken and the aggregate duration of his employment did not exceed 4 years as required under section 9(2) of the 2003 Act.
6 C-212/04
7 C-364/407
8 [2007] ELR 165
9 C-170/84
10 C-212/04

2011/47

Supreme Court upholds law reducing retirement benefits of former communist secret service members (PL)

COUNTRY POLAND
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Summary

In 2009 the Polish Parliament amended the law in such a way that the retirement benefits of former members of the communist secret service were reduced. This deprivation of acquired rights was judged to be constitutional and proportionate and, therefore, lawful.

Facts

The plaintiff was a police officer when she retired in 1999. From 1979 until 1990, i.e. for a total of 11 years, she had worked in the secret service of the communist regime. In 1990, shortly after the overturn of that regime the secret service was abolished and the plaintiff joined the police force, where she worked for nine more years before retiring in 1990. Under the law in effect at that time, a person who had worked in the police force (in the broad sense, including, for example,

members of the secret service and the fire brigade) for no less than 15 years was eligible to retirement benefits of a minimum of 40% of final salary. Accordingly, the plaintiff was awarded lifelong retirement benefits equaling 40% of her final salary for the 11 years she spent in the secret service plus 2.6% for each year spent in the police force, plus 15% for the fact that she was disabled, making a total 68% of her final salary. This was very high by Polish standards.

In 2009 Parliament enacted a law amending the pension rules, not retroactively but with effect from 1 January 2010. Pursuant to this amendment, each year of service with the secret service yielded no more then 0.7% of final salary.[1] Accordingly, the plaintiff's retirement benefits were reduced from 68% to: (11 x 0.7) + (9 x 2.6) + 15 = 46.1% of her final salary.

In 2010 the Constitutional Court held that the 2009 law was not in breach of the Constitution, which prohibits the arbitrary removal of acquired rights, as well as any form of "collective punishment". Although acquired rights deserve to be protected, the Constitutional Court reasoned that this does not apply to rights that were acquired dishonourably. In the court's view, privileged rights acquired in the secret service were acquired dishonourably, given that such service was performed for the benefit of a totalitarian regime that disregarded human rights and the rule of law. In a democratic society it is not reasonable that such dishonestly-acquired privileges should be retained. The Constitutional Court did not see the removal of unjustly awarded privileges as constituting the collective punishment of all former secret service members for dishonourable acts that they did not individually commit. The court added that the amendment of the law was a proportionate means of achieving a legitimate aim.

Undeterred by the Constitutional Court's ruling, the plaintiff challenged the reduction of her retirement benefits in the civil court system. She alleged that it deprived her of an acquired right. The court of first instance dismissed her application, whereupon she appealed. The Court of Appeal asked the Supreme Court for guidance.

Judgment

The Supreme Court noted that the aim of the 2009 amendment was not to deprive former officials of the communist regime of their pensions, merely to adjust the level of their benefits to that of the general public. This adjustment related only to the period during which these former officials had acted against the principles of Polish independence, freedom and democracy (i.e. only up until 1990) and the adjustment was only for the future (i.e. from 2010 onwards). Moreover, even following the adjustment, the pensions of these former officials of the communist regime remained more generous than those of most of the victims of that regime[2]. Given these circumstances, the adjustment was not only permissible but actually required by the constitutional principle of social justice and ordinary decency. Further, the Constitutional Court had already ruled on the constitutionality of the 2009 amendment.

Commentary

This case must be assessed against the background of recent Polish history. In 1944 the communists created the secret services. In June 1989, not long before the fall of the Berlin Wall (in November 1989), semi-free elections were held for the first time. Those elections marked the beginning of a transformation of Polish society from a totalitarian system to a democratic one. In 1990 the secret services were dissolved and replaced by a newly created Office for State Protection. In 1991 entirely free elections were held.

The crucial concept in this case is that of proportionality. Besides the arguments made by the Supreme Court, it should be noted that the 2009 amendment was not made until 19 years after the change to the political system. Although the Supreme Court did not mention the First Protocol to the ECHR, the Constitutional Court did. That court cited the ECtHR's ruling in *Rasmussen v. Poland* (28 April 2009, application no. 38886/05) regarding a former judge who had made a false declaration that she had not been a collaborator of the communist secret police[3]. In that case, the Polish courts found that the plaintiff had not satisfied the conditions which domestic law attached to the acquisition of her pension. Accordingly, the ECtHR found that there had been no violation of the First Protocol.

Personally, I find the reasoning of the Supreme Court to be surprisingly emotional. It stressed that the former secret service, for which the plaintiff had worked, had acted "unjustly" and "dishonourably". This fact alone was found sufficient to override the principle that legally acquired rights can be set aside provided this is done in a "proportional" manner.

Academic comments

Prof. A.M. □wiatkowski, Jagiellonian University: In the modern world, arguments in favour of retaining acquired rights to benefits have ceased to be valid and this applies not only to the political changes that took place in the former East European countries, but also to West European countries, as economic and demographic changes could also serve as valid reasons for a decision to strip beneficiaries of their "acquired" rights. In the current state of affairs in Europe the social security system is no longer secure. The most recent decision of the Polish Supreme Court tells us that for reasons of maintaining social justice and the need to oppose external deficiencies, we will need to learn how to cope with these new challenges.

Comments from other jurisdictions

Germany (Simona Markert): The German Courts have also dealt with litigation regarding the reduction of retirement benefits for former members of the secret service. In Germany, the political history is similar to that of Poland. Since the fall of the Berlin wall in November 1989, former officers of the government department of national security have received reduced retirement benefits. Even generals have been given the average retirement benefit of former GDR employees pursuant to a statutory provision that states that the acquired pension rights of members of the secret service are only partially taken into account partially.

Some former members of the secret service claimed that this regulation was unconstitutional, as they were being treated unequally. In 1999 (1 BvL 34/95) and 2004 (1 BvR 1070/02) the German Federal Constitutional Court upheld the reduction to their retirement benefits. The Federal Constitutional Court decided that former members of the secret service had received excessively high payments not based on their work. It was therefore permissible to exclude these payments from the pensions calculations.

In 2008 the Social Court of Berlin (S 35 R 6322/08) mentioned the decision of the German Federal Constitutional Court and concluded that the law amending the pension rules was not unconstitutional. The Court noted that that section did not violate human rights.

United Kingdom (Carla Feakins): Poland's recent history gives this case a very specific political context, which the UK does not share. However, there has been a recent UK case examining when economic and

demographic changes could serve as reason for reducing "acquired" rights to benefits.

Last year the UK's newly elected coalition government prioritised cutting public spending in order to bring down the growing budget deficit. It wanted to shrink the size of the civil service and to reduce civil service redundancy and early retirement payments, which it considered to be excessive compared to the rest of the public sector and the private sector generally. The government passed a law removing a pre-existing requirement to seek agreement from affected trade unions before making changes to the existing scheme and introducing new caps on payments. As a result, two trade unions started judicial review proceedings to challenge these changes.

In *Public and Commercial Services Union and another – v – Minister for the Civil Service* [2011] EWHC 2041, the trade unions' argument focused on whether the change amounted to an unlawful interference with the peaceful enjoyment of "possessions" contrary to Article 1 of the first Protocol to the European Convention on Human Rights. This argument was not raised in the Supreme Court in Poland, although it was apparently discussed by the Polish Constitutional Court.

In both cases, the central issue was whether the change was proportionate. In the Polish case, the adjustment only related to the period when the employee worked for the secret service and even following the adjustment the scheme remained more beneficial than pensions received by victims of the communist regime. The Polish Supreme Court held that not only was the adjustment proportionate, but also required by the constitutional principle of social justice. The UK High Court reasoned that the adjustment did not remove entitlement to the benefits altogether, but adjusted the burden fairly among all civil servants. This was largely based on evidence that the new scheme was accepted by the majority of the other unions consulted. The aim of reducing the budget deficit was legitimate and not challenged, but questions might remain as to how extreme benefit reduction can be in a harsh economic climate before the changes are deemed to go beyond what is reasonably necessary.

Subject: Acquired rights
Parties: Ewa C - v - Ministry of the Interior
Court: Sąd Najwyższy (Supreme Court)
Date: 3 March 2011
Case Number: UZP 2/11
Hardcopy publication: OSNP 2011, no. 15-16, item 20
Internet publication:
http://www.sn.pl/orzecznictwo/uzasadnienia/ipusisp/II-UZP-00211.pdf

(Footnotes)

1 Until 1999, 0.7% was the percentage of salary that Polish workers accrued by way of retirement benefits for each year during which they did not earn salary, for example because they were in receipt of sickness benefits and therefore did not contribute to the pension system.

2 Inhabitants born before 1950 are eligible to retire at age 65 (men) or 60 (women) at 24% of the national average salary plus 1.3% or 0.7% of their average salary in any 10 of the last 20 years for each year of employment with or without salary. Inhabitants born in or after 1950 participate in a defined contribution scheme.

3 After the overturn of the communist regime individuals in higher positions had a duty to declare whether they had collaborated with the secret police. If they replied truthfully there were no consequences; if they lied that they had not collaborated, they were barred from exercising public functions for ten years and could be deprived of certain privileges.

2011/48

Inactive stand-by periods can be compensated differently from active working hours (BE)

COUNTRY BELGIUM
CONTRIBUTOR THIJS DE WAGTER, LYDIAN, BRUSSELS

Summary

Remuneration for stand-by periods, during which an employee is simply asked to be available by phone in order to answer urgent calls, without the obligation to be at a specific location or to perform his habitual tasks, need not be equivalent to the remuneration for active working hours.

Facts

B. worked as a Senior Field Engineer for Storage Technology Belgium plc, a company active in the computer hardware industry. Stand-by periods during which B. had to be available to answer urgent calls were part of the job. During these stand-by periods, B. was free to go wherever he wanted, as long as he could be reached by (mobile) phone so that, if necessary, he could react within two hours after the call. As compensation for the stand-by periods, he received a fixed standby allowance on top of his monthly wage. For work performed during the stand-by periods, he also received payment.

After his dismissal, B. claimed overtime pay (150 to 200% of his normal salary) as compensation for the stand-by periods during which he did not actually perform work. He based his claim on the Belgian Act on Working Time. He deducted from his claim the standby allowance and the compensation for actual standby work that had already been paid.

The Labour Court rejected his claim, stating that the hours during which he did not effectively work were not considered working time. B. appealed, but the Labour Court of Appeal confirmed the Labour Court's decision[1]. B. subsequently appealed the judgment to the Belgian Supreme Court (*Cour de Cassation*).

As a preliminary remark, the reader should note that the Supreme Court does not judge the facts of the case, but merely the legality of the Court of Appeal's judgment. In other words, the role of the Supreme Court was to verify whether the final judgment breached the law. If the Supreme Court established that the Court of Appeal was in breach, it would nullify the judgment and refer the case to another Court of Appeal. That court must then judge afresh on the facts of the case.

Judgment

B. asserted that the Labour Court of Appeal had violated Article 6 of Directive 93/104 concerning certain aspects of working time[2] and Article 19(2) of the Belgian Working Time Act of 16 March 1971. He argued (i) that both provisions define working time as the time during which the employee is at the employer's disposal and (ii) that stand-by periods during which the employee has to be available for the employer's calls, even if he or she need not be at a specific location and his labour performance is not "intense", qualify as periods during which the employee is *"at the employer's disposal"* within the meaning of said provisions. Consequently the Labour Court of Appeal should have held that B.'s stand-by periods (a) qualified as working time and (b) had to be remunerated at the normal rate of salary.

The Supreme Court rejected B.'s appeal in a three-step reasoning.

Firstly, the Supreme Court specified that Article 6 of the Directive obligates the Member States to ensure that the period of weekly working time is limited by law and that the average working time for each seven-day period, including overtime, does not exceed 48 hours.

Secondly, the Supreme Court quoted the definition of working time as expressed in Article 19(2) of the Working Time Act, namely "the time during which the member of staff is at the disposal of the employer".
Finally, the Supreme Court concluded that it results neither from Article 6 of the Directive nor from Article 19(2) of the Working Time Act that the remuneration of inactive stand-by periods, during which the employee has to be available for the employer's calls without the obligation to be at a specific location or to perform his or her habitual labour tasks, must be equivalent to remuneration for active working hours.

Commentary
The Supreme Court's rejection of B.'s appeal does not come as a surprise. Based on a strict interpretation of the principle "being at the disposal of the employer" in Belgian and European jurisprudence (See *Vorel* (C-437/05) and *Grigore* (C-258/10)), it was not to be expected that the Court would accept standby-periods during which the employee must be available for the employers' calls without needing to be at a specific location or to perform his or her habitual labour tasks, as working time.

Whereas the Labour Court of Appeal came to the conclusion that the standby-periods did not qualify as "working time", neither in the light of the Directive, nor in the light of the Working Time Act, the Supreme Court, however, refrained from judging whether or not the standby-periods qualify as working time, merely holding that the Labour Court of Appeal had not violated either Article 6 of Directive 93/104 or Article 19(2) of the Belgian Working Time Act. This is partly due to the fact that B. erroneously invoked Article 6 of the Directive on which to base his appeal. Article 6 of the Directive does not define working time (as Article 2 does), but merely obliges Member States to limit weekly working time.

The Court also left unanswered whether the stand-by periods qualify as working time under Article 19(2) of the Working Time Act. It focused on whether the remuneration for inactive stand-by periods (whether or not qualifying as working time) must be equivalent to remuneration for active working hours. The answer to this question was a clear no, as the Court could not identify such an obligation either from Article 6 of the Directive or Article 19(2) of the Working Time Act.
On the one hand, it is a pity that the Court did not give a clear confirmation of the Brussels' Court of Appeal's definition of working time, as this has left some margin for interpretation. Indeed, some Belgian authors have interpreted the judgment of the Supreme Court as confirmation that even inactive stand-by periods are to be considered as working time. In our view, this is erroneous.
On the other hand, there is no longer room for discussion about remuneration for inactive stand-by periods, irrespective of whether or not they qualify as working time, being inferior to remuneration for effective working hours. This is entirely in line with the case law of the ECJ, which has accepted arrangements that compensate stand-by periods and effectively performed hours of work differently (see *Vorel* (C-437/05), paragraphs 35 and 36).
However, the question of whether stand-by periods qualify as working time has not become irrelevant under Belgian law. If a stand-by period is considered to be working time, the compensation for stand-by periods will need to be in line with the applicable minimum wage. If it does not qualify as working time, the compensation need only comply with collective bargaining agreements concluded at sector level with regard to compensation for stand-by periods. If no such collective bargaining agreement exists, as is very often the case, the employer and employee may freely agree on a compensation arrangement for stand-by periods.
In this context, it is also important to note that the European Commission is currently reviewing Directive 2003/88/EC (the successor to Directive 93/104), by means of a two-stage consultation of the social partners at EU level and a detailed impact assessment. In December 2010, the Commission adopted a second-stage consultation paper asking workers' and employers' representatives for their views on possible changes to the Directive. In this paper, special attention was given to the topic of stand-by periods.
The Commission suggested a codification of the principles on stand-by periods established in the rulings of the ECJ:
Stand-by periods where the worker is required to be available to the employer at the workplace in order to provide his or her services in case of need, are working time (See *SIMAP* (C-303/98); *Jaeger* (C-151/02)).

