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Norway: termination at age 67 not discriminatory

UK: reasonable adjustment needs no "good prospect" of success

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INTRODUCTION

For those readers of EELC who are members of the European Employment Lawyers Association (EELA), I hope to meet you in Dublin on 11 and 12 May on the occasion of the next annual EELA conference. You will be updated on the latest developments in European employment law, of which there are many. Some of those developments – equally relevant to non-EELA readers of this magazine – are reflected in the case reports and summaries presented in this issue, such as:

- how the prohibition of age discrimination keeps raising new questions, for example on the legality of age-related redundancy compensation;
- how the English courts continue to break new ground on the issue of reasonable accomodation on behalf of disabled employees;
- how Dutch lawyers struggle with the ECJ's distinction between "contractual" and "non-contractual" employees and what this distinction means when a business that employs individuals who have a contractual relationship with a third party, such as temps and assignees, is transferred;
- how lawyers in Germany (and elsewhere) are coping with Schultz-Hoff and the ECJ's recent ruling in Schultz (summarised in this issue);
- how certain Irish minimum wage rules were recently judged to be unconstitutional;
- how the ECJ, in Dereci (summarised in this issue) tries to reconcile restrictive immigration policies with the principle of free movement;
- how the European Court of Human Rights is providing guidance on the dilemmas facing employers of whistle blowers.

February 2012,

Peter Vas Nunes, Editor.

2011/52

The Albron case following the ECJ's ruling (NL)

CONTRIBUTOR DOROTHÉ SMITS*

Summary
Following the ECJ's 2010 ruling in the *Albron* case, the Dutch referring court has now rendered a decision that is likely to affect legal practice in the Netherlands hugely, by which employees who have been working on a permanent basis for a company that transfers its business are protected by the transfer of undertaking rules even though they were not contractually employed by the company.

Facts
This case is a sequel to the Amsterdam Court of Appeal judgment of 29 May 2008 reported in EELC 2009/2, in which that court referred questions to the ECJ, and to the ECJ's judgment of 21 October 2010 (case C-242/09).

The "Heineken" conglomerate employs over 5,000 people in The Netherlands. All of them are employed by a legal entity called Heineken Nederland Beheer B.V. ("HNB"). The sole purpose of this company is to employ staff and to assign them to other Heineken entities. One of these entities is Heineken Nederland B.V. ("HN").

John Roest was one of approximately 70 catering attendants who worked in a number of Heineken staff restaurants. They were employed by HNB, which assigned them to HN, which in turn put them to work in the said restaurants. At the time the present dispute arose, Mr Roest had been employed by HNB for 20 years, but it is unclear from the facts how long he had been working for HN. In 2005 HN contracted out the operation of its staff restaurants to a professional catering company, Albron. Although both HN and Albron took the position that this transaction did not constitute a transfer of undertaking within the meaning of the Dutch law transposing Directive 77/187 (now Directive 2001/23), Albron did offer HN's catering attendants employment, albeit on less favourable terms, including significantly lower salaries. John Roest and his union FNV Bondgenoten took Albron to court, claiming that the outsourcing of the staff restaurants' operations constituted a transfer of undertaking and that he was therefore entitled to retain his terms of employment.

Albron defended its position by referring to the relevant provision of Dutch law, Article 7:663 of the Civil Code, which states that:

"by virtue of a transfer of undertaking, the employer's rights and obligations, exiting at the time of the transfer, under an employment contract concluded between the latter and an employee in that undertaking are automatically transferred to the transferee" (emphasis added).

Given that HNB, not HN, was John Roest's contractual employer, and that HN's undertaking, not that of HNB, had transferred to Albron, Dutch law led to the conclusion that there was no transfer of undertaking within the meaning of Article 7:663.

The court of first instance awarded Mr Roest's claim in a judgment that was widely criticised for contradicting existing doctrine. The court looked, amongst other things, at the ECJ's 1985 judgment in the *Botzen* case (C-186/83), in which the ECJ held:

"An employment relationship is essentially characterised by the link existing between the employee and the part of the undertaking or business to which he is assigned to carry out his duties. In order to decide whether the rights and obligations under an employment relationship are transferred under Directive No 77/187 by reason of a transfer within the meaning of Article 1(1) thereof, it is therefore sufficient to establish to which part of the undertaking or business the employee was assigned." (paragraphs 14 and 15.)

The court of first instance referred to *Botzen* in concluding that the lack of a contractual employment relationship between the employee and the transferor should not be decisive.
Albron appealed. The appellate court referred two questions to the ECJ, which the ECJ rephrased as follows:

"(...) *in essence, whether, in the case of a transfer, within the meaning of Directive 2001/23, of an undertaking belonging to a group to an undertaking outside that group, it is possible to regard as a 'transferor', within the meaning of Article 2(1)(a) of that directive, the group company to which the employees were assigned on a permanent basis without however being linked to the latter by a contract of employment (the 'non-contractual employer'), given that there exists within that group an undertaking with which the employees concerned were linked by such a contract of employment (the 'contractual employer')."*

The ECJ emphasized that a contractual link with the transferor is not required in all circumstances for employees to be able to benefit from the protection conferred by the Directive. However, according to the ECJ it is not apparent that the relationship between the employment *contract* and the employment *relationship* is one of subsidiarity and that, therefore, where there is a plurality of employers, the contractual employer must systematically be given greater weight. A non-contractual employer to which the employees are assigned on a permanent basis is likewise capable of being regarded as "transferor" within the meaning of Directive 2001/23.

The ECJ stressed that a transfer of an undertaking presupposes a change in the legal or natural person responsible for the economic entity transferred and who, in that capacity, establishes working relationships as employer with the staff of that entity, in some cases despite the absence of contractual relations with those employees. It follows that the position of a contractual employer who is not responsible for the economic activity of the economic entity transferred, cannot systematically take precedence, for the purposes of determining the identity of the transferor, over the position of the non-contractual employer responsible for that activity.

This reasoning led to the ECJ's decision that "(...) *in the event of a transfer, within the meaning of Directive 2001/23, of an undertaking belonging to a group to an undertaking outside the group, it is also possible to regard as a 'transferor' within the meaning of Article 2(1)(a) of that directive, the group company to which the employees were assigned on a permanent basis without however being linked to the latter by a contract of employment, even though there exists within that group an undertaking with which the employees concerned were linked by such a contract of employment."*

Judgment

Following the ECJ's decision, the case returned to the Dutch Court of Appeal. It had to ascertain how the ECJ's decision should be interpreted in accordance with the rules of the Directive, taking national law into account. The Court of Appeal came to regard the contracting out of HN's activities to Albron as a transfer of undertaking, without reflecting on the remarks made by the ECJ as to who was responsible for the economic activity of the entity transferred.

The Court of Appeal took the position that Dutch national law on transfers of undertakings (Article 7:663 Civil Code) can be interpreted in line with Directive 2001/23 without contravening Dutch law. It ruled that although Article 7:663 explicitly refers to "employment contract", hence referring to a "contractual" employer, that does not exclude a non-contractual employment relationship. Albron's argument that under Dutch law the concept of plurality of employers does not exist was put aside and by doing so the court went against earlier case law. According to the court it is possible to accept the concept of employer-plurality within the context of transfers of undertakings, without affecting the remainder of the of the Dutch employment law system. In other words, it is possible under Dutch law for an employee to have two employers simultaneously, a "contractual" one and a "non-contractual" one, for the purpose of transfers of undertakings, but not for other purposes.

Whilst the decision of the court of first instance caused a major stir, the Appellate Court's judgment seems to have been accepted as an indisputable *fait accompli*. This is surprising because both the ECJ decision and the Appellate Court's decision raise enough questions, it seems to me, for an ongoing debate.

Besides this, one aspect that continues to surprise me is that Mr Roest agreed to the termination of his employment contract with HNB and collected a severance payment on the basis of a social plan focused on the consequences of the transfer of undertaking and the termination of the employment contract. The social plan in question was negotiated by the trade union that represented Mr Roest in court at the time. Neither the court of first instance nor the Appellate Court investigated whether or not Mr Roest had freely made a decision in relation to the termination, in which case the rules on transfers of undertakings should not have been applied in the first place.

Commentary

The ECJ ruling seems to touch uncharted territory. Earlier ECJ case law referred to situations where the transferor was the contractual employer, e.g. *Botzen* and *d'Urso and others*. The focus was on the definition of "employee" when looking at the transfer of an undertaking where only a part of the business was transferred. That focus led, for example, to questions as to which employees transferred.

In *Albron* the focus is on the definition of "transferor". The ECJ concluded that it was clear from the facts at issue that the non-contractual employer lost its capacity as non-contractual employer following the transfer. It states: "*Therefore, one cannot exclude the possibility that it might be regarded as 'transferor', within the meaning of Article 2(1)(a) of Directive 2011/23.*" (underlining added, DS).

The ECJ has extended the scope of the definition of "transferor" by including a non-contractual employer. It did not rule on the scope of the "employee", which remains unchanged, namely: "*any person who, in the Member State concerned, is protected as an employee under national employment law*". Moreover, according to the ECJ the directive shall be without prejudice to national law as regards the definitions of contract of employment or employment relationship.

In *d'Urso and others* the ECJ ruled that in the event of a transfer of an undertaking, the contract of employment or employment relationship between the undertaking transferred may not be maintained with the transferor and is automatically continued with the transferee: the question as to whether or not a contract or relationship of employment exists at the date of the transfer must however be assessed on the basis of national law.

The *Albron* case, I dare say, does not fit all sizes, given that the following issues still need further clarification:

1. Intra-group concerns / rights and obligations
2. Assignment on a permanent basis.

1. Intra-group concerns

The ECJ case specifically deals with an intra-group concern and the question remains as to whether the decision is also applicable outside the scope of that, and if so, in what situations.