However, a derogation is proposed for sectors where continuity of service is required (notably in public services such as healthcare), which would allow periods of stand-by to be counted only partially as hours of work for the purpose of calculating the worker's total working time. The social partners would be given flexibility to find solutions at local or sectoral level and identify the most appropriate method for counting stand-by periods.
For stand-by periods away from the workplace, only periods spent actually responding to a call would be counted as working time, although waiting time at home could be treated more favourably under national laws or collective agreements (See *Vorel* (C-437/05)).

It is, however, unclear if and when the Commission's suggestions will be incorporated in a revised Directive. This is due to the fact that the social partners and co-legislators are divided as to whether to maintain the opt-out that is currently being used by a large number of Member States in connection with stand-by periods. The UK in particular is ill-disposed towards a review of the Directive and the abolition of the curtailment of the opt-out. The UK is concerned that a tougher Directive could increase the bill for public services and business, just at the moment it needs to cut costs to ensure economic growth. No doubt the debate will continue.

Subject: Working time
Parties: B – v – Sun Microsystems Belgium plc
Court: Supreme Court
Date: 6 June 2011
Case number: C.10.0070.F
Publication:
http://www.cass.be → jurisprudence → cour de cassation F-20110606-4

(Footnotes)
1 Labour Court of Appeal of Brussels, 27 October 2009. This judgment was reported and commented on in EELC 2010/87.
2 At the time the facts occurred, this Directive had not yet been replaced by Directive 2003/88.

2011/49

Creative interpretation of law on compensating forced absence from work in light of EU principles (LAT)

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Summary
If an employee has been reinstated at work by a court judgment, compensation for forced absence from work cannot be calculated differently as a result of the fact that before the dismissal the employee did not actually perform his or her work.

Facts
The plaintiff was on childcare leave from 14 November 2005 until 13 May 2007 (18 months). On the very first day she returned from leave her employer, the Ministry of Health, served her with an employment contract termination notice. The notice was given on the grounds that an audit conducted back in 2005 had shown bad results.

The employee brought an action claiming, amongst other issues, for invalidation of the termination notice and reinstatement in her former position.

The court of first instance rejected the employee's claim. The Court of Appeal partly satisfied the claim by invalidating the employment termination notice, reinstating the employee and ordering the Ministry of Health to pay the employee compensation for missed earnings for the period between 14 May 2007 and the date of the reinstatement. The claim was based on the concept of unfair dismissal.

In 2009 the Supreme Court overturned the part of the judgment that concerned compensation for forced absence from work and the matter was once again heard by the Court of Appeal.

The Court of Appeal established that it was undisputed that the Ministry of Health had to pay the employee compensation for the whole period of forced absence from work. However, the way the compensation should be calculated was unclear.

According to Latvian labour law, the compensation should consist of the employee's average earnings for the whole period of forced absence from work. Average earnings are based on the employee's salary during the six month period prior to the forced absence including supplementary payments specified in law, collective agreements or the employment contract and including bonuses.

However, the law also states that if the employee has not worked for the previous 12 months and has not been paid during this period, average earnings are to be calculated based on the statutory minimum wage. As the employee at issue had not worked for the last 18 months prior to the termination of her employment, the court of appeal held that for the purpose of calculating average earnings (i.e. to compensate for forced absence from work) the statutory minimum wage should be applied. In practice this meant that the employee's compensation for forced absence from work was significantly reduced.

The employee challenged this judgment with the Supreme Court, claiming that it should be reversed because:

1) it violates the principle of equal pay for men and women as stipulated in Directive 75/117 and Article 157 TFEU because predominantly women make use of long term childcare leave and, thus, it will mainly be women who fall within the scope of the provision of the labour law to the effect that if the employee has not worked for the previous 12 months and remuneration has not been paid to him or her, average earnings must be calculated based on the minimum statutory minimum wage; and
2) reducing average earnings to the level of the statutory minimum wage is contrary to Council Directive 2003/88, which provides that employees have the right to at least four weeks of annual paid leave. (Under Latvian labour law compensation for annual leave is also payable based on average earnings.)

Consequently, the case went to the Supreme Court for the second time.

Judgment
First, the Supreme Court referred to the ECJ's judgment in case C-167/97 (*Regina v Secretary of State for Employment, ex parte Nicole Seymour-Smith and Laura Perez*). The Supreme Court explained that compensation for termination of employment without valid grounds should consist of the amount that would have been paid if the employment had continued. Thus, this type of compensation is covered by the definition of pay for the purposes of Article 119 of the EC Treaty. The Supreme Court also cited the ECJ's judgment in joined cases C-350/06 and C-520/06 (*Gerhard Schultz-Hoff v Deutsche Rentversicherung Bund* and *Stringer and Others v Her Majesty's Revenue and Customs*) stating that Article 7(2) of Directive 2003/88 must be interpreted as precluding national legislation or practices which provide that, on termination of the employment relationship, no allowances in lieu of paid untaken annual leave need be paid to a worker who has been on sick leave for the whole or part of the leave year and/or of a carry-over period – which was the reason why that worker could not exercise his right to paid annual leave. Therefore, the worker's normal remuneration (i.e. the amount that must be paid during rest periods corresponding to paid annual leave) should be used to calculate the allowance in lieu.

Based on these arguments, the Supreme Court ruled that a situation where compensation for forced absence from work is calculated without taking into account the employee's salary as stipulated in the employment contract would place an employee who has been on a long term childcare leave in a much less favourable position than an employee, who before the termination, was performing his or her duties. This was not an acceptable position, not only because it was inequitable, but also because, in the court's view, only the salary that the employee could have earned was relevant – irrespective of any circumstances that prevented the employee from actually working – because if, for example, the employee had been unable to perform her duties because of sickness, she would have been awarded an amount based on her ordinary salary by the court.

Thus, the Supreme Court ruled that the plaintiff had the right to a level of compensation for forced absence from work that corresponded to her normal average earnings – and not to average earnings under the statutory minimum wage – in contrast to the ruling of the Court of Appeal. The Supreme Court held that the legal provision whereby the amount of average earnings of an employee who has been on long term childcare and sickness leave, has not worked for the previous 12 months and has not been paid, significantly reduces (i.e. it is equal to the statutory

minimum), does not apply to situations where compensation is due to the employee for forced absence from work for unfair dismissal.

Commentary
This judgment reaffirms a positive trend, namely that the Latvian Supreme Court is ready to apply principles arising from the ECJ's case law relating to employment law matters even where they contradict national law.
The judgment is also of particular interest because the Supreme Court changed its initial opinion of 2009 on the way average earnings for the purposes of determining compensation for forced absence from work should be calculated.

Comments from other jurisdictions
Czech Republic (Natasa Randlova): In the Czech Republic if the employee believes that the termination of employment is unfair and therefore invalid, he or she may inform the employer in writing that he or she insists on further employment. Then, if the court determines that the dismissal was unfair, the employer is obliged to provide the employee with salary compensation as of the date the employee informed the employer of its decision until the employee is reinstated or until a valid termination of employment takes place.

Salary compensation is provided in the amount of the employee's average earnings. Average earnings are calculated based on gross salary for payment to the employee during the decisive period (i.e. from the previous calendar quarter) and the period of work performed in the decisive period. If the employee had worked for less than 21 days during the decisive period, "probable earnings" will apply.

Probable earnings are determined from the gross salary that the employee would probably have earned. Consideration will be given to the usual amounts of the individual components of the salary (e.g. bonuses) of the employee, or of the salary of other employees performing the same work or work of similar value at the employer's business.

Only if the average earnings are calculated as being lower than the minimum wage stipulated by law to which the employee would have been entitled in the respective calendar month, would the average earnings be increased – to the amount of the minimum wage. The same principle applies to probable earnings.

Germany (Paul Schreiner): In Germany there is no such thing as a minimum wage per hour stipulated by the state. In cases like this, a German court would probably simply have held that the normal remuneration must be paid for the period of forced absence from work. If some elements of the total remuneration were variable, a German court would likely have awarded a claim based on 100% performance. In the case of additional benefits such as overtime payments, however, a German court would be likely to look at how much overtime had been done in the past and apply those average additional hours to the period of forced absence from work.

Subject: Calculation of compensation for forced absence from work
Parties: I.T. – v – Ministry of Health of the Republic of Latvia
Court: Supreme Court
Date: 15 December 2010
Case number: SKC-694/2010
Hardcopy publication: Not published
Internet publication:
http://www.at.gov.lv/files/archive/department1/2010/694-10.pdf

2011/50

Temps not bound by user undertaking's collective agreement (GER)

COUNTRY GERMANY
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Summary
The employer and the employee were not bound by a collective agreement, but the company to whom the employee was loaned was bound by one. This company's collective agreement provided that claims had to be lodged within three months. The employee made a claim for underpayment. The Court of Appeal denied most of the claim on the grounds that it was lodged too late, given that the employee was bound by the company's collective agreement. Reversing this judgment, and basing its findings on, *inter alia*, Directive 2008/104, the Federal Labour Court held that, being a "temp", the employee was not bound by the user company's collective agreement.

Facts
The plaintiff was employed by the defendant (the "Employer"), as a consultant engineer, from October 2005 to June 2008. The Employer was not a member of an employers' association and the plaintiff was not a member of a union. Therefore, their employment agreement was not by law governed by a collective agreement. They had not agreed on the inclusion of any collective terms in their contract. Thus, they were more or less free to agree on whatever terms of employment they wished, including salary. Let us say that the plaintiff's salary, as agreed with the Employer, was 100 per month. The Employer loaned the plaintiff to one of its clients (the "User Undertaking"). That client was a member of an employers' association and hence it was bound by certain collective agreements, which it applied to its own employees. Those collective agreements provided for a higher salary for consultant engineers than that agreed between the plaintiff and the Employer. Let us say that this salary was 110 per month. This is what the plaintiff would have earned had he been an employee of the User Undertaking.

As is common in Germany, the User Undertaking's relevant collective agreement contained what is known as a preclusion clause. This is a contractual time-bar for the submission of claims. In this case, the collective agreement provided that claims had to be lodged within three months and, in the event a claim was denied, the claimant had six more months to bring legal action.

In August 2008 the plaintiff informed his employer that he was claiming the balance between what he had been paid (100 per month) and what he ought to have been paid (110 per month) for the 33 months that he had worked in the User Undertaking, namely between October 2005 and June 2008. The court of first instance awarded (almost all of) the claim, but on appeal the *Landesarbeitsgericht* reversed the judgment. It turned down the claim except for the months of May and June 2008, reasoning that (i) the User Undertaking's collective agreement applied to the plaintiff and that (ii) as that agreement time-barred claims not

lodged within three months, most of the plaintiff's claim had been forfeited. The plaintiff appealed to the *Bundesarbeidsgericht* (the "BAG"), the highest court for employment disputes.

Judgment

The BAG focused on the Temporary Agency Workers Act (*Arbeitnehmerüberlassungsgesetz*, abbreviated AÜG). The AÜG regulates the three-party relationship between (i) a company such as the Employer, that seconds employees to another company (the "Lessor", in German: *Verleiher*); (ii) a company such as the User Undertaking, that makes use of individuals who have been seconded to them by their employer (in the Directive's terminology: the "User Undertaking"); and (iii) employees such as the plaintiff, who have been seconded by their employer to a third party ("Secondees", in German: *Leiharbeitnehmer*). It should be noted that it is not only temporary employment agencies that are Lessors within the meaning of the AÜG. Any employer that lends out any of its employees commercially to a third party is a Lessor. Section 9(2) AÜG provides that terms and conditions agreed between an employer and those of its employees who have been loaned to a third party that are less favourable to those employees than the terms and conditions in force between the user undertaking and its own employees who perform similar work under similar conditions, are invalid (i.e. void). Section 10(4) AÜG goes on to provide that in the event of such invalidity, the employees in question are entitled to "the same essential conditions, including salary, as the user undertaking grants to its own comparable employees". The invalidity applies to each separate term of employment. A more favourable term cannot therefore balance out a less favorable term. Thus the law allows employees to cherry pick.

Accordingly, the plaintiff was entitled to the same salary as the employees of the User Undertaking and the question became whether or not the preclusion clause applied to the plaintiff's claim.

The BAG gave four reasons why a preclusion clause in a user undertaking's collective agreement could be invoked against a Secondee:

Section 10(4) AÜG refers to essential terms of employment "granted" (*gewähren*) by the user undertaking. A preclusion clause is not a benefit that can be "granted" to an employee. On the contrary, it is something that restricts his rights. Therefore, a preclusion clause in a user undertaking's collective agreement does not apply in the relationship between a temp and his own employer.

The AÜG distinguishes between "terms of employment", which apply within a relationship between the user undertaking and its employees, and "contractual terms", which apply in the relationship between the Lessor and its employees. A preclusion clause is not a "term of employment".

The BAG referred to Directive 2008/104. Although the transposition deadline for the Directive (5 December 2011) had not expired, and in fact had not even started to run at the time the plaintiff made his claim, the BAG noted that Article 11(1) of the Directive provides that "the Member States must make all the necessary arrangements to enable them to guarantee at any time that the objectives of this Directive are being attained". Such a provision is known in Germany as a *Frustrationsverbot*, literally, a prohibition against frustrating the intent of, in this case, the Directive. Therefore, national law must be construed in a manner that takes account of the Directive's objectives. Article 2 describes the purpose of the Directive as being "to ensure the protection of temporary agency workers and to improve the quality of temporary agency work by ensuring that the principle of equal treatment [...] is applied to temporary agency workers". Article 3 (1)(f) defines "basic working and employment conditions" as working hours (etc.) and pay. It makes no mention of preclusion periods. A preclusion period cannot be seen as an integral part of the condition "pay".

The plaintiff was not a member of a union, neither did his contract make any reference to a collective agreement.

For these reasons the BAG held that the plaintiff was not bound by the preclusion clause in the User Undertaking's collective agreement and that he could therefore claim from the Employer the balance between 110 and 100 per month for almost the entire period, the only time-bar being the statutory period of three years.

Commentary

Even though Directive 2008/104 had not yet been transposed into national law at the time the plaintiff worked for the User Undertaking, the BAG referred to the purpose of the Directive and the definitions contained therein, since on the date of the decision the Directive had already come into force.

The decision dealt with a rather unusual case in that the plaintiff was not a "temp" but a regular employee whose employer (which was not a temporary employment agency) seconded him to a third party. However, the judgment also has an impact on temps, since German law does not distinguish between temps employed by temporary employment agencies and "regular" employees of companies which occasionally second some of their employees for commercial reasons.