Within a group it seems quite understandable that the group itself should be held responsible for providing its employees with the protection of the transfer of undertaking rules when a number of decisions can be attributed to a single source. In this context one of my distinguished colleagues in the past referred to an ECJ ruling in *A.G. Lawrence and others.* The ECJ had looked at an equal pay issue by comparing pay for comparable work for different employers following a transfer of undertaking situation.[1] The ECJ held that regarding equal pay nothing in the wording of the Directive suggests that the applicability of the provisions are limited to situations in which men and women work for the same employer. The ECJ however stated that where differences identified in the pay conditions of workers performing equal work or work of equal value cannot be attributed to a single source, there is no body which is responsible for the inequality and which could restore equal treatment. This reasoning in *Lawrence* could perhaps be applied to the *Albron* situation. That would mean that the company deciding on the transfer (in this case, HN) could be held responsible for safeguarding the rights and obligations arising from the transfer notwithstanding the fact that the employees involved are not employed by that company.

But what if the companies involved are not related to each other? Will the company that officially qualifies as a transferor, i.e. the "non-contractual employer", be held responsible for transferring rights and obligations that do not belong to it? Take, for example, a temporary agency employee (a "temp") who works in a factory. His or her employer is the temporary agency but he or she receives day-to-day instructions from the owner of the factory. If the factory is sold, and if, as a result, the temp transfers into the employment of the new factory owner, the former owner will be transferring rights and obligations belonging to a third party, namely the temporary agency. In this respect the rephrasing done by the ECJ is interesting, given that the Court of Appeal had explicitly asked the ECJ whether the rights "pertaining to the employees working for that undertaking are transferred to the transferee". However, the ECJ did not opine on this. A reasoning along the lines of *Lawrence* would exclude from the scope of the *Albron* ruling companies that do business with one another without being group-related.

The question is of particular interest in The Netherlands because under Dutch law the transferor and the transferee remain jointly liable for one year after the transfer so as to safeguard the rights and obligations that are transferred. What does this mean in the current context? Will only the non-contractual employer be held liable or the contractual employer as well? Or only the latter? And how far does the liability go? The transfer of undertaking relationship could turn into a complicated threesome or maybe even a foursome.

One thing is certain and that is that these liabilities will need to be identified by mergers and acquisitions lawyers and covered contractually. In tandem, the scope of the employment due diligence will need to be extended.

2. Permanent assignment

The ECJ refers to 1) assignment on 2) a permanent basis. What does this mean?

In terms of what constitutes an assignment, could we replace HNB by, let us say, a temporary agency or a secondment company that provides for workers who are contractually employed by them? Or a payroll company? Will they be considered to be an employer-transferor?

In *Briot – v – Randstad* the ECJ was asked for a preliminary ruling on this question, but the underlying matter did not require the ECJ to give an explicit ruling because the contract of the employee involved was with the temporary agency (Randstad Interim) for a definite period and that contract expired and was not renewed before the transfer date, meaning that the transfer did not influence the contract.[2] In that case the work to which the employee was assigned (a restaurant) was transferred to Sodexho. The employee nevertheless claimed a renewal of the contract for a fixed-term with Sodexho. The ECJ ruled in this situation that the temporary worker must not be regarded as still being available to the user company on the date of the transfer given the expiration of the contract before the date of transfer.

This would indicate that if the employee were available under a contract at the date of the transfer, the employee would transfer to the user company, notwithstanding the fact that he has a contract with the temporary agency. This would probably also apply for a payroll company: I see no material difference.

In the Netherlands that would create another complicated situation given the fact that temporary agencies generally apply collective bargaining agreements containing specific provisions that create a more flexible relationship between the temporary agency and the temporary worker (less protection and more contracts for a fixed term). Those rules present a legitimate exception to strict statutory law, but only when agreed upon in a collective bargaining agreement where the parties involved are supposed to safeguard the overall position of the employees involved. It is common understanding that these special provisions (so-called "3/4 binding law") cannot be transported to a third party, who would then be able to benefit from its lenient character without having been a party to the collective agreement concerned. The other side of the coin is that the employees who have deliberately chosen to work on a more flexible basis are limited in their way of working and their freedom of movement. How is the user-company going to safeguard the rights and obligations arising from a collective bargaining agreement that are supposed to be transferred as they exist on the date of transfer?[3] Brainteasers for the parties involved.

And then there is the following difficult question. In terms of permanence, is whether or not the parties intend to create a permanent employment relationship between the employee and the non-contractual employer relevant? And what if their intentions have changed along the way? I would say it is relevant, given what the ECJ says:

"*The transfer of an undertaking presupposes a change in the legal or natural person who is responsible for the economic entity of the entity transferred* ***and who, in that capacity, establishes working relationships as employer with the staff of that entity****, in some cases despite the absence of contractual relations with those employees.*"

However, what is the applicable framework? Are we talking about several months, one year, five years or even longer? The facts in the *Albron* case only state that the employee had been employed by HNB for more than 20 years. No information is given as to the years the employee worked for HN, so the decision itself does not provide a reference.

When looking beyond the scope of a transfer of undertaking, maybe a comparison could be made with assignments under the Posting Directive 96/71 and the existing case law in this field. That directive does not include a time frame either and therefore no hard and fast rule applies, but there are indications that suggest a three year period is considered to fall within the scope of that directive. Would that be an appropriate number of years?

Concluding remarks

What if the employee has deliberately chosen a flexible working environment? He then is forced into a situation where he has little choice but to transfer. If he objects he is deemed to have given notice, which can leave him exposed, because Dutch law does not have the equivalent of the "*Widerspruchsrecht*" under German law that gives the employee the option to continue working for the transferor. The employee really only has one option and that is to go to court and ask for the employment contract to be terminated and severance paid, but in order to be successful the employee must convince the judge that the transfer affects his position in such an unreasonable way that the employer could not expect him to agree to it. Such a strategy would be effective, for example, if there was a transfer from Amsterdam to Frankfurt.

It was argued in *d'Urso* that preventing surplus employees in the undertaking from being maintained in the transferor's service could be less favourable to those employees either because a potential transferee might be dissuaded from acquiring the undertaking if it is obliged to retain the surplus personnel or because the surplus personnel would be dismissed and thus lose the advantage which they might have derived from continuing their employment relationships with the transferor.[4]

The ECJ pointed out that although the transfer must not in itself constitute grounds for dismissal by the transferor or the transferee, it goes on to provide that this provision must not "stand in the way of dismissals that may take place for economic, technical or organisational reasons entailing changes in the workforce". It must be added that if, in order as far as possible to prevent dismissals, national legislation makes provisions that favour transferors by allowing the burdens connected with the employment of surplus employees to be alleviated or removed, the Directive likewise does not stand in the way of the application of those provisions to the transferee's advantage

after the transfer.[5]
In a case where the undertaking facing a surplus of employees could apply ETO reasons to dismiss staff, it must apply national rules regarding dismissals. With reference to *Albron* that could mean that it would be forced to dismiss (some of) its own employees instead of former Heineken employees, whereas the Heineken group might well have had more options for the employees transferred than *Albron*. In such a scenario any supposed employee protection to be gained from the transfer rules would be illusory.

I can only hope that the ECJ will shed some light on these issues soon.

Subject: Transfer of undertakings
Parties: Albron Catering BV – v – FNV Bondgenoten and John Roest
Court: *Gerechtshof* (Court of Appeal) of Amsterdam
Date: 25 October 2011
Case number: 106.004.857
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(Footnotes)
1 ECJ 17 September 2002, C-320/00 (*Lawrence and others*); F.B.J. Grapperhaus, *Ondernemingsrecht* 2006, Issue 7, no. 87, p. 290-292.
2 ECJ 15 September 2010, C-386/09 (Briot).
3 As the ECJ ruled on 9 March 2006, C-499/04,(Werhof).
4 *D'Urso and others*, C-362/89 (25 July 1991), paragraph 18.
5 *D'Urso and others*, paragraph 19.

2011/53

Does disclosing employee's sexual orientation constitute discrimination or harassment? (UK)

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Summary
The Court of Appeal has confirmed that a homosexual employee who had chosen to reveal his sexual orientation to colleagues at a previous workplace could not claim that he was unlawfully discriminated against or harassed simply because he was not able to choose how and when he could reveal his sexual orientation to other colleagues. However, "outing" someone without consent could amount to discrimination and harassment in other circumstances.

Facts
The facts of this case have already been reported in the February 2011 issue of EELC. To re-cap briefly, Mr Grant was an employee of Her Majesty's Land Registry ("HMLR") in its Lytham office. Whilst employed there, he had told colleagues that he was homosexual. He was subsequently promoted and transferred to a different office in Coventry where he did not tell people that he was gay. In this new role, several incidents occurred involving his new manager, Ms Kay, some of which related to Mr Grant's sexual orientation. These incidents included:

- A telephone conversation between Ms Kay and another colleague, Irene Crothers. Ms Crothers had indicated to Ms Kay that she thought Mr Grant was "very pleasant". Ms Kay responded, "don't go fluttering your eyelashes at him, he's gay."
- A remark made over dinner with colleagues where Ms Kay asked Mr Grant about his partner, saying "How is your partner Chris, how is he?" making clear to those present that Mr Grant was gay.

Mr Grant brought a claim against HMLR asserting discrimination and harassment under the *Employment Equality (Sexual Orientation) Regulations 2003* (the "Regulations"). In particular, Mr Grant claimed that he had suffered direct discrimination and harassment in a number of ways, all stemming from the fact that Ms Kay had revealed his homosexuality to his colleagues against his wishes. He asserted that he ought to have had the right to control how and when (if at all) his sexual orientation was revealed in his new workplace.

Under the Regulations, direct discrimination is defined as less favourable treatment on grounds of sexual orientation. "Harassment" is defined as unwanted conduct on grounds of sexual orientation which has the purpose or effect of violating an employee's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the employee. The conduct in question will only be regarded as having either of these effects if, having regard to all the circumstances including the employee's perception, it should reasonably be considered as having that effect. (**Note:** these Regulations have now been replaced by substantially similar provisions under the *Equality Act 2010*).

The Employment Tribunal's decision
The Employment Tribunal ("ET") rejected certain of the allegations made by Mr Grant, but upheld his claims of direct discrimination in respect of six incidents, including the two mentioned above. The ET went on to find that five of the six incidents also amounted to unlawful harassment.