What also made this case unusual is that no preclusion period was agreed between the Lessor and the Secondee. In most cases the parties are bound to collectively agreed preclusion periods due to membership of an employers' association/labour union or based on a contractual reference to such collective agreements. In some other cases preclusion periods are contractually agreed between the Lessor and the Secondee. Nevertheless, this decision is very important because the collective bargaining agreements concluded by the CGZP, a German trade union, and an employers' association for temporary employment agencies have (separately) been declared invalid by the BAG[1]. Consequently, preclusion periods resulting from these agreements and applicable to the employment contracts of leased employees do not form part of the employment contracts. Therefore, the situation is comparable to the rather unusual case reported above.

This decision contradicts the prevailing opinion in legal handbooks and case law. Lessors had regularly argued successfully that an employee's claim to equal pay is already precluded as a result of (collectively) agreed preclusion periods. The new decision increases the Lessor's financial risk.

From our point of view the reasoning of the BAG is conclusive, although, in fact, it leads to more favourable treatment of temporary employees, rather than equal treatment of temporary and permanent employees. Now, temporary employees may claim equal payment with permanent employees, but do not have to observe any preclusion period that applies to regular employees. Therefore, temporary employment agencies – and also employers who second employees, such as in this case – should be aware of the need to integrate preclusion periods into their employment contracts. It should be noted also that, according to current case law, a contractual preclusion period is only valid if the employee can make a claim within a minimum of three months and, if

the employer declines it, the employee will have the option to bring an action within a minimum of a (further) three months.

Comments from other jurisdictions
Ireland (Georgina Kabemba): In Ireland we have yet to transpose the EU Temporary Workers Directive (2008/104/EC). We are currently awaiting publication of the Temporary Agency Workers Bill 2011. It has been indicated by the Irish Minister for Jobs, Enterprise and Innovation that there are intentions to include a derogation similar to that of the United Kingdom's transposing legislation, the Agency Workers Regulations 2010, allowing a qualifying period before equal treatment in terms of basic working conditions (including pay) applies. In the UK, agreement was reached between unions and employers for a 12 week qualifying period. Proposals from the Minister's Office suggest a possible six month qualifying period, to which some trade unions have already signalled their opposition.

It will be interesting to see whether or not the principle of 'Verleiher' in the German legislation extending coverage of the legislation from agencies to employing companies with secondees may be considered. However, it seems unlikely.

Subject: Temporary agency work
Parties: not known
Court: *Bundesarbeitsgericht* (Federal Labour Court)
Date: 23 March 2011
Case Number: 5 AZR 7/10
Hardcopy publication: DB 2011, 1526-1528
Internet publication: www.bundesarbeitsgericht.de

(Footnote)
1 This occurred in another case. That decision, combined with the judgment in this case, means that the collectively agreed preclusion period in the collective agreements of the CGZP are invalid, and that, consequently, Section 10(4) AÜG applies without restriction to any preclusion period.

2011/51

Lump-sum agreements in days ("forfait-jours") validated under strict conditions

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Summary
The French Supreme Court has validated the principle of lump sum agreements in days (*forfait jours*)[1], despite opposition from the European Committee of Social Rights.

Facts
An employee was hired as a Sales Manager in 2001. His employment contract contained a lump sum (*forfait jours*) clause, as authorised by the applicable Collective Agreement for the Metallurgical Industry. A *forfait jours* agreement provides that an employee will work for a certain number of days per year – commonly 216, 217 or 218 – rather than a certain number hours per week. It is up to the employee to decide which days and at which times during those days he works, as long as he works at least the agreed number of whole days. He is paid the agreed fixed salary regardless of how many days or hours he actually works, provided that this is no less than the agreed minimum. The employee is not eligible for overtime compensation if he exceeds the minimum. In 2006 the employee resigned, but brought an action the Industrial Tribunal of Alencon claiming payment of overtime arrears on the grounds that the *forfait jours* clause in his contract was not enforceable against him. He argued that his employer had not complied with the terms of the Collective Agreement. Under this agreement, the employer had to monitor the number of days that the employee actually worked, as well as his workload. The employer had failed to do this. The Industrial Tribunal dismissed his claim.

The Court of Appeal of Caen also dismissed his claim, on the grounds that his employment contract referred to the Collective Agreement for the Metallurgical Industry, which entitled autonomous executives to benefit from a *forfait jours* agreement on the basis of 217 working days per year. The Court concluded that since the employee had accepted the benefit of a lump sum agreement in days, this had to be interpreted as excluding any overtime compensation.

The Court of Appeal further held that the employer's non-compliance with the collective agreement did not put into question the validity of *forfait jours.*

Judgment
The French Supreme Court overruled the decision of the Court of Appeal, referring to an impressive number of domestic and European legal texts.

The Supreme Court held that *"Given the Preamble of the Constitution of 27 October 1946, Article 151 of the Treaty on the Functioning of the European Union as it refers to the European Social Charter and the Community Charter of Fundamental Social Rights of Workers, Article L. 3121-45 of the Labour Code interpreted in the light of Article 17, paragraphs 1 and 4 of EC Directive 1993/104 of 23 November 1993, Articles 17, paragraph 1, and 19 of Directive 2003/88 of the European Parliament and the Council of 4 November 2003, Article 31 of the Charter of Fundamental Rights of the European Union, and Article 14 of the Collective Agreement of Metallurgy, the right to health and rest are constitutional requirements;*

It follows from the above-mentioned articles of European Union directives that Member States can only derogate from the provisions relating to working time with respect to general principles of protection, safety and health of employees;

Any lump sum agreement in days must be provided by a collective agreement whose contents provide a guarantee of compliance with maximum working time, daily and weekly rest periods".

The Supreme Court further held that *"whereas the provisions of the Collective Agreement of Metallurgy dated 28 July 1998 which are likely to protect the safety and health of employees who are subject to lump sum agreements in days, were not complied with by the employer, the Court of Appeal should have concluded that the lump sum agreement in days was not enforceable against the employee and that he was therefore entitled to*

overtime arrears and that the Court should have verified the existence of overtime arrears and the number of hours."

The Supreme Court sent the case back to the Court of Appeal in Paris.

Commentary

Those who feared the end of *forfait jours* can relax, as the French Supreme Court did not invalidate this working time arrangement, despite strong opposition from the European Committee of Social Rights. However, the Supreme Court did subject its enforceability to strict conditions.

The concept of *forfait jours* originates from the so-called "Aubry II" Act of 19 January 2000, which reduced the working week from 39 to 35 hours and allowed working time to be calculated on the basis of days rather than hours for specific categories of employees. Only executives who, due to the nature of their functions, have autonomy in organising their working time and employees whose working hours cannot be predetermined and have real autonomy in the organisation of their working time can enter into such an arrangement.

Broadly, *forfait jours* is a particular arrangement where employees' working time is not calculated in hours but in days. This means that the employee will have to put in a certain number of days per year (218 days maximum) and receives a lump sum salary for the number of days worked. Such a working time arrangement is only possible if it authorised in the applicable collective agreement[2] and the employee's employment contract.

Employees under *forfait jours* are free to organise their working time within the working days. French law imposes only a daily rest period of 11 consecutive hours and a weekly rest period of 35 consecutive hours, which leaves an enormous amount of flexibility. In theory, such employees could work, for example, from Monday to Saturday from 7a.m. until 8p.m. (13 hours per day including rest breaks), making a total of 78 hours per week, without breaking the 11 and 35 hour rules.

There is concern in some quarters that the system of *forfait jours* may lead to abuse. For example, an employee may experience pressure to put in more than the agreed number of days per year, to work excessively long days or to take insufficient breaks or rest, in order to complete the work on time or to achieve targets. For this reason, collective agreements that allow *forfait jours* frequently provide certain guarantees aimed at avoiding abuse, such as an annual meeting with the employee to monitor the maximum number of hours worked per day and/or per week, weekly and daily rest periods, etc. However, such guarantees are not always implemented by employers.

In 2001 a Council of Europe panel known as the Committee of Social Rights found the *forfait jours* legislation to be incompatible with the European Social Charter. It did so again in 2004 (twice) and most recently in a judgment dated 23 June 2010 where it held that *forfait jours* do not comply with Article 2§1 of the European Social Charter, which provides that *"to ensure the effective exercise of the right to fair working conditions, the Contracting Parties undertake to provide for reasonable daily and weekly working time".*

In its decision, the European Committee noted that in order to comply with the provisions of Article 2§1 of the Charter, flexible working time arrangements should meet three criteria:

they must prevent employees from working unreasonably long working
- days or weeks;
- they must provide adequate guarantees; and
- they must provide reasonable reference periods for the calculation of working time.

By applying the above criteria, the European Committee held that *forfait jours* did not comply with Article 2§1, since the authorised working week for executives under such working time arrangements could be excessive and the legal guarantees of such a system remain insufficient.

In its ruling, the Supreme Court did not make any direct reference to Article 2§1 of the European Social Charter, as to do so would have been considered to be an acknowledgement of its horizontal direct effect. Instead, the Supreme Court examined the conformity of *forfait jours* with other legal provisions, including the preamble of the French Constitution of 1946, guaranteeing the right to rest and health, and the Treaty on the Functioning of the European Union, which, in Article 151, refers specifically to the fundamental rights resulting from the European Social Charter.

Before remanding the case back to the Paris Court of Appeal, the Supreme Court drew several conclusions, which can be summarised as follows:

- *forfait jours* are not contrary to the Constitution or to EU law;
- collective agreements providing for *forfait jours* must contain guarantees to ensure compliance with the rules on maximum working time, and with daily and weekly rest periods;
- the Collective Agreement of Metallurgy dated 28 July 1998, which provides for *forfait jours,* contains guarantees that are likely to protect employee's health and safety; and
- strict compliance with those guarantees by the employer is crucial, otherwise a *forfait jours* clause will be unenforceable against the employee.

We can only approve of this decision, as to have declared the popular *forfait jours* system invalid would have have been nothing short of an earthquake in the French world of business, depriving both employers and employees of a working time arrangement that works well. Indeed, employees under *forfait jours* are free to organise their working time each day and benefit from extra days of paid leave (on top of paid holidays and bank holidays), known as RTT days (the number of which varies per year between 9 to 13 days).[3]

However, employers need to be more vigilant than before, since the Supreme Court has toughened its position. Indeed, by ruling as it did, the Supreme Court has changed from its previous position, which was that failure by an employer to implement the guarantees provided in a collective agreement for employees under *forfait jours*, merely entitles those employees to damages[4]. Henceforth, such failure would mean the unenforceability of *forfait jours* and, hence, payment of overtime arrears for up to five years.

In summary then, the enforceability of *forfait jours* depends on three cumulative conditions: (1) it must be authorised by the applicable collective agreement, (2) it must contain guarantees ensuring compliance with the maximum working time, and daily and weekly rest rules and (3) such guarantees should be diligently implemented by the employer. Unfortunately, the Supreme Court has not specified the minimum requirements for these guarantees. We hope it will do so in a future judgment.

In order to avoid an avalanche of claims for overtime arrears then, all employers should review collective agreements that authorise *forfait*

jours and ensure that they contain the required guarantees as specified by the Supreme Court and, if not, insert the necessary provisions to ensure compliance with the maximum working time and daily and weekly rest. Last but not least, employers must comply with these guarantees scrupulously in order to avoid having to pay overtime arrears.

It should be noted that employers cannot rely on the Supreme Court's former doctrine. This means that in sectors where the collective agreement does not contain guarantees and/or where the guarantees were not complied with, claims for overtime arrears are possible.

In any event, the Supreme Court's decision seems in line with the level of importance given in Europe to employees' health and safety at work, leaving the field open to an evolution of case law.

Comments from other jurisdictions

Germany (Paul Schreiner): In Germany *forfait-jours* agreements are unknown. In some industries it is quite common practice for the parties to employment contracts to agree to a flexible workload, set out in terms of working hours ("working on demand"). The employer is free, then, to ask the employee to work in accordance with its needs at its discretion.

What is crucial in that situation, however, is the working time regulations as contained in the *Arbeitszeitgesetz* (Working time Act). According to Section 3 of the *Arbeitszeitgesetz* working time each day must not exceed eight hours. However, working time can be extended to ten hours if an average of eight hours has not been exceeded within six calendar months or 24 weeks. Because of this regulation it would be difficult to benefit from the *forfait-jours* system in Germany, even if it could be set up.

Subject: working time
Parties: not known
Court: *Cour de cassation* (Supreme Court)
Date: 29 June 2011
Case number: 09-71-107
Internet publication: http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000024293425&-fastReqId=1931578159&fastPos=2#

(Footnotes)

1 Lump sum agreements in days are a particular working time arrangement where an employee's working time is not calculated in hours but in days. The employee will have to work a certain number of days per year and will receive a lump sum salary for the number of days worked. Such a working time arrangement is only possible if it is both authorised by the applicable Collective Agreement and is also provided for in the employee's employment contract.
2 Not all employees are covered by a collective agreement. If there is no applicable collective agreement there can be no *forfait jours* arrangement.
3 The number of RTT days is calculated by subtracting from the number of days in a year (365 or 366): weekends, bank holidays, regular paid leave and the number of agreed *forfait jours* days.
4 Cass. soc. 13 January 2010 n° 08-43.201.

ECJ COURT WATCH

SUMMARIES BY PETER VAS NUNES

RULINGS

ECJ 30 June 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 the 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 Đ 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, after working in his home country for a short period, 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 at age 61 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, when he turned 65, 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. In addition, 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 2002 on a voluntary basis. However, on appeal this judgment was largely overturned. Mr Da Silva Martins appealed to the Federal Social Insurance Court (*Bundessozialgericht*), arguing that it must be possible to export care insurance benefits to another EU country, in particular where the cover was financed by his own contributions and no comparable benefits exist in Portugal. The court 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 schemes, the person concerned shall be subject exclusively to the compulsory insurance scheme.

ECJ's findings

1. A benefit may be regarded as a social security benefit within the meaning of Regulation 1408/71 insofar as it relates to one of the risks expressly listed in Article 4(1). The "risk of reliance on care", that has only recently been covered by the social security schemes of several Member States, does not appear expressly on that list. However, in *Molenaar* (C-160/96), the ECJ held that benefits such as those provided under the German care insurance scheme must be regarded as "sickness benefits" within the meaning of Article 4(1) (§ 38-46).
2. However, the ECJ has always acknowledged that care insurance benefits, although they are "sickness benefits" within the meaning of Article 4(1), are at most supplementary to, not necessarily an integral part of and in some respects different from, the "classic" sickness benefits. They display certain characteristics of invalidity benefits and of old-age benefits (§ 47-48).
3. The referring court's question must be answered in the light of the above (§ 49).
4. Were it not for Article 15(2) of the Regulation, Mr da Silva Martins would be allowed to retain (voluntary) insurance beyond 1 August 2002, even though his relocation to Portugal caused his compulsory insurance with the German sickness insurance scheme to cease and caused him to be covered by the Portuguese compulsory sickness insurance scheme. Article 15(2) provides that, where application of the legislation of two or more Member States entails overlapping of insurance under a compulsory insurance scheme [*Editor: in this case, that of Portuga*l] and one or more voluntary of optional continued insurance schemes [*in this case, that of Germany*], the person concerned shall be subject exclusively to the compulsory insurance scheme (in this case, that of Portugal). Article 15(2) is

one of the expressions of the principle of a single social security scheme, as set out in particular in Article 13(1) (§ 50-54).