In reaching its decision, the ET did not take into account the fact that Mr Grant had revealed his sexuality while at the Lytham office. There was no finding in the ET's decision that Ms Kay's purpose had been to harass Mr Grant on the ground of his sexual orientation.

The Employment Appeal Tribunal's decision
HMLR appealed to the Employment Appeal Tribunal ("EAT"), arguing that the ET had failed to have regard to the fact that Mr Grant had "come out" in the Lytham office, and that this ought to have been central to the ET's legal analysis of the case.
The EAT agreed with HMLR's submission and overturned the ET's decision, remitting the case to a different tribunal for it to consider all the relevant incidents afresh.

The Court of Appeal's decision
Mr Grant appealed to the Court of Appeal, seeking to restore the ET's decision. He argued that the EAT had approached the case on a false premise; namely, that Ms Kay had known that he had been open about his sexuality in the Lytham office, whereas she had not. As such, the fact that he had revealed his sexual orientation at Lytham was immaterial.
In putting forward this argument, Mr Grant relied on the right to privacy under Article 8 of the European Convention on Human Rights and submitted that because sexuality was a private matter, he had the right to disclose his sexual orientation at a time and in a manner of his own choosing. He argued that it was not for others to make comments on his private life and frustrate that wish, and that the Regulations ought to be read consistently with Article 8.

The Court of Appeal stated that the fact that Mr Grant had "come out" at his previous office did not mean that subsequent comments or references to his sexuality could not amount to discrimination. In this case, however, the Court found that the fact that Mr Grant had come out earlier was a "highly significant factor," irrespective of whether or not Ms Kay knew that this was the case.

The Court noted that, if a Lytham employee had innocently mentioned to Ms Crothers that Mr Grant was gay, it would be "bizarre" if that employee could, by simply disclosing that information, be liable for discrimination or harassment. Such information dissemination would still have been unwanted by Mr Grant, but it would *"make a mockery of discrimination law"* to suggest someone could be liable in those circumstances.

Because Mr Grant had made his sexual orientation public, the Court held that the telephone conversation incident could not constitute direct discrimination because any objection he had about the information being discovered by others was unreasonable and unjustified. Similarly, the Court could not find that the incident constituted harassment. The ET had decided as a matter of fact that Ms Kay had not *intended* any ill purpose when she had revealed Mr Grant's sexuality. The Court of Appeal considered that, given the fact that Mr Grant had already "come out" Ms Kay's revelation could not have had the *effect* of creating a "humiliating environment" either. Putting the matter very forcibly, the Court said that:
"...to describe this incident as the tribunal did as subjecting the claimant to a 'humiliating environment' when he heard of it some months later is a distortion of language which brings discrimination law into disrepute."
For similar reasons, the Court found that the incident over dinner could not amount to direct discrimination or harassment. Even if Mr Grant was made "uncomfortable" by Ms Kay's comments, the Court found that it could not properly be described as a detriment.

Finally, in remitting the case to a different tribunal, the Court stressed that nothing in its judgment was intended to minimise concerns about the consequences of "outing" colleagues in the workplace. However, where someone has chosen widely to reveal their sexual orientation, as was the case here, such information placed the case in a different category in assessing whether there was discrimination and/or harassment.

Commentary

The Court of Appeal's judgment is both interesting and useful in that it recognised that there will be circumstances where revealing or discussing a colleague's sexual orientation may amount to direct discrimination and/or harassment. In this case, however, the Court made very clear that the fact that Mr Grant had chosen to reveal his sexual orientation put his case into a different category.

Another interesting point made by the Court concerned the importance of keeping separate the issue of privacy and the question of discrimination. In particular, the Court stated that the fact that the law must be interpreted consistently with the rights found in the European Convention on Human Rights did not mean that Convention rights must be actively promoted whenever a statute falls to be construed and *"discrimination law cannot be used as a surrogate to enforce rights of privacy."*

The judgment is also significant in relation to the issue of intent with respect to discrimination and harassment. With both the telephone incident and the dinner incident, the Court noted that Ms Kay had no ill purpose in commenting on Mr Grant's sexual orientation. In the Court's view, this, along with the critical fact that Mr Grant had revealed his sexual orientation in Lytham, meant that the ET could not properly have concluded that there was either direct discrimination or harassment. This point was expanded upon by the Court in referring to other forms of possible discrimination where the person in issue has revealed certain information about him or herself:

"An individual may choose to make generally known in the workplace certain aspects of his or her private life, such as the fact that he or she has contracted some debilitating illness, or is pregnant, or has become a Christian. In my judgment if that information is discussed in the course of conversation, even idle gossip, ***provided at least there was no ill intent****, that would not make the disclosure of that information an act of disability, sex or religious discrimination, as the case may be. That is so even if the victim is upset at the thought that he or she will be the subject of such idle conversation. By putting these facts into the public domain, the claimant takes the risk that he or she may become the focus of conversation and gossip."*

Subject: Sexual orientation discrimination; harassment
Parties: Grant – v – (1) Her Majesty's Land Registry; (2) Equality and Human Rights Commission (intervener)
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Case number: 2011 EWCA Civ 769
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2011/54

No duty to offer disabled employee career break (UK)

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Summary

The duty on an employer to make reasonable adjustments is limited to steps which would alleviate a disabled employee's disadvantage, by enabling the individual either to remain at work or to return to work if on sick leave. The obligation did not extend to offering a disabled employee a career break or submitting suggestions of potential rehabilitative work arrangements to her doctor.

Facts

Mrs Smith was employed by Salford Primary Care Trust (the "Trust") as an occupational therapist in a managerial position. In March 2007, she was suffering from chronic fatigue syndrome and took long term sick leave. Whilst away from work, her role ceased to exist and she consequently had several meetings with her manager to discuss other possible roles that she could do upon her return to work.

Mrs Smith also had several meetings with the Trust's occupational health ("OH") adviser, who advised in January 2008 that she was not fit to come back to work and that any return would need to be gradual and focused upon helping her back to work "in some capacity". The OH adviser consulted Mrs Smith's doctor (general practitioner, "GP") in March 2008 and suggested that she might begin a phased return to work over the summer. As an alternative, he suggested that she might benefit from the option of a career break.

Mrs Smith, however, decided that she did not wish to return to her previous role or her former workplace in any capacity. She rejected alternative roles in different workplaces and turned down the Trust's offers of administrative work as she had no IT skills. She also rejected the Trust's offer of IT training.

Mrs Smith failed to attend two meetings with the Trust, who subsequently wrote to her in June 2008, detailing the efforts that had been made to find her a role. The Trust again offered IT training and invited Mrs Smith to a further meeting. It was also made clear that if Mrs Smith did not attend, then the Trust might have to consider terminating her employment.

At this point, Mrs Smith resigned, saying that she had lost all confidence in the Trust's willingness to facilitate her return to work. She subsequently brought a claim for constructive dismissal and maintained that the Trust had failed in its duty to make reasonable adjustments to facilitate her return to work.

The Employment Tribunal's Decision

The ET identified the relevant provision, criterion or practice ("PCP") in this case as being the expectation that Mrs Smith would perform her full role within the contracted hours. Given that she was unable to multi-task or set up the "emotional barriers" that she needed to deal with her work, the ET concluded that she was placed at a substantial disadvantage and that the Trust had failed to make reasonable adjustments. The ET found that the Trust should have tried to provide Mrs Smith with something to

do by way of rehabilitation and that a proposal of rehabilitative working arrangements should have been made to allow Mrs Smith's GP to sign her back to work. However, the ET rejected the submission that a career break would have been a reasonable adjustment.
Given the Trust's failure to make reasonable adjustments, the ET held that it was reasonable for Mrs Smith to conclude that the relationship of trust and confidence had broken down and so she was entitled to treat herself as constructively dismissed. The Trust appealed to the Employment Appeal Tribunal ("EAT") and Mrs Smith cross-appealed the finding that a career break was not a reasonable adjustment.

The Employment Appeal Tribunal's Decision
The EAT allowed the Trust's appeal and dismissed the cross-appeal. The EAT clarified that reasonable adjustments are primarily concerned with enabling a disabled person to remain in or return to work with the employer. Adjustments that do not alleviate a disabled person's disadvantage could not qualify as reasonable adjustments within the meaning of the Disability Discrimination Act 1995 ("DDA"). The EAT cited consultations, trials and exploratory investigations as particular examples of adjustments that would not qualify.

The EAT disagreed with the ET's finding that it would have been a reasonable adjustment for the Trust to come up with a proposal for some sort of rehabilitative duties that Mrs Smith could have taken to her GP. Making a proposal for non-productive work was not in itself a reasonable adjustment, as it would not have alleviated the disadvantageous effect of the PCP on Mrs Smith.
Rejecting Mrs Smith's cross-appeal, the EAT held that offering a disabled employee a career break would not have been a reasonable adjustment. It would have been highly irregular, resulting in Mrs Smith losing sickness benefits, and would not have alleviated the effect of the PCP on Mrs Smith. Whilst agreeing with the ET that the PCP in question was a requirement for Mrs Smith to perform her full role in her contracted hours, the EAT commented that a career break itself would not have facilitated a return to work or alleviated her inability to multi-task.

Finally, the EAT also overturned the ET's finding of unfair constructive dismissal. The Trust's letter to Mrs Smith was both standard and reasonable in the circumstances and its earlier behaviour had not undermined trust and confidence. The ET had wrongly asked whether Mrs Smith reasonably believed that trust and confidence had been destroyed, whereas the correct question was whether the Trust's conduct, viewed objectively, was calculated or likely to destroy trust and confidence. The ET had also failed to take into account the fact that Mrs Smith had resigned at a time when she was not yet fit to return to work and discussions surrounding reasonable adjustments were still ongoing.

Commentary
This is a useful case in setting the boundaries for what may or may not qualify as a reasonable adjustment. The duty is limited to steps that would alleviate the disadvantage caused to a disabled person as a result of a PCP – in other words, a distinction should be drawn between "procedural" and "substantive" steps. Specifically, the EAT has said that consultations and trial periods do not themselves alleviate the disadvantage and so cannot qualify as reasonable adjustments. In this type of case, reasonable adjustments are primarily concerned with enabling an individual to remain in work or to return to work.
Although steps taken as part of a process of getting an employee back to work may be reasonable or helpful in themselves, this does not automatically mean that they will constitute reasonable adjustments for the purposes of the employer's duty under disability discrimination legislation (which is now contained in the Equality Act 2010 in place of the DDA). Tribunals therefore need to identify both the PCP and the disadvantage caused, assess whether the proposed adjustment would alleviate that particular disadvantage and, if so, determine whether it was reasonable in the circumstances.