5. Article 15(2) does not apply, because Article 15(1) provides that the provisions embodying the single scheme principle (Article 13-14 d) shall not apply to voluntary or to optional continued insurance unless, in respect to the relevant type of insurance [*in this case, sickness*], there exists in any Member State only a voluntary scheme of insurance. The exception does not apply, since German care insurance is generally a compulsory insurance scheme. Moreover, Article 15(2) is not intended to apply to a situation such as that at issue, in which the contributions for the optional German Care insurance scheme and those for the compulsory Portuguese sickness insurance scheme, although equated with each other for the purposes of Regulation 1408/71, are not identical. Therefore, the Regulation does not, in principle, stand in the way of Mr da Silva Martins continuing his German care insurance following his return to Portugal (§ 55-59).
6. The ECJ proceeds to address Articles 27 and 28 of the Regulation. Article 27 provides, "A pensioner who is entitled to draw pensions under the legislation of two or more Member States, one of which is that of the Member State in which he resides, and who is entitled to benefits under the legislation of the latter Member State [...] shall [...] receive such benefits from the institution of the place of residence and at the expense of that institution as though the person concerned were a pensioner whose pension was payable solely under the legislation of the latter Member State". Applied to the present case, this means that Mr da Silva Martins, being entitled to Portuguese benefits, was to receive those benefits as though he had lived and worked in Portugal all his life. Article 28 deals with the situation that a pensioner is not entitled to relevant benefits under the legislation of his country of residence. In that case he retains his entitlement to the benefits of another Member State under certain conditions (§ 60-16).
7. Article 28 does not apply, given that care benefits qualify as sickness benefits within the meaning of the Regulation. It therefore needs to be examined whether Mr da Silva Martins can claim under Article 27 (§ 65).
8. Given that care benefits qualify as sickness benefits, and that Mr da Silva Martins is insured under the Portuguese sickness insurance scheme, it is in principle for Portugal to provide him with benefits relating to the risk of reliance on care (§ 66-68).
9. However, Article 27 must be interpreted in the light of the objectives underlying the Regulation, taking into account the particular features of benefits relating to the risk of reliance on care as opposed to sickness benefits in the narrow sense (§ 69).
10. Regulation 1408/71 aims to contribute to the establishment of the greatest possible freedom of movement for migrant workers. However, the Regulation merely provides for coordination, not harmonisation of legislation. Differences in legislation therefore remain. The Regulation cannot guarantee to an insured person that moving to another Member State will be neutral in terms of social security, in particular where sickness benefits are concerned. Therefore, a relocation leading to a less favourable situation may in principle be compatible with the requirements of primary EU law on the freedom of movement for persons (§ 70-72).
11. "However, according to settled case law, such compatibility would exist only to the extent that, in particular, the national legislation concerned does not place the worker at a disadvantage compared to those who pursue all their activities in the Member State where it applies and does not purely and simply result in the payment of social security contributions on which there is no return"(§ 73).
12. In a situation such as that of Mr da Silva Martins, the automatic suspension of the provision of all benefits linked to the German care insurance scheme in the event of his relocation to Portugal is such as to entail contributions on which there is no return. Therefore it would be inconsistent with the aim pursued by Article 48 TFEU if a former migrant worker in a position such as Mr da Silva Martins were to lose all advantages representing the counterpart of contributions paid by him in Germany in respect of a separate insurance scheme relating not to the risk of sickness in the narrow sense but to the risk of reliance on care, simply because Article 27 entitles him to Portuguese sickness benefits in the narrow sense (§ 74-78).
13. Thus, the mere fact that Mr Da Silva Martins became entitled to Portuguese sickness benefits upon his return to Portugal does not lead to his losing entitlement to the German care insurance scheme. Should it be established that the Portuguese sickness insurance scheme does provide for cash benefits relating to the risk of reliance on care, albeit at a lower level, then the principles underlying Regulation 1408/71 require that he be paid the balance at the expense of the German competent institution (§ 83).

Ruling

Articles 15 and 27 of Council Regulation (EEC) No 1408/71 [...] must be interpreted as not precluding a person in a situation such as that at issue in the main proceedings, who draws retirement pensions from retirement insurance funds both of his Member State of origin and of the Member State in which he spent most of his working life and has moved from that Member State to his Member State of origin, from continuing, by reason of optional continued affiliation to a separate care insurance scheme in the Member State in which he spent most of his working life, to receive a cash benefit corresponding to that affiliation, in particular where cash benefits relating to the specific risk of reliance on care do not exist in the Member State of residence, that being a matter for the referring court to ascertain.

If, contrary to that hypothesis, cash benefits relating to the risk of reliance on care are provided for under the legislation of the Member State of residence, but only at a lower level than that of the benefits relating to that risk from the other pension-paying Member State, Article 27 of Regulation No 1408/71 [...] must be interpreted as meaning that such a person is entitled, at the expense of the competent institution of the latter State, to additional benefits equal to the difference between the two amounts.

ECJ 7 July 2011 (reference for a preliminary ruling under Article 267 TFEU), case C-310/10 *(Ministerul Justitiei si Libertatilor Cetatenesti – v – Stefan Agafitei and others)* **("Agafitei")**, Romanian case (DISCRIMINATION)

Facts

Romania transposed directives 2000/43 (racial discrimination) and 2000/48 (framework directive on discrimination) (the "Directives") by means of Legislative Decree 137/2000. It prohibits discrimination, not only on the grounds mentioned in the Directives, but also on the ground of, inter alia, "social class". Article 27 of the Decree allows victims of discrimination to seek compensation. In 2008 the Romanian Constitutional Court declared Article 27 to be unconstitutional insofar as it gives courts jurisdiction to annul, or to decline to apply, legislative acts which they consider to be discriminatory and to replace them with rules developed in case law.

The plaintiffs were 31 Romanian judges. They felt discriminated against because prosecutors within two branches of the Justice Department (the branch that prosecutes corruption and the branch that prosecutes terrorism) were given a salary increase, as a result of which they earn more than judges.

National proceedings

The court of first instance found that the plaintiffs had been discriminated against on grounds of socio-professional category and place of work (criteria that correspond to "social class"). The Justice Department appealed. The Court of Appeal stayed the appeal proceedings and referred two questions to the ECJ, essentially asking whether the Directives preclude a judgment such as that of the Constitutional Court.

ECJ's findings

1. In principle, the ECJ is obliged to answer the referring court's questions, given that it is for the national courts alone to assess the need for a preliminary ruling (§ 23-26).
2. Nevertheless, where it is obvious that EU law cannot be applied to the circumstances of the case, the ECJ may refuse to rule on a question (§ 27-28).
3. A situation such as that at issue in the main proceedings does not fall within the scope of the Directives, the alleged discrimination not being based on any of the grounds listed therein (§ 29-36).
4. However, since legislative decree 137/2000 transposes the Directives into national law, it is necessary to consider whether an interpretation of the Directives can be justified on the ground that the said decree was rendered applicable by domestic law to circumstances such as those at issue as a result of the reference made by the decree to the Directives (§ 37).
5. The ECJ concludes that is no such justification. The need to ensure uniform interpretation of the provisions of EU law may justify extending the ECJ's jurisdiction in matters where, because national law refers to such provisions, they are only indirectly applicable. However, such a consideration cannot, without disregarding the divisions of power between the EU and its Member States, confer on such provisions of EU law primacy over higher-ranking provisions of domestic law (§ 38-41).

Ruling

The reference for a primary ruling is inadmissible.

ECJ 21 July 2011, case C-104/10 *(Patrick Kelly - v - National University of Ireland)* **("Kelly")**, Irish case (SEX DISCRIMINATION)

Facts

Paul Kelly, a qualified teacher living in Dublin, applied for admission to a vocational training course (Master in Social Science) that was being offered by University College Dublin. His application was turned down. He made a complaint to the Equality Tribunal, submitting that he was better qualified than the least-qualified female candidate to be offered a place on the course. The Equality Tribunal rejected his complaint, concluding that Mr Kelly had failed to establish a *prima facie* case of sex discrimination.

National proceedings

Mr Kelly appealed to the Circuit Court. He also asked the Circuit Court to order the university to give him copies of (i) the other candidates' applications with appendices and (ii) the "scoring sheets". The Circuit Court refused to issue such an order, whereupon Mr Kelly appealed to the High Court, which referred five questions to the ECJ for a preliminary ruling.

ECJ's findings

1. Question 1 was whether Article 4(1) of Directive 97/80 ("Member States shall take such measures as are necessary [...] 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") entitles an applicant for vocational training who believes that his application was rejected for a sex-discriminatory reason, to information held by the course provider on the qualifications of the other applicants, in order that he may establish a *prima facie* case of discrimination (§ 26).
2. A person who considers himself to be discriminated against must initially establish presumptive discrimination. Only then must the defendant disprove the discrimination. It is for the national courts to assess the facts from which discrimination may be presumed (§ 29-32).
3. The Directive does not specifically entitle persons who feel discriminated against to information. However, there is a risk that refusal to disclose by the defendant could compromise the achievement of the Directive's objective and thus deprive it of its effectiveness. In that regard, Article 4(3) TEU requires Member States to refrain from any measure that could jeopardise the attainment of the Union's objectives (§ 33-36). The order for reference mentions that the university did offer to provide Mr Kelly with part of the information requested. [*Editor: the order for reference was not published on www.curia.eu*]. "Accordingly" [*?editor*] the answer to the first question is that Article 4(1) of Directive 97/80 must be interpreted as meaning that it does not entitle an applicant for vocational training, who believes that his application was not accepted because of an infringement of the principle of equal treatment, to information held by the course provider on the qualifications of the other applicants for the course in question, in order that he may establish "facts from which it may be presumed that there has been direct or indirect discrimination" in accordance with that provision. Nevertheless, it cannot be ruled out that a refusal of disclosure by the defendant, in the context of establishing such facts, could risk compromising the achievement of the objective pursued by that Directive and thus risk depriving, in particular, Article 4(1) thereof of its effectiveness. It is for the national court to ascertain whether that is the case (§ 37-39).
4. Questions 2 and 3 essentially ask the same as question 1, now based on Directives 76/207 and 2002/73 on sex discrimination and the ECJ's answer is basically similar (§ 40-48).
5. Question 5 asks whether any entitlement to information under Directives 76/207, 97/80 and 2002/73 is affected by rules of national or EU law relating to confidentiality. The ECJ answers that, when assessing whether a refusal of disclosure by the defendant in the context of establishing *prima facie* sex discrimination could risk depriving Article 4(1) of Directive 97/80 of its effect, national courts must take into account the EU rules in respect of data protection. The answer to the question, therefore, is affirmative (§ 49-56).
6. Question 4 asks whether the nature of the obligation contained in Article 267(3) TFEU (obligation of national court to refer questions to the ECJ) differs according to whether a Member State has an adversarial rather than an inquisitorial legal system. The ECJ

answers in the negative.

Ruling (on Question 1):
Article 4(1) of Council Directive 97/80/EC [...] must be interpreted as meaning that it does not entitle an applicant for vocational training, who believes that his application was not accepted because of an infringement of the principle of equal treatment, to information held by the course provider on the qualifications of the other applicants for the course in question, in order that he may establish "facts from which it may be presumed that there has been direct or indirect discrimination" in accordance with that provision.

Nevertheless, it cannot be ruled out that if the defendant refuses to disclose, in the context of establishing such facts, the objective pursued by the Directive could be compromised, depriving Article 4(1) thereof, in particular, of its effectiveness. It is for the national court to ascertain whether that is the case in the main proceedings.

ECJ 21 July 2011, joined cases C-159/10 and C-160/10 *(Gerhard Fuchs and Peter Köhler - v - Land Hessen)* **("Fuchs and Köhler")**, German case (AGE DISCRIMINATION)

Facts
Mr Fuchs and Mr Köhler (the "plaintiffs") were employed by the German province (*Land*) Hessen as State prosecutors. Article 50 of the provincial Law on the Civil Service (*Hessisches Beamtengesetz* or "HBG") provided that civil servants must retire at age 65 but that they may continue working until 68 if they so wish and if that is in the interests of the service. The plaintiffs applied to continue working beyond 65 but their applications were turned down. They brought an action before the administrative court (*Verwaltungsgericht*) in Frankfurt.

National proceedings
The administrative court was not sure whether Article 50 was compatible with Directive 2000/78. It explained that Article 50 was introduced in 1962, at a time when it was thought that fitness for work declines after 65. Since that time, the increase in life expectancy has led the German legislature to increase the retirement age for federal employees and private-sector employees. Moreover, elected civil servants in Hessen may perform their duties until age 71. In 1962 the Hessen legislature introduced Article 50 to promote the employment of younger people and thus to ensure an appropriate age structure without, however, specifying what such a structure might be. According to the court the aim of achieving an appropriate age structure does not serve the public interest. Moreover, the retirement of prosecutors does not always result in a recruitment exercise to fill the newly-vacated posts. It would therefore seem that the provincial government is endeavouring to make budgetary savings.
In light of the above, the administrative court referred three questions, each with many sub-questions, to the ECJ.

ECJ's findings
1. Question 1 was essentially whether Directive 2000/78 precludes a law, such as Article 50, which provides for the compulsory retirement of civil servants at age 65, subject to the option to continue until age 68 if that is in the interests of the service, if that law has one or more of the following aims: the creation of a "favourable age structure", planning of staff departures, promotion of civil servants, prevention of disputes or achieving budgetary savings (§ 32).
2. Article 50 creates a difference in treatment on grounds of age. Such a difference does not constitute discrimination if it is objectively justified pursuant to Article 6(1) of Directive 2000/78. Therefore, it is necessary to investigate whether Article 50 is justified by a legitimate aim and the means put in place to achieve that aim are appropriate and necessary (§ 33-36).
3. The HBG does not clearly state the aim pursued by Article 50. However, that aim may be identified in other ways: see *Palacios, Petersen* and *Rosenbladt* (§ 38-39).
4. Originally, Article 50 was based on an irrebuttable presumption that a person is unfit to work beyond age 65. However, that presumption should no longer be regarded as underpinning Article 50. An alteration of the aim of a law does not, of itself, preclude that law from pursuing a legitimate aim. Circumstances can change and the law may nevertheless be preserved for other reasons (§ 40-43).
5. A measure may be justified by more than one legitimate aim and the various aims may be linked to one another or classed in order of importance (§ 44-46).
6. The provincial government of Hessen and the German government submit that a "favourable age structure", i.e. having a range of ages of employees, is the principal aim of Article 50. This range helps employees to pass on experience and to share recently acquired knowledge. The ECJ has acknowledged this as a legitimate aim. The same applies to the aim of preventing disputes concerning employees' fitness for work beyond a certain age (§ 47-50).
7. In *Age Concern* (C-388/07), the ECJ held that aims that may be considered "legitimate" within the meaning of the Directive are aims that have a public interest nature that is distinguishable from reasons particular to the employer's situation, such as cost reduction or improving competitiveness (§ 51-52).
8. The aims of establishing a balanced age structure, improving personnel management and preventing disputes, taking into account the interests of all affected civil servants, may be regarded as aims in the public interest (§ 53).
9. In *Palacios de la Villa* the ECJ held that it must be possible to alter the means used to attain a legitimate aim (§ 54).
10. Given the scarcity of prosecutors' posts, it is not unreasonable for the Hessen government to take the view that a measure such as Article 50 can secure the aim of putting in place a balanced age structure (§ 56-60).
11. The Member States enjoy broad discretion to choose measures capable of achieving a legitimate aim. Taking into account the circumstances of the case, including prosecutors' pension rights and the possibility of working for three more years if that is in the interests of the service, Article 50 does not go beyond what is necessary to achieve said aim (§ 61-68).
12. Budgetary considerations can underpin the chosen social policy of a Member State, but they cannot in themselves constitute a legitimate aim within the meaning of the Directive (§ 69-74).
13. Question 2 asks what information a Member State must produce in order to demonstrate the appropriateness of and need for the measure at issue and, in particular, whether statistics or precise data with figures must be supplied (§ 76).
14. Mere generalisations are not enough. Article 6 (1) of the Directive imposes on Member States the burden of establishing to a high standard of proof the legitimacy of the aim relied on as justification (§ 77-78).
15. The Member States enjoy broad discretion in the choice of measures they consider appropriate. That choice may be based on all kinds of considerations including political ones, which will often involve a compromise and which cannot with certainty lead to the expected result (§ 80-81).

16. It is for the national court to assess the probative value of the evidence adduced, which may include statistical evidence (§ 82).
17. Question 3 queries the coherence of a law such as the HBG, given that (i) it allows prosecutors to continue to work until age 68 if that is in the interests of the service, (ii) it seeks to restrict voluntary retirement at the age of 60 or 63 by a reduction in pension rights and (iii) the federal law and the laws of a number of other *Länder* as well as the law applicable to private sector employees provide for an increase to the normal retirement age from 65 to 67 (§ 84).
18. The option to continue to work until age 68 is intended to cover cases where a prosecutor reaches the age of 65 but has been allocated a criminal case in which proceedings have not yet been concluded. Such an exception is unlikely to undermine the aim of achieving a balanced age structure. The same applies to other exceptions, such as allowing teachers to continue beyond age 65 until the end of the school year and allowing elected officials to complete their term of office (§ 85-91).
19. The fact that a person who retires before the normal retirement age receives a reduced pension is logical (§ 92-93).
20. The fact that the legislature envisages raising the normal retirement age does not mean that, from that point on, the existing law is unlawful. Moreover, legislation can vary from one region to another (§ 94-97).

Ruling

Council Directive 2000/78 [...] does not preclude a law [...] which provides for the compulsory retirement of permanent civil servants – in this instance prosecutors – at the age of 65, while allowing them to continue to work, if it is in the interests of the service that they should do so, until the maximum age of 68, provided that that law has the aim of establishing a balanced age structure in order to encourage the recruitment and promotion of young people, to improve personnel management and thereby prevent possible disputes concerning employees' fitness to work beyond a certain age, and that it allows that aim to be achieved by appropriate and necessary means.

In order for it to be demonstrated that the measure concerned is appropriate and necessary, the measure must not appear unreasonable in the light of the aim pursued and must be supported by evidence the probative value of which it is for the national court to assess.

A law such as the Law on the Civil Service of the *Land* Hessen [...], which provides for the compulsory retirement of prosecutors when they reach 65, does not lack coherence merely because it allows them to work until 68 in certain cases or contains provisions intended to restrict retirement before the age of 65. Other legislation of the Member State concerned provides for certain – particularly elected – civil servants to remain in post beyond that age and also the gradual raising of the retirement age from 65 to 67 years.

ECJ 6 September 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 cleaner in a state-run school in the Italian town Scorzè. Her employment started in 1980. Until 31 December 1999 she was employed by the Scorzè town council, not as a civil servant but as an ordinary 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 ("ATA services") were not always performed by employees in the service of central government. In some schools, the "ATA 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 ATA 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 ATA 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 ATA 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 ATA staff who were transferred pursuant to Law 123/99 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 been 20 years, yielding 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, in a dispute not involving Ms Scattolon, the Supreme Court interpreted Law 124/99 in favour of the plaintiffs in that case, 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 ATA 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 of 20 years, 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.

ECJ's findings

Question 1

1. The term "undertaking" covers any grouping of persons and assets enabling the exercise of an economic activity pursuing a specific objective which is sufficiently structured and independent. Whether or not the ATA staff constitute an undertaking therefore depends on (i) whether the ATA activities (cleaning, maintenance, etc.) are of an economic nature, (ii) if so, whether this is despite the absence of physical assets, (iii) whether the ATA workers are organised sufficiently independently and (iv) whether the fact that those workers form part of the public administration has any influence (§ 42 and § 48).
2. The ATA services were in some cases subcontracted to private operators. Those services do not fall within the exercise of public powers. Therefore, the ATA services are of an economic nature (§ 43-47).
3. The fact that an economic activity is essentially based on manpower does not prevent a structured group of workers from corresponding to an economic entity for the purposes of the Directive. The ATA workers are such an entity (§ 49-50).
4. In the context of the Directive "the concept of independence refers to the powers, granted to those in charge of the group of workers concerned, to organise, relatively freely and independently, the work within that group and, more particularly, to give instructions and allocate tasks to subordinates within that group". The ATA staff satisfy this requirement (§ 51-52).
5. The transfer of administrative functions between public administrative authorities is excluded from the scope of the Directive. However, this exception is limited to cases where the transfer concerns activities within the exercise of public powers. ATA activities are not such activities (§ 53-59).
6. It follows from the above that the ATA staff constitute an "undertaking". The fact that their activities were transferred by a unilateral decision (Law 123/99) does not render the Directive inapplicable. The undertaking was "transferred" within the meaning of the Directive (§ 60-65).

Questions 2 and 3

7. In *Collino and Chiappero* (C-343/98) the ECJ held that, whilst the transferred employees' length of service with their former employer does not as such constitute a right which they may assert against the new employer, the fact remains that, in certain cases, it is used to determine certain financial rights of employees, and those rights must, in principle, be maintained by the transferee in the same way as by the transferor. However, the obligation to take into account the transferred employees' entire length of service exists only insofar as it derives from the employment relationship between those employees and the transferor (§ 69-70).
8. In the present case, unlike *Collino*, account must be taken not only of Article 3(1) of the Directive (transfer of individual rights and obligations) but also of Article 3(2), which provides that the transferee must continue to observe the terms and conditions agreed in any collective agreement on the same terms as those applicable to the transferor under that agreement, until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement. The second subparagraph of Article 3(2) provides that Member States may limit the period for observing such terms and conditions with the proviso that it shall not be less than one year. This second paragraph does not prevent the terms of employment from ceasing to apply on the date of the transfer if that is the date on which the transferor's collective agreement terminates or another collective agreement enters into force. Therefore, insofar as national law allows, it is lawful for the transferor to apply the new collective agreement from the date of the transfer, provided that this does not place the transferred workers in a less favourable position solely as a result of the transfer (§ 71-75).
9. The Directive cannot be invoked to obtain improved terms of employment. Moreover, the Directive does not outlaw differences in treatment between the transferred workers and the transferee's existing workforce (§ 77).
10. Given the above, the State had the right to classify the length of service completed by ATA staff with local contracts as equivalent to that completed by ATA staff with former state contracts of the same profile (§ 78-81).

Question 4

11. There is no need to answer this question (§ 84).

Ruling

The takeover by a public authority of a Member State of staff employed by another public authority and entrusted with the supply to schools of auxiliary services including, in particular, tasks of maintenance and administrative assistance constitutes a transfer of an undertaking falling within Council Directive 77/187/EEC [...], where the staff consist in a structured group of employees who are protected as workers by virtue of the domestic law of that Member State.

Where a transfer within the meaning of Directive 77/187 leads to the immediate application of the collective agreement in force with the transferee to the transferred workers, and where the conditions for remuneration are particularly linked to length of service, Article 3 of that Directive serves to prevent the transferred workers from suffering a substantial loss of salary compared to their situation immediately before the transfer, on the basis that their length of service with the transferor (which is equivalent to workers in the service of the transferee), is not taken into account when determining their starting salary with the transferee. It is for the national court to examine whether, at the time of the transfer at issue in the main proceedings, there was such a loss of salary.

ECJ 8 September 2011, joined cases C-297/10 (*Sabine Hennings - v - Eisenbahn-Bundesambt***) and C-298/10** *(Land Berlin - v - Alexander Mai)* **("Hennings")**, German case (AGE DISCRIMINATION)

Facts

Until 2004/2005 the employment relationship of "contractual" employees (i.e. not civil servants) in the employment of the German federal government or of a provincial or local government were governed by a collective agreement known as the "BAT" (*Bundes-Angestelltentarifvertrag*). This collective agreement provided for, *inter alia*, the following rules regarding pay:

- every employee is paid according to a pay scale with a different scale for each salary group;
- each salary group has steps, one for employees aged 21-23, one for employees aged 23-25, and so forth, i.e. an employee gets a salary increase once every two years;
- the maximum step in salary group I (the highest group) corresponds to age 47 and over;
- upon hiring, an employee is placed on the step corresponding to his age;

- however, there are two exceptions to this rule; the first is that under certain conditions a person with above-average professional experience can be placed on a higher step than that corresponding to his age;
- the second exception is that someone who is hired at an age exceeding 31 (lower salary groups) or 35 (higher salary groups) is placed on a lower step than corresponds with his age, namely on the step corresponding to his actual age minus one half of the years between 31/35 and that age;
- the salary determined under the BAT was in some cases supplemented by a "local supplement" that took account of financial burdens associated with family status.

On 1 April 2004 the BAT ceased to apply to contractual employees of the Berlin government. On 1 October 2005 the BAT ceased to apply to contractual employees of the federal government. It was replaced by a new collective agreement, known as the TVöD (*Tarifvertrag für den öffentlichen Dienst*), which did not differentiate according to age. The transition from the BAT to the TVöD was regulated by a separate, transitional collective agreement. It provided that established rights existing on 30 September 2007 would be preserved.

National proceedings

Mr Mai was hired by the Berlin government in 1998 at age 30. At the time his employment ended in 2009, he was classified in BAT salary group Ia and received a salary corresponding to his age of 41, which was € 3,336 gross per month. He took the view that the gradation of basic pay by age categories was age discriminatory and brought proceedings claiming, for a period of approximately 2½ years, the balance between what he had been paid and what he would have been paid had he been 47 or over.

Ms Hennings was a civil engineer in the employment of the federal government. She was 41 at the time she was appointed in salary group IVa. Because she was over age 31 at that time, she was placed on a step corresponding to a lower age than her real age. On 1 October 2007, when she was reclassified pursuant to the transfer from the BAT to the TVöD, she was 43 but was paid as if she was 37. She demanded to be reclassified according to her actual age, which would yield her an additional Ð 435 gross per month.

Both Mr Mai and Ms Hennings litigated all the way to the highest German Court for employment disputes, the BAG. It referred one question re Mai and five questions re Hennings to the ECJ.

ECJ's findings

1. Question 1 in the Hennings case and the single question in the Mai case ask whether the principle of non-discrimination on grounds of age precludes pay being based on age. Following some introductory remarks and general observations, the ECJ examines whether the difference of treatment is justified under Article 6(1) of Directive 2000/78 (§ 46-61).

2. Like the Member States, the parties to a collective agreement enjoy a broad discretion in their choice, not only to pursue a particular aim in the field of social and employment policy, but also in the definition of measures capable of achieving it. The nature of measures adopted by way of a collective agreement differs from the nature of those adopted unilaterally by way of legislation in that the social partners, when exercising their fundamental right to collective bargaining recognised in Article 28 of the Charter of Fundamental Rights of the EU, have taken care to strike a balance between their respective interests. Nevertheless, the social partners must comply with the Directive (§ 62-68).
3. The referring court and the German government state that the higher pay which an older employee used to get under the BAT was justified by (i) the employee's longer professional experience and (ii) his loyalty to his employer. Some scholars and lower courts mention a third argument, namely that the higher pay for older employees is compensation for their – usually greater – financial needs, but this argument is flawed, given that there is no correlation between age and financial needs (§ 69-70).
4. The German government submits that not paying an employee hired after the age of 31/35 according to his real age is justified by the fact that, after a certain point in time, persons appointed late tend to have professional experience that is not entirely relevant to the activity they will carry out. It follows that the aim of the age criterion in the BAT is to establish a pay scale that takes account of employees' professional experience. That aim is, in principle, legitimate, as held in *Cadman* (C-17/05) and *Hütter* (C-88/08) (§ 71-72).
5. As a general rule, recourse to the criterion of length of service is appropriate to achieve that aim, since length of service goes hand in hand with professional experience: see *Danfoss* (109/88), *Cadman* and *Hütter* (§ 73-74).
6. However, the system of appointing employees in a salary group corresponding to their age goes beyond what is necessary and appropriate to achieve said aim. For example, someone without any professional experience who is hired at age 30 will receive the same pay as someone who was hired at age 21 and now has 9 years of experience. This makes the BAT-system unjustified (§ 75-76).
7. Questions 2 and 3 in case C-297/10 ask whether the EU's age discrimination rules preclude the replacement of a discriminatory system (BAT) by a non-discriminatory system (TVöD) while maintaining unequal treatment of existing employees of different ages, if the consequent discrimination is justified by the preservation of established rights, it is progressively reduced and the only other possible solution would be to reduce the pay of older employees (§ 79).
8. The ECJ has previously held that the protection of the established rights of a category of persons constitutes an overriding reason in the public interest which justifies the measure, provided that is does not go beyond what is necessary for such protection (§ 90).
9. The aim of the transitional measure is legitimate and the measure does not go beyond what was necessary (§ 91-99).

Ruling

The principle of non-discrimination on grounds of age proclaimed in Article 21 of the Charter of Fundamental Rights of the European Union and given specific expression in Council Directive 2000/78/EC [...] must be interpreted as precluding a measure laid down by a collective agreement such as that at issue in the main proceedings which provides that, within each salary group, the basic pay step of a public sector contractual employee is determined on appointment by reference to the employee's age. The fact that European Union law precludes that measure and that it appears in a collective agreement does not interfere with the right to negotiate and conclude collective agreements recognised in Article 28 of the Charter of Fundamental Rights of the European Union.

Articles 2 and 6(1) of Directive 2000/78 and Article 28 of the Charter of Fundamental Rights of the European Union must be interpreted as not

precluding a measure in a collective agreement, [...] which replaces a system of pay leading to discrimination on grounds of age by a system of pay based on objective criteria while maintaining, for a transitional period limited in time, some of the discriminatory effects of the earlier system in order to ensure that employees in post are transferred to the new system without suffering a loss of income.