Subject: Disability discrimination
Parties: Salford NHS Primary Care Trust – v – Smith
Court: Employment Appeal Tribunal
Date: 14 April 2011
Case number: UKEAT/0507/10
Hard copy publication: Not yet reported
Internet publication: www.bailii.org

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2011/55

Reasonable adjustment need not have "good prospect" of removing disabled employee's disadvantage (UK)

CONTRIBUTOR ELEANOR KING*

Summary
Under UK disability discrimination legislation, a proposed adjustment does not need to have a "good or real prospect" of removing a disabled employee's disadvantage in order to be regarded as reasonable. It is sufficient that there is merely some prospect that it will succeed.

Facts
Mr Foster was employed by the Leeds Teaching Hospital NHS Trust (the "Trust") as a senior security inspector. In October 2006, his relationship with his line manager broke down and he went on long term sick leave as a result of stress. Shortly afterwards, Mr Foster raised a grievance against his manager. In June 2007, an occupational health doctor confirmed that Mr Foster's stress was work-related and that he would be unable to return until the problems were resolved. In September 2007, his grievance was rejected by the Trust.

In January 2008, there was some confusion between Mr Foster's trade union representative and the Trust. The union representative thought that the Trust had agreed to redeploy Mr Foster to a department where he would no longer be working with his line manager, whereas the Trust had in fact agreed that he could return to a different role within the same department. The Trust believed that Mr Foster's illness and his grievance were separate issues and that if he was fit to return to work outside of the department, then he was also fit to return within it.
In June 2008, the Trust decided that Mr Foster should be placed on its redeployment register for three months in order to check whether any roles outside the department became available during that time. Although a potential redeployment did arise, Mr Foster was too ill to take it.

Mr Foster never returned to work. He was eventually dismissed in February 2009 on the grounds that an occupational health doctor could not predict the likelihood of his situation changing in the foreseeable future. He subsequently brought tribunal claims for disability discrimination (on the basis that the Trust had failed to make reasonable adjustments) and unfair dismissal.

The Employment Tribunal's Decision

Under the relevant legislation, the Disability Discrimination Act 1995 ("DDA"), the Employment Tribunal ("ET") had to establish whether the employer had met its duty to make reasonable adjustments. Section 4A(1) of the DDA, provided that where an employer's provision, criterion or practice ("PCP") placed a disabled employee at a substantial disadvantage in comparison with non-disabled employees, then the employer had a duty to make reasonable adjustments.

The ET found that if the Trust had made the adjustment of placing Mr Foster on the redeployment register in January 2008, rather than in June 2008, then there would have been a "real" or "good" prospect of Mr Foster returning to work. The ET therefore found that the Trust had breached the required duty and that, in the circumstances, it had also unfairly dismissed Mr Foster. The Trust appealed against this decision to the Employment Appeal Tribunal ("EAT").

The Employment Appeal Tribunal's Decision

Upholding the ET's decision, the EAT stated that it had not been necessary for it to go as far as finding that there would have been a "good" or "real" prospect of Mr Foster being redeployed if he had been placed on the redeployment register in January instead of June 2008. All that had been necessary was for the ET to find that there was *a* prospect of the proposed adjustment removing Mr Foster's disadvantage.

The EAT went on to say that the ET would, in any event, have been entitled to conclude that there would have been a "good" prospect of removing the disadvantage, given that around 5,000 employees worked in Mr Foster's department. With such a large number of employees, it was likely that a redeployment opportunity would have arisen during the first half of 2008.

The EAT also ruled that the Trust's failure to make reasonable adjustments had set the wheels in motion for Mr Foster's dismissal, so the ET had been entitled to find the dismissal unfair.

Commentary

Although the DDA has now been replaced by the Equality Act 2010, the latter has substantially similar provisions relating to reasonable adjustments at sections 20 and 21. Even where it is shown that an adjustment might remove a disabled person's disadvantage, this does not necessarily mean that it will be a *reasonable* adjustment. The test of reasonableness is an objective one, depending on the circumstances of the case. Guidance on the relevant factors is set out in a statutory code of practice published by the UK's Equality and Human Rights Commission.

Comments from other jurisdictions

The Netherlands (Peter Vas Nunes): it is sometimes said that in the UK employees and their counsel are more readily inclined to invoke anti-discrimination law than are their Dutch counterparts, and that UK case law affords employees more protection against discrimination than Dutch courts (and, presumably, the courts in many other European jurisdictions) tend to grant them. One theory holds that this is the case because employees in The Netherlands have a greater level of protection against dismissal and against loss of income as a result of disability than British employees do. The idea is that, not having much other protection, employees in the UK need recourse to the anti-discrimination laws more than do their Continental colleagues. Whether or not this theory is accurate, the case reported above illustrates certain differences between the UK and The Netherlands rather nicely.