ECJ 8 September 2011, case C-177/10 *(Francisco Javier Rosado Santana - v - Consejería de Justicia y Administración Pública de la Junta de Andalucía)* **("Rosado Santana")**, Spanish case (FIXED-TERM WORK)

Facts

Mr Rosado Santana was employed by the provincial Ministry of Justice as an "interim civil servant", i.e. 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 ten 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. The decision at issue was handed down in March 2009 and Mr Rosado Santana brought proceedings in June 2009.

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.

ECJ's findings

1. Clause 4(1) of the Framework Agreement provides that fixed-term workers shall not be treated in a less favourable manner than comparable permanent workers. Given that Mr Rosado Santana was no longer a fixed-term worker at the time of the alleged discrimination, the Spanish government and the Commission argue that clause 4 does not apply to the dispute. The ECJ rejects this argument, as it would effectively reduce the scope of the protection envisaged by Directive 1999/70 (§ 37-44).
2. Rules concerning periods of service to be completed in order to qualify for a promotion constitute "employment conditions" within the meaning of Clause 4(§ 45-47).
3. Questions 1 and 2 were whether national courts may interpret Clause 4 so as to exclude it being applied to civil servants. The ECJ replies in the negative. Clause 4 has direct effect and applies equally to the public and private sectors (§ 49-62).
4. Questions 3 and 4 ask whether Clause 4 allows periods of service completed by an interim civil servant to be discounted when considering promotion, if that person has subsequently become a career civil servant (§ 63).
5. It is for the national court to determine whether Mr Rosado Santana was in a situation "comparable" to that of persons with ten years seniority as a career civil servant, in the light of factors such as the nature of the work, training requirements and working conditions. The nature of his duties and the quality of the experience he thereby acquired are not merely factors which could objectively justify different treatment, they are among the criteria determining comparability. If this work and experience are not comparable, there is no discrimination. If they are comparable, then the issue of objective justification arises (§ 64-71).
6. Clause 4 does not permit a difference in treatment between fixed-term workers and permanent workers to be justified on the basis of a general abstract norm. The concept of "objective grounds" in Clause 4 requires unequal treatment to be justified by precise and specific factors, characterising the employment condition to which it relates, in the particular context in which it occurs and on the basis of objective and transparent criteria in order to ensure that unequal treatment in fact meets a genuine need, is appropriate for achieving the objective pursued and is necessary for that purpose. The mere fact that employment is temporary is not, in itself, capable of constituting an "objective ground" (§ 72-74).
7. The Spanish government argues (i) that less stringent requirements are imposed on interim civil servants as regards entry into the civil service and proof of merits and capacities, (ii) that interim civil servants are tied to their posts, contrary to career civil servants, who are mobile and (iii) that certain duties are reserved for career civil servants, which implies that there is a difference in the quality of their experience and training. Some of these differences could, in principle, justify the different treatment at issue (§ 75-78).
8. Where, in a selection procedure, a difference in treatment flows from the need to take account of objective requirements relating to the relevant post which are unrelated to the fixed-term nature of the interim civil servant's employment relationship, it is capable of being justified. On the other hand, a general and abstract condition that a certain period of service must have been entirely completed as a career civil servant without taking account of the specific nature of the tasks to be performed or their inherent characteristics, does not meet the requirements for justification (§ 78-80).
9. Question 5 was whether EU law precludes national legislation requiring a challenge to the rejection of a candidature to be brought within two months of the competition notice (§ 85-86).
10. Although it is for the national legal system to lay down procedural rules, the Member States must ensure that the rights conferred on individuals by EU law are effectively protected, the rules may not be less favourable than those governing similar domestic actions (principle of equivalence) and they must not render the exercise of rights conferred by EU law excessively difficult (principle of effectiveness) (§ 87-89).
11. It is for the national court to ascertain whether the two month time-limit is a general rule laid down for all actions challenging administrative measures and, hence, whether it meets the principle of equivalence (§ 90-91).
12. The two month time-limit at issue is not, in principle, liable to render excessively difficult the exercise of Mr Rosado Sanata's rights under the Framework Agreement. However, in the circumstances

of this case, it was not until March 2009 that it became clear to Mr Rosado Santana that the competition notice was being applied in a way which could adversely affect his rights under the Framework Agreement. It is for the national court to determine whether this circumstance made it practically impossible or excessively difficult for Mr Rosado Santana to exercise his rights.

Ruling

Council Directive 1999/70/EC [...] must be interpreted, on the one hand, as applying to contracts and relationships concluded with the public authorities and other public-sector bodies and, on the other, as precluding any difference in treatment as between career civil servants and comparable interim civil servants of a Member State, based solely on the ground that the latter are employed for a fixed term, unless different treatment is justified on objective grounds for the purposes of Clause 4(1) of the Framework Agreement.

Clause 4 of the Framework Agreement on fixed-term work must be interpreted as prohibiting employers from not taking into account periods of service completed as an interim civil servant in a public administration for the purposes of permitting such a person, who has subsequently become a career civil servant, to obtain an internal promotion available only to career civil servants, unless this is justified by objective grounds for the purposes of Clause 4(1) of that Agreement. The mere fact that the interim civil servant completed those periods of service under a fixed-term employment contract or relationship does not constitute such an objective ground.

The primary law of the European Union, Directive 1999/70 and the Framework Agreement are to be interpreted as not precluding, in principle, national legislation which provides that, where an action brought by a career civil servant challenging a decision rejecting his candidature for a competition is based on the fact that the promotion procedure was contrary to Clause 4 of the Framework Agreement, that action must be brought within two months of the publication of the competition notice. Nevertheless, such a time-limit could not be relied upon against a career civil servant who has been a candidate in that competition, who has been admitted to the tests and whose name was placed on the definitive list of successful candidates for that competition, if that were liable to render practically impossible or excessively difficult the exercise of the rights conferred by the Framework Agreement. In those circumstances, time for the purposes of the two month time-limit, could run only from notification of the decision annulling the civil servant's admission to the competition and his appointment as a career civil servant in the higher group.

ECJ 13 September 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.

ECJ's findings

1. A pilot aged 60 is in a comparable situation to that of a younger pilot. Therefore, the automatic termination of employment at age 60 constitutes a difference of treatment based directly on age (§ 44-45).
2. The objective of the contested provision is air traffic safety. This is a legitimate aim, but is it "necessary for the protection of the rights and freedoms of others" within the meaning of Article 2(5) of the Directive? Neither German nor international legislation prohibits pilots from flying aircraft beyond the age of 60, it merely lays down certain additional conditions, such as that a younger pilot must also be present in the cockpit. Therefore, the contested provision is not "necessary" as provided in Article 2(5) (§ 54-64).
3. Article 4(1) of the Directive allows differential treatment which is based on a characteristic where, by reason of the nature of the relevant occupational requirement or its context, such a characteristic constitutes a genuine and determining requirement, provided that the objective of the differential treatment is legitimate and the requirement is proportionate. Possessing certain physical capabilities may be considered as a "genuine and determining occupational requirement". The objective of guaranteeing air traffic safety is legitimate. But is automatic termination of employment at age 60 a "proportionate" way to achieve that objective? (§ 65-70.)
4. Being a derogation from the principle of non-discrimination, Article 4(1) must be interpreted strictly. Given that the law does not prohibit piloting beyond age 60 altogether, the contested provision is a disproportionate means to achieve air traffic safety (§ 71-76).
5. Air traffic safety does not fall within the aims referred to in Article 6(1) of the Directive, namely social policy objectives, such as those related to employment policy, the labour market or vocational training. Therefore, automatic termination of employment at age 60 is not justified under Article 6(1).

Ruling

Article 2(5) of Council Directive 2000/78 [...] must be interpreted as meaning that the Member States may authorise the social partners to adopt measures within the meaning of Article 2(5) in the areas referred to in that provision that fall within collective agreements, on condition that the rules of authorisation are sufficiently precise as to ensure that they fulfil the requirements set out in Article 2(5). A measure such as that at issue in the main proceedings, which fixes the age limit beyond which pilots may no longer carry out their professional activities at 60, whereas national and international legislation fixes that age at 65, is not a measure that is necessary for public security and the protection of health, within the meaning of the said Article 2(5).

Article 4(1) of Directive 2000/78 must be interpreted as precluding a clause in a collective agreement, such as that at issue in the main proceedings, that fixes at 60 the age limit from which pilots are considered as no longer possessing the physical capabilities necessary to carry out their professional activity, while national and international legislation fix that age at 65.

The first paragraph of Article 6(1) of Directive 2000/78 must be interpreted to the effect that air traffic safety does not constitute a legitimate aim within the meaning of that provision.

ECJ 15 September 2011, case C-155/10 *(Williams and others - v - British Airways plc)* **("Williams")**, British 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 were 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.

ECJ's findings
1. The ECJ examines all the questions together, referencing its case law that Article 7 is a particularly important principle of Community social law and that for the duration of their annual leave, employees must continue to receive their normal remuneration (§ 15-19).
2. The purpose of Article 7 is to put the worker, during his leave, in a position that is comparable to periods of work in terms of remuneration. It follows from this that an allowance, the amount of which is just sufficient to ensure that there is no serious risk that the worker will not take his leave, will not satisfy the requirements of EU law (§ 20-21).
3. The structure of a worker's ordinary remuneration is a matter for the Member States to determine. However, that structure cannot affect the worker's right to enjoy, during his period of rest and relaxation, economic conditions that are comparable to those relating to the exercise of his employment (§ 22).
4. Accordingly, any inconvenience that is intrinsically linked to the performance of the tasks the worker is contractually bound to carry out and in respect of which a sum of money is included when calculating the workers' total pay (such as, in the case of airline pilots, for time spent flying), must be taken into account when calculating annual leave. By contrast, components of the worker's pay that are intended only to cover occasional or ancillary costs arising at the time of performance (such as for time away from base), need not be taken into account in calculating pay during annual leave. (§ 24-25).
5. Pay during leave must be calculated based on an average over a representative period in accordance with the ECJ's case law to the effect that entitlement to annual leave and to payment in respect of that are treated as being two aspects of a single right (§ 26).
6. As ruled in *Parviainen* (C-471/08), all remuneration components relating to the personal and professional status of an airline crew member must be maintained during (in that case: maternity, in this case, paid annual) leave (§ 28).

Ruling
Article 7 of Directive 2003/88/EC must be interpreted as meaning that an airline pilot is entitled, during his annual leave, not only to the maintenance of his basic salary, but also (i) to all the components intrinsically linked to the performance of the tasks which he is required to carry out under his contract of employment and in respect of which a monetary amount, included in the calculation of his total remuneration, is provided and (ii) to all the elements relating to his personal and professional status as an airline pilot.

It is for the national court to assess whether the various components comprising that worker's total remuneration meet those criteria.

OPINIONS

Opinion of Advocate-General Trstenjak of 7 July 2011, case C-214/10 *(KHS AG - v - Winfried Schulte)* **("KHS")**, German case (HOLIDAY ALLOWANCE)

Facts
Mr Schulte was entitled to 30 days of paid leave per year. On 23 January 2002 he had a heart attack from which he never recovered. As from 1 October 2003 he received disability benefits and on 31 August 2008 his employment with KHS ended. Thus, he had not worked during the last six and a half years of his employment. Following the termination of his employment, he claimed payment in lieu of paid leave for the years 2006, 2007 and 2008.

National proceedings
The court of first instance awarded part of the claim. KHS appealed, arguing that Mr Schulte's leave entitlements for the years 2006 and 2007 were extinguished pursuant to paragraphs 11(1) and 11(3) of the relevant collective agreement. Paragraph 11(1) provided that leave entitlement shall expire (i) three months after the calendar year in which it was accrued, unless it could not be taken for operational reasons or (ii) 12 months after the calendar year if it could not be taken on account of illness. Paragraph 11(3) prohibited payment in lieu of paid leave except upon termination of the employment. The appellate court found that Mr Schulte's leave entitlement for the year 2006 had extinguished on 3 March 2008. In coming to this conclusion, the court acknowledged that, as held in *Schultz-Hoff* (C-350/06 and C-520/06), the loss of entitlement to paid leave is only compatible with Directive 2003/88 if the worker has had a real opportunity to take leave, which Mr Schulte had not. However, the court noted that the ECJ had not yet ruled on whether the Directive allows workers on prolonged sick leave to accumulate leave entitlements without a time-limit. It therefore

referred two questions to the ECJ. The first was whether Article 7(1) of Directive 2003/88 precludes legislation under which entitlement to the minimum paid annual leave expires at the end of the reference period (i.e. the year in which it was accrued) or at the end of the carry-over period, even in the case where the worker has been unfit for work over a prolonged period. The second question was whether, if such legislation is not precluded, the possibility of carrying over leave entitlement must exist for a period of at least 18 months.

Opinion

1. Although the dispute between Mr Schulte and KHS relates to Article 7(2) of the Directive (payment in lieu following termination), the questions relate to Article 7(1), which deals with leave during employment. Nevertheless the questions referred should be examined in the light of Article 7(1), given that the right to payment in lieu is a secondary right, derived from the primary right to paid leave during employment (§ 35).
2. The right to paid annual leave is a particularly important principle of EU social law (§ 37).
3. In *Schultz-Hoff* the ECJ held that Article 7(1) of the Directive does not, in principle, preclude national legislation which lays down conditions for the exercise of the right to paid annual leave, including the loss of that right at the end of a leave year or carry-over period. The reason for this is that laying down the conditions for the "exercise and implementation" of the right to paid leave falls within the competence of the Member States. However, the ECJ also held that in order to lose his right to paid leave a worker must have actually had the opportunity to exercise that right (§ 38-39).
4. In *Schultz-Hoff* the ECJ had no need to express an opinion on the minimum length of the carry-over period where the worker could not exercise his right (§ 44-47).
5. There are arguments for and against requiring Member States to allow the unlimited accumulation of leave entitlement. An argument in favour is that it reduces the uncertainty associated with illness. Both the onset of illness and recovery are unpredictable. Moreover, to determine whether or not an employee is ill requires medical examinations. Another argument is that a worker cannot help falling ill, therefore illness cannot be used as a pretext for depriving him of a right. Finally, Article 7(1) makes no distinction between workers who have worked and those who have been absent for illness, for which reason the ECJ, in *Schultz-Hoff*, held that the right to paid annual leave "cannot be made subject [...] to a condition concerning the obligation to have worked during the leave year"(§ 50-55).
6. The Advocate-General lists the following arguments against obliging Member States to grant unlimited accumulation of leave entitlements. First, leave can only fulfil its health and safety function if it is taken during or shortly after the leave year (§ 56-57).
7. Secondly, a doubling or even tripling of the minimum annual leave does not lead to an increase in the recuperative effect. Rather, it appears proper and appropriate to set the amount of annual leave in reasonable relationship to the actual need for rest. Such a relationship can be achieved by granting more than the minimum of four weeks' annual leave, but without simply awarding a multiple thereof (§ 58).
8. Thirdly, a worker returning from sick leave must be given a chance to get used to being back at work. If he were again removed from work by long or continuing periods of leave this might be counterproductive for his career and impede his reintegration into the labour market. In fact, the cost of accumulated entitlement to leave may give the employer an incentive to resort to dismissal (§ 59-61).
9. Fourthly, a completely unlimited entitlement to annual leave for several consecutive years would impede the development of small and medium-sized businesses (§ 62-65).
10. Finally, Article 7(2) of the Directive provides that upon termination of employment, untaken leave must be "replaced", not "compensated" for by payment in lieu. The purpose of the payment is to put the worker in a financial position in which he is able to catch up with his paid leave. An unlimited accumulation of leave would ultimately reduce annual leave to a mere economic good (§ 66-70).
11. In summary, the Advocate-General concludes that an unlimited accumulation of entitlement to paid annual leave or to allowances in lieu is not required under EU law in order to ensure that the objectives of Article 7 of Directive 2003/88 are achieved. Given this, it is necessary to examine the compatibility of a time-limit on the carrying-over of leave entitlement (§ 71).
12. In the case of *Schultz-Hoff* the decisive factors were the extremely short carry-over period and the fact that the collective agreement did not take sufficient account of cases of hardship, such as workers' unfitness to work. It may be that in other circumstances the expiry of leave entitlement would be consistent with EU law (§ 72-75).
13. It is necessary to grant the worker at least a residual entitlement to leave which he can exercise upon recovery and return to work. At most, a partial expiry to leave entitlement is acceptable. The question is how long the minimum time-limit for exercising leave entitlement should be. A possible answer lies in the ILO Convention 132, to which the ECJ referred in *Schultz-Hoff*. Article 9(1) of this Convention states that paid annual leave must be granted and taken no later than 18 months following the year in which it accrued. This period gives the worker up to 2 ½ years to take his minimum paid annual leave for a given leave year (i.e. the year in which the leave accrued plus 18 months). A worker who returns to work following prolonged illness is then entitled to between 8 and 12 weeks' leave (§ 76-82).
14. ILO Convention 132 is not binding on the EU through EU law. Hence, Member States of the EU may derogate from the 18 month period by providing for a longer period (§ 83-90).

Proposed reply

Article 7 of Directive 2003/88 precludes national legislation that extinguishes accrued paid leave entitlement at the end of a leave year or carry-over period even where the worker was on sick leave during all or part of the leave year and where his incapacity to work persisted until the end of his employment relationship, unless the carry-over period is sufficiently long to ensure that the purpose of the right to rest is guaranteed. A carry-over period of 18 months satisfies that requirement.

Opinion of Advocate-General Mengozzi of 6 September 2011, case C-434/10 *(Peter Aladzhov - v – Zamestnik director na Stolichna direktsia na vatreshnite raboti kam Ministerstvo na vatreshnite raboti)* **("Aladzhov")**, Bulgarian case, (FREE MOVEMENT)

Facts

Mr Aladzhov, a Bulgarian national, was one of three directors of a Bulgarian company that was in arrears with the payment of VAT and customs duties. The tax department tried to collect its tax claim but failed to find assets. So it requested the government to issue an order preventing Mr Aladzhov from leaving the country until the company

of which he was a Director had paid its taxes. The order was issued, and Mr Aladzhov could not leave the country. This impeded his work, not only for this company, but also for another company of which Mr Aladzhov was sales director. He applied to the court to annul the order.

National proceedings

The court referred three questions to the ECJ, basically asking whether a prohibition on leaving one's country on account of a tax debt is compatible with the EU's rules in respect of free movement, in particular Directive 2004/38. Article 27(1) of this Directive allows Member States to restrict the right of EU citizens to leave their country on grounds of public policy, public security or public health, adding that those grounds shall not be invoked to serve economic ends. Article 27(2) provides that such restrictions "shall comply with the principle of proportionality and shall be based exclusively on the individual's personal conduct", which conduct "must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted".

Opinion

1. The ECJ interpreted Article 27 of Directive 2004/38 in 2008 in its ruling in the *Jipa* case (C-33/07). In that case the ECJ acknowledged Member States' right to adopt laws limiting their subjects' right to travel freely within the EU for reasons of public order and public security. The question at issue in the present case is whether a Member State may invoke this exception to the principle of free movement - which, being an exception, must be construed narrowly - to justify preventing one of its nationals from leaving the country on account of a tax debt (§ 20-26).
2. This case needs to be distinguished from the case that led to the ECtHR's 2006 judgment in *Riener - v - Bulgaria*. That case concerned the compatibility with Article 2 of the 4th Protocol to the ECHR of an order prohibiting a Bulgarian national from leaving his country in connection with a large tax debt. The ECtHR found that prohibition's aim to be the protection of public policy and the rights and freedoms of others. The ECtHR was able to arrive at that conclusion because the ECHR, contrary to Article 27 of Directive 2004/38, allows the public policy exception to be based on economic motives. In other words, the EU accepts derogations from the right of its citizens to free movement less readily, and offers a higher degree of protection than the ECHR (§ 30).
3. Article 27 requires that a derogation from the principle of free movement be based on a "fundamental interest of society" and states that it cannot be invoked to serve economic ends. The question is therefore, what is the objective of the Bulgarian legislation in question? The only indication of this in the order for reference is a remark that Bulgaria adopts measures to safeguard its budgetary income and that that is in the *general interest*. The existence of a tax debt is represented as a threat to the interests of society. This can be interpreted in two ways (§ 31-32).
4. One way is to see the State as an entrepreneur who is attempting to get a debtor to pay. In this case the objective is purely economic and therefore not compatible with the Directive. Another way is to see the obligation to pay taxes as an integral part of a system that is essential to society as a whole (§ 33-34).
5. A Member State which invokes the public policy argument must demonstrate clearly and precisely why it believes that the non-collection of taxes is a genuine threat to its public policy and that the obligation to pay taxes is an objective that is of a higher order than mere economic interests (§ 35-38).
6. Even supposing the requirements of Article 27(1) have been met, a ban on leaving the country will still need to satisfy the requirements set out in Article 27(2), namely that it is proportionate, that it is based exclusively on the individual's personal conduct and that that conduct represents a sufficiently serious threat to one of the fundamental interests of society (§ 39).
7. The refusal to allow Mr Aladzhov to leave the country was not because of a personal tax debt but because he was a Director of a company with a tax debt, together with two others. Why the ban was aimed at him and not at his two co-Directors is unclear. Moreover, the ban impeded his ability to earn an income as sales director of another company. This seems incompatible with the objective of collecting taxes from him (§ 39-41).
8. In addition, the amount of tax arrears that is sufficient under Bulgarian law to trigger a ban on leaving the country is so low – approximately € 2,500 - that it is questionable whether non-payment of such a sum really poses a threat to the country's fundamental interests (§ 42).
9. Finally, there are surely other, equally effective ways to collect taxes that are less problematic in relation to the principle of free movement. For all these reasons, the measure at issue is disproportionate (§ 43-44).
10. Moreover, that measure was not based on Mr Aladzhov's personal conduct and it had not been established that the conduct represented a serious threat to Bulgarian society (§ 45).

Proposed reply

A ban on leaving the territory of a Member State, imposed on a national of that state in his capacity as a director of a company with tax arrears can, in principle, be a restriction based on public policy within the meaning of Article 27(1) of Directive 2004/38, provided that the collection of the tax in question serves more than merely economic interests (to be determined by the national courts). Article 27(2) precludes national legislation banning an individual from leaving his country on account of a tax debt of a company of which he is director if the prohibition is disproportionate and is not based on an assessment that the individual's personal conduct represents a sufficiently serious threat to society.

Opinion of Advocate-General Trstenjak of 8 September 2011, case C-282/10 *(Maribel Dominguez - v - Centre informatique du Centre Ouest Atlantique - v - Préfet de la région Centre)* **("Dominguez")**, French case (PAID LEAVE)

Facts

Ms Dominguez was employed by a French private organisation. In November 2005, while commuting between her home and her place of work, she was involved in a traffic accident. As a result, she was unable to work until January 2007. This caused her to be absent for the whole of 2006. Upon her return to work she was informed that she had not accrued any paid leave in 2006. This was because French law, as it stood at the time, provided that only workers who had worked for the same employer for at least one month in any calendar year accrue entitlement to paid leave in that year. This provision is referred to below as the "contested provision". (The one month requirement was later changed to 10 days). In determining whether a worker has "worked", certain periods during which the worker did not actually work are equated with worked periods. One of these is where the worker was unable to work for a full year on account of an accident at work or an occupational disease. Given that Ms Dominguez's absence was not

caused by an accident at work, she was not covered by this exception and so she did not accrue any paid leave for the year 2006.

National proceedings

Ms Dominguez claimed 22½ days of paid leave for the year 2006. Her claim was turned down in two instances. She appealed to the Supreme Court, which referred three questions to the ECJ. The first question was whether Article 7(1) of Directive 2003/88 serves to prevent legislation such as that at issue. The second question was whether, if the answer to the first is affirmative, the national court must disapply that legislation. The third question was whether it is compatible with Directive 2003/88 for national legislation to differentiate between medical absences for different reasons where this grants workers more paid annual leave than the EU minimum of four weeks per year.

Opinion

Question 1

1. It is for the Member States to determine the manner in which the right to paid annual leave can be exercised. However, the ECJ's case law, in particular its judgment in the *BECTU* case (C-173/99), makes clear that a Member State may not make the acquisition of that right as such dependent on the fulfilment of a condition, which is what the contested provision does (§ 40-48).
2. It follows from *Schultz-Hoff* (C-350/06 and 520/06) that the right to paid leave can arise during sickness. Therefore, the contested provision is incompatible with Directive 2003/88, as is common ground between all of the parties. The French government has since announced that it will amend the contested provision (§ 49-53).

Question 2

3. The Advocate-General devotes many pages to the debate on the (absence of) horizontal direct effect of directives. Her exposition is structured as follows: (1) an exposition of the role of national courts in disputes between private parties including (a) the limits of horizontal direct effect and (b) possible alternatives; and (2) the status of the right to paid leave (§ 55).
4. The basic principle is that a directive cannot be applied directly in a dispute between private parties. There is no need to distinguish, as some scholars do, between negative effect (disapplying a provision of national law) and positive effect (applying a provision of EU law). There are only two ways to compensate for this lack of horizontal direct effect, namely (i) an obligation on national courts to interpret their domestic law, as far as possible, in line with EU directives and (ii) an obligation on Member States to compensate persons who have suffered loss on account of the failure to transpose a directive (§ 61-68).
5. Notwithstanding said basic principle, three methods are conceivable to achieve horizontal direct effect of Directive 2003/88: (i) directly applying Article 31(2) of the Charter of Fundamental Rights of the EU; (ii) according the right to paid leave the status of a fundamental right that is directly applicable between private parties and (iii) according that right the status of a fundamental right by means of the directive, as the ECJ did in *Kücükdeveci* (§ 70).
6. Since the Lisbon Treaty came into force (1 December 2009), the Charter has had the status of primary EU law. Article 31(2) of the Charter reads, "Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave". Although the Charter was not yet in force at the time Ms Dominguez was unfit for work, the principles to which it gives expression already existed at that time. The right to paid leave is more than a principle, it is a right (§ 72-79).
7. However, Article 51 of the Charter makes clear that this right is a right *vis-a-vis* the relevant Member State, not *vis-a-vis* the employer (§ 80-83).
8. There are arguments in support of according the right to paid annual leave the status of a fundamental EU right (§ 91-114).
9. The ECJ has not yet ruled explicitly on whether fundamental rights are directly applicable between private parties. There are some indications that the ECJ is tending in the direction of an affirmative answer to this question, including *Defrenne, Mangold* and *Kücükdeveci* (§ 115-126). However, such an affirmative answer, in respect of paid annual leave, would risk creating a discrepancy between a fundamental right on the one hand and Article 31(2) in combination with Article 51 of the Charter on the other (§ 127-132).
10. In order to apply a fundamental right directly to a dispute between private parties, that right must be unconditional and sufficiently specific. A fundamental right to paid annual leave does not satisfy these criteria (§ 135-142).
11. The third method to achieve horizontal direct effect of a directive is the method adopted by the ECJ in *Kücükdeveci*, namely to reason that the right to paid leave, not as such but as expressed by Directive 2003/88, is a fundamental right constituting primary EU law. Strictly speaking, Directive 2003/88 satisfies the requirements specified in *Kücükdeveci*. Nevertheless, there is reason to review the pros and cons of applying the *Kücükdeveci* doctrine to this issue (§ 144-151).
12. One argument against doing so is that applying both a fundamental right and a directive risks mixing up two sources of law. The directive may, for example, contain rights that go beyond the fundamental right. It is not logical to distill a fundamental right from a directive (§ 154-157).
13. Moreover, the *Kücükdeveci* doctrine cannot be applied to the right to paid annual leave. In the case of age discrimination the general principle of EU law is identical to the rules expressing that principle in Directive 2000/78. This is not the case with the right to paid leave, which requires materialisation in national law (§ 160-163).
14. Furthermore, the *Kücükdeveci* doctrine leads to uncertainty. It allows directives to be used as entry points for all sorts of new primary EU law (§ 164-167).
15. Not according Directive 2003/88 horizontal direct effect need not necessarily prejudice Ms Dominguez. If the relevant requirements have been met, she can claim from the French state for the loss she suffered as a result of the contested provision being incompatible with the Directive (§ 171-174).

Question 3

16. The Member States are free to legislate as they wish in respect of paid annual leave exceeding the minimum required by Directive 2003/88. Therefore, they may differentiate such "extra" leave according to reasons of sick leave absence (§ 176-182).

Proposed reply

- Article 7(1) of Directive 2003/88 precludes a provision of national law according to which paid annual leave is only acquired in the event the worker has worked for at least ten days (or one month) in the relevant reference period.
- Article 7(1) of Directive 2003/88 does not obligate a national court to disapply such a provision of domestic law.
- Article 7(1) of Directive 2003/88 does not preclude a provision of national law that differentiates between sick leave absences

for different reasons in respect of the right to paid annual leave exceeding the minimum leave prescribed by the Directive.

Opinion of Advocate-General Jääskinen of 15 September 2011, case C-313/10 *(Land Nordrhein-Westfalen - v - Sylvia Jansen)* **("Nordrhein")**, German case (FIXED-TERM EMPLOYMENT)

Facts

Ms Jansen was employed by the provincial Justice Department of *Nordrhein-Westfalen* on the basis of nine consecutive fixed-term contracts. The reason given for the temporary nature of her contracts was that her position was vacant temporarily as a result of temporary absences of permanent staff on account of parental leave, special leave or temporary working time reduction. Her ninth and final contract was justified by the fact that the relevant funding was of a temporary nature.

National proceedings

When Ms Jansen was informed that her ninth contract, which was to expire on 30 June 2006, would not be renewed, she took legal action. She asked the court to declare that her employment was permanent and would therefore continue beyond 30 June 2006. She argued that the conditions specified in Article 14(1) of the German law regulating fixed-term work, the "TzBfG", which transposed Directive 1999/70, had not been satisfied. Article 14(1) TzBfG allows an employer to hire someone on a fixed-term basis only if there is an objective reason (*sachlichen Grund*) for doing so. Such a reason is deemed to exist if one of eight listed reasons applies. The relevant reasons in this case are (1) that the business need for the position is temporary, (3) that the employee is engaged to replace someone else, and (7) that the employee is paid out of a temporary budget. Article 7(3) of the relevant provincial law provided that temporary staff could be hired provided permanent positions foreseen in the provincial budget were left unfilled. The court of first instance awarded Ms Jansen's claim. The Justice Department appealed. The appellate court referred four questions to the ECJ.

Opinion

1. Question 1 was whether, in determining an "objective reason" within the meaning of clause 5(1) of the Framework Agreement annexed to Directive 1999/70, the number of prior successive fixed-term contracts, or their total duration, is relevant.
   Clause 5(1) provides: "To prevent abuse arising from the use of successive fixed-term employment contracts [...] Member States [...] shall [...] introduce [...] one or more of the following measures:
   (a) objective reasons justifying the renewal of such contracts [...];
   (b) the maximum total duration of successive fixed-term employment contracts [...];
   (c) the number of renewals of such contracts [...] (§ 28).
2. In the introduction to his opinion, the Advocate-General points to the fact that, following a sharp increase in the use of fixed-term contracts, an estimated 100,000 workers in Germany are in a similar position to Ms Jansen (§ 3).
3. Clause 5(1) does not define what is meant by "objective reasons". Previously, the ECJ held that the concept needs to be interpreted in the light of the Framework Agreement's objective, which is to prevent abuse (§ 29-33).
4. Clause 5(1) does not forbid successive fixed-term contracts between the same parties. It merely enjoins the Member States to implement measures to prevent workers from remaining in a precarious situation for too long. Only the abusive use of a series of fixed-term contracts to satisfy a permanent need for labour should be combatted (§ 34-36).
5. The Advocate-General agrees with the referring court that the larger the number of successive contracts or the longer the total period of the combined contracts, the more strictly the "objective reason" criteria must be applied. As a rule, the longer a worker is employed on a fixed-term basis the more likely there is to be abuse. By limiting the "objective reasons" test to the last of the contracts, Clause 5(1) can lose its practical effect. All the circumstances surrounding the entire chain of contracts need to be reviewed (§ 37-39).
6. The three measures listed in Clause 5(1) are separate but mutually influential (§ 40-45).
7. In answer to question 2, the Advocate-General is of the opinion that Clause 5(1) precludes national law that allows for successive fixed-term contracts on budgetary grounds where these are available exclusively to the public sector (§ 46-65).
8. The third question was whether a series of successive fixed-term contracts may be justified (exclusively) by the fact that the worker is paid out of a temporary budget. The Advocate-General replies in the negative. Allowing a temporary budget to be the sole justification would give employers too much scope for abuse. The "objective reason" referred to in Clause 5(1) must be specific and demonstrable (§ 66-80).
9. Question 4 was whether an amendment to the German law expanding the scope of the provision that allows for successive fixed-term contracts from schools to the entire public sector violates Clause 8(3) of the Framework Agreement, on the basis that it provides that "implementation of this agreement shall not constitute valid grounds for reducing the general level of protection afforded to workers in the field of this agreement".
10. Clause 8(3) introduced a requirement for transparency in respect of the grounds justifying a change of law, rather than a standstill clause. Clause 8(3) does not prohibit any reduction in employee protection. On the contrary, such a reduction is valid, provided two cumulative criteria have been satisfied: (1) the reduction may not form part of the transposition of the Directive and (2) it may not reduce the general level of protection. The change of law at issue in this case was unconnected to the transposition of Directive 1999/70. It is for the national court to determine whether the second criterion has been satisfied (§ 81-97).

Proposed reply

- Clause 5(1) of the Framework Agreement annexed to Directive 1999/70 does not prevent a national court from taking into account the number of previous fixed-term contracts and their total duration when assessing whether there is an "objective reason".
- Clause 5(1) precludes differentiating between the private and public sectors when determining the existence of an objective reason.
- Clause 5(1) precludes national law, such as that at issue, that allows mere budgetary reasons to justify successive fixed-term contracts.
- A Member State that allows budgetary reasons to justify successive fixed-term contracts within the entire public sector, when it allowed such a justification only for part of that sector at the time it transposed Directive 1999/70, violates Clause 8(3) if (1) it justifies the change of law by invoking the Directive and (2) the change of law reduces the general level of protection. Such a violation does not lead to an obligation by the national court to disapply its domestic law, merely to interpret it in line with the Directive.

PENDING CASES

Case C-172/11 (*Georges Erny - v - Daimler AG – Werk Wörth*), reference lodged by the German Arbeitsgericht Ludwigshafen am Rhein on 11 April 2011 (PART-TIME WORK)

This case concerns a French frontier worker in Germany, who challenges a provision contained in an individual contract concerning part-time working for older employees, which stipulates that the agreed top-up amount is to be calculated in accordance with the German minimum wage rules.

Case C-194/11 (*Susana Natividad Martínez Álvarez - v - Consjería de la Presidencia, Justicia e Igualdad del Principado de Asturias*), reference lodged by the Spanish Juzgado de lo Contencioso-Administrativo No 1, Oviedo on 27 April 2011 (WORKING TIME)

Does Directive 2003/88 preclude a Spanish provision of law that, when temporary incapacity for work arises during leave, the leave can be deemed interrupted only if such incapacity involves admission to hospital?

Case C-202/11 (*Anton Las - v - PSA Antwerp NV, previously Hesse Noord Natie NV*), reference lodged by the Belgium Arbeidsrechtbank Antwerpen on 28 April 2011 (FREE MOVEMENT)

A Flemish decree issued in 1973 obligates employers situated in the Flemish language region,to draft all documents relating to the employment relationship in Dutch when hiring workers, even in the context of employment relations with an international character. Is this compatible with the free movement rules?

Case C-229/11 (*Alexander Heimann - v - Kaiser GmbH*) and **case C-230/11** (*Konstantin Toltschin – v – Kaiser GmbH*), reference lodged by the German Arbeitsgericht Passau on 16 May 2011 (WORKING TIME)

Do the Charter of Fundamental Rights of the EU and/or Directive 2003/88 preclude national legislation according to which, if there is a compulsory reduction in the number of hours worked per week (short-time working), the amount of paid leave accrued during that period is reduced *pro rata*? If so, is this also the case in the event the working week is reduced to zero?

Case C-241/11 (*European Commission - v - Czech Republic*), action brought by the Commission on 19 May 2011 (PENSIONS)

The Commission is seeking an order for the Czech Republic to pay Ð 5,645 for each day it fails to comply with ECJ 14 January 2010, case C-343/08 in which the ECJ held that the Czech Republic had failed to transpose Directive 2003/41 on occupational retirement.

Case C-251/11 (*Martial Huet - v - Université de Bretagne occidentale*), reference lodged by the French Tribunal administratif de Rennes on 23 May 2011 (FIXED-TERM CONTRACT)

Does the obligation (under French law) to convert a fixed-term contract into a contract of indefinite duration mean that the new contract must reproduce in identical terms the principal clauses of the previous contract, in particular, those concerning job title and remuneration?

Case C-282/11 (*Concepción Salgado González - v - Instituto Nacional de la Seguridad Social (INSS) and Tesorería General de la Seguridad Social (TGSS)*), reference lodged by the Spanish Tribunal Superior de Justicia de Galicia on 6 June 2011 (SOCIAL SECURITY)

This case concerns the interpretation of Annex VI(D)(4) to Regulation 1408/71 on "theoretical" Spanish benefit.

Case C-302/11 (*Rosanna Valenza - v - Autorità Garante della Concorrenza e del Mercato*), **case C-303/11** (*Maria Laura Latavista – v – Autorità Garante della Concorrenza e del Mercato*), **case C-304/11** (*Rosanna Valenza – v – Autorità Garante della Concorrenza e del Mercato*) and **case C-305/11** (*Laura Marsella and others – v- Autorità Garante della Concorrenza e del Mercato*) reference lodged by the Italian Consiglio di Stato on 17 June 2011 (FIXED-TERM CONRACT)

This case arose as a result of the ECJ's case law to the effect that the Italian rules prohibiting the conversion of a fixed-term contract into a contract of unlimited duration in the context of the public service are not precluded by Article 5 of the Annex to Directive 1999/70 and therefore lawful. The debate has now shifted to Article 4, under which the period-of-service qualifications relating to particular conditions of employment must be the same for fixed-term workers as for permanent workers, except where different length-of-service qualifications are justified on objective grounds. Does Article 4, read in conjunction with Article 5, preclude Italian law under which it is possible directly to recruit workers (i.e. without a public selection procedure) who have already been recruited under fixed-term contracts, under contracts of unlimited duration, but with the length of service accrued under those fixed-term contracts being set at zero?

Case C-312/11 (*European Commission - v - Italian Republic*), action brought by the Commission on 20 June 2011 (DISABILITY DISCRIMINATION)

The Commission is asking the ECJ to declare that Italy has failed to transpose Directive 2000/78 fully and correctly by not placing all employers under an obligation to make reasonable accommodation for all disabled persons.

Case C-317/11 (*Rainer Reimann - v - Philipp Halter GmbH & Co. Sprengunternehmen KG*), reference lodged by the German Landesarbeitsgericht Berlin-Brandenburg on 27 June 2011 (WORKING TIME)

Do the Charter of Fundamental Rights and Directive 2003/88 prevent (i) a national rule such as Paragraph 13(2) of the *Bundesurlaubsgesetz*, pursuant to which a collective agreement may reduce the annual minimum leave of four weeks and (ii) a rule in a collective agreement pursuant to which leave entitlement does not accrue in those years in which a certain total gross wage is not earned as a result of illness? If so, is such a rule inapplicable? If so, should legitimate expectations with regard to the validity of said rule be protected if periods prior to 1 December 2009 (Lisbon Treaty) are affected? Should the parties to a non-compliant collective agreement be granted a period in which they may agree another rule themselves?

Case C-335/11 (*HK Danmark, acting on behalf of Jette Ring - v - Dansk almennyttigt Boligselskab DAB*) and **case C-337/11** (*HK Danmark, acting on behalf of Lone Skouboe Werge – v – Pro Display A/S in liquidation*), reference lodged by the Danish Sø- og Handelsret on 1 July 2011

(DISABILITY DISCRIMINATION)
Questions 1 and 2 relate to the concept of disability within the meaning of Directive 2000/78. Question 3 is whether a reduction in working hours is a reasonable accommodation as provided in Article 5 of that Directive. Question 4 is whether Directive 2000/78 serves to prevent national law allowing an employer to dismiss an employee with a shortened notice period where that employee has been ill (with full pay) for a certain period, even if the absence was caused by a disability within the meaning of the Directive or by the employer's failure to provide reasonable accommodation.

Case C-349/11 (*Auditeur du Travail - v - Yangwei SPRL*), reference lodged by the Belgian Tribunal de Première Instance de Liège on 4 July 2011 (PART-TIME WORK)

Does the Framework Agreement on part-time work (annexed to Directive 97/81) preclude (i) an obligation to keep for inspection a copy of the part-time agreement containing the work schedule, identity and signatures of the parties, (ii) an obligation to enable the authorities to ascertain at any time when the cycle commences, (iii) an obligation to notify a worker on a variable work schedule five days in advance, to display such notice and to retain it for one year and (iv) an obligation to have and retain a document recording all departures from previously established work schedules?

Case C-363/11 (*Commissioner of the Court of Auditors at the Ministry of Culture and Tourism - v - Audit Service of the Ministry of Culture and Tourism and Konstantinos Antonopoulos*), reference lodged by the Greek Elegktiko Sinedrio (Court of Auditors) on 7 July 2011 (FIXED-TERM CONTRACT)

This case relates to Greek law that allows employees with trade union positions to take leave of absence for union business, the terms of such leave differing for workers on fixed-term and indefinite term contracts and depending on whether they hold an "established post". Are the different categories of workers "comparable" within the meaning of the Framework Agreement on fixed-term work annexed to Directive 1999/70? Does the difference in treatment infringe the principle of non-discrimination in the pursuit of trade union rights in accordance with the Charter of Fundamental Rights of the EU?

Case C-367/11 (*Déborah Prete - v - Office National De L'emploi*), reference lodged by the Belgium Cour de cassation on 11 July 2011 (FREEDOM OF MOVEMENT)

This case concerns the entitlement of a former student from elsewhere in the EU to unemployment benefits.

Case C-368/11 (*Raffaele Arrichiello*), reference lodged by the Italian Tribunale di Santa Maria Capua Vetere on 11 July 2011 (FREEDOM TO PROVIDE SERVICES)

This case deals with the Italian legislation establishing a State monopoly on betting services.

Case C-379/11 (*Caves Krier Frères S.àr.l. - v - Directeur de l'Administration de l'emploi*), reference lodged by the Luxembourg Cour administrative on 18 July 2011 (FREE MOVEMENT)

Luxembourg law grants reimbursement of social security premiums in the event an unemployed person aged over 45 is hired, but only if such a person is registered as a job seeker with the Luxembourg employment administration. Is this condition compatible with EU law?

Case C-385/11 (*Isabel Elbal Moreno - v - Instituto Nacional de la Seguridad Social (INSS) and Tesorería General de la Seguridad Social (TGSS)*), reference lodged by the Spanish Juzgado de lo Social de Barcelona on 19 July 2011 (PART-TIME WORK)

This case concerns the Spanish social security rule requiring contributions to a retirement pension scheme to be made by and on behalf of employees. As a consequence of the double application of the *pro rata temporis* principle, a proportionally greater contribution period is required from a part-time worker than from a full-time worker to qualify for a (reduced) pension. Is this compatible with the Framework Agreement on part-time work annexed to Directive 97/81? Given that the vast majority of the part-time workers involved are women, is this system compatible with Directive 2006/54?

Case C-394/11 (*Valeri Hariev Belov - v - ChEZ Elektro Balgaria AD, ChEZ Raspredelenie Balgaria AD and Darzhavna Komisia po energiyno I vodno regulirane*), reference lodged by the Bulgarian Komisia za zashtita ot diskriminatsia on 25 July 2011 (ETHNIC DISCRIMINATION)

This case deals with electricity metres which, in areas inhabited mainly by Gypsy Roma, are attached to electricity poles at a height at which consumers cannot read them, whereas in other areas the meters are placed at a lower height, usually in the consumer's home, where they can be read. Does this constitute ethnic discrimination?

Case C-393/11 (*Autorità per l'Energia Elettrica e il Gas - v - Antonella Bertazzi and others*), reference lodged by the Italian Consiglio di Stato on 25 July 2011 (FIXED-TERM CONTRACT)

This case deals with a certain category of fixed-term workers, in respect of whom the law disregards length of service. Is this law compatible with clause 4(4) of the Framework Agreement annexed to Directive 1999/70 in respect of period-of-service qualifications?

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
2011/34 (BU) Bulgarian law lists transfer-triggering events exhaustively
2011/37 (CY) Cypriot court applies directive

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
2011/21 (HU) pregnancy protection in transfer-situation
2011/35 (UK) resignation does not prevent employee's transfer

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
2011/36 (NL) Dutch court sets bar high

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"
2011/26 (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