Mr Foster was dismissed in February 2009, two and a half years after he fell ill. All he could do was claim monetary compensation on the basis of unfair dismissal. How much he got is not reported, but I suspect it may not have been much by Dutch standards. He could not prevent being dismissed nor could he claim reinstatement. In this respect, the law in England and Wales seems more employer-friendly than Dutch employment law.

On the other hand, would a Dutch court have found that Mr Foster's employer discriminated against him by not making a reasonable adjustment? Would his lawyer have even considered entering such a claim? I doubt it. More likely, Mr Foster would have applied for an order to transfer him to a department/role away from his line manager. He would have been supported in such an application by the fact that, under Dutch law, an employer that does not do all it reasonably can to allow a disabled worker to return to work, even if only in a different position, on a part-time basis and/or with certain restrictions, risks (i) having to continue paying the employee's salary for in excess of two years, (ii) not being able to dismiss the employee and (iii) having to pay increased national insurance contributions.

The issue of workers who call in sick with stress following a break-down of their relationship with their manager (or their colleagues) is one with which every Dutch employment lawyer is well acquainted. Occupational doctors often have difficulty diagnosing the employee's condition: does it qualify as "sickness" within the meaning of the law, in which case the employee is protected against dismissal (for at least two years) and against loss of income (up to at least 70%), or is the employee absent from work for other reasons and, if so, is he to blame or must the employer bear the consequences? There are guidelines and there is case-law on this question, but the issue remains vexed.

In this case, Mr Foster's employer believed that his illness and his grievance against his manager were separate issues and that if Mr Foster was fit to return to work outside of his own department, then he was fit to return within it. This is a typical employer's response, but a Dutch court might well see things differently. In any event, a Dutch court would not be likely to utilise anti-discrimination law to arrive at its conclusion.

Subject: Disability discrimination
Parties: Leeds Teaching Hospital NHS Trust – v – Foster
Court: Employment Appeal Tribunal
Date: 14 June 2011
Case number: UKEAT/0552/10
Hard copy publication: Not yet reported
Internet publication: www.bailii.org

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2011/56

SEVERANCE PAYMENT IN A SOCIAL PLAN BASED ON AGE AS WELL AS ON PERIOD OF EMPLOYMENT (GER)

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Summary
Severance payments in a social plan can be calculated according to both the age of the employee and to length of service. However, a provision in a social plan that considers the employee's prospects on the labour market (which are dependent on age) in a way which puts the emphasis on age, must be specifically justified by a legitimate aim in accordance with section 10 of the German General Equal Treatment Act (the "AGG").

Facts
The plaintiff, born in 1969, was employed by the defendant from January 1997 to March 2008. In October 2007 a social plan was agreed between the defendant and its works council. The amount of the severance payment agreed in the social plan was calculated on the basis of the period of employment and the gross monthly salary. However, the calculation differentiated between ages, by awarding 80% of the full value of the calculation up to the age of 29; 90% for 30 to 39 and 100% from the age of 40 years and older. The employment relationship of the plaintiff was terminated on 31 March 2008 by the defendant. The defendant paid a severance payment to the plaintiff based on the age differential, which amounted to 90% of the full amount, as regulated in the social plan. The plaintiff claimed the full 100%. She argued that the reduction for younger employees violated the prohibition against age discrimination.

The court of first instance and on appeal the Landesarbeitsgericht (the "LAG") dismissed the claim. Both courts decided in favour of the defendant and argued that to calculate the severance payment provided for in the social plan in a way that took account, not only of the employee's period of employment, but also of her age was compatible with section 10(6) AGG, which provides as follows: *"Notwithstanding Section 8, a difference of treatment on grounds of age shall likewise not constitute discrimination if it is objectively and reasonably justified by a legitimate aim. The means of achieving that aim must be appropriate and necessary. Such differences of treatment may include, amongst others: differentiating between social benefits within the meaning of the Works Constitution Act (*Betriebsverfassungsgesetz*), the creation by the parties of a regulation governing compensation based on age or length of service whereby the employee's prospects on the labour market (which are decisively dependent on his or her age) have been taken into consideration by means of emphasizing age relatively strongly, or the exclusion of employees who are economically secure from social benefits because they may be eligible to draw an old-age pension after drawing unemployment benefit."*

This provision itself does not violate EU law because it is justified by a legitimate aim of the national government in accordance with Article 6(1) of Directive 2000/78. Although Section 10(6) AGG itself only permits differences in treatment relating to age **or** period of employment, consideration of both is not expressly excluded.

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

The defendant based its position on Section 10(6) AGG, arguing that that provision permits the chosen form of differentiation, i.e. reduced job prospects as a function of age.

Judgment
The BAG held that both the sliding scale of age and length of service are compatible with Section 10(6) AGG in calculating severance payments based on a social plan. Although the social plan violated the prohibition of age discrimination contained in section 3(1) and (2) AGG[1], the reduction of the severance payment by 10% by reason of age, was justified by a legitimate aim that was appropriate and necessary in accordance with Section 10(6) AGG.

The BAG also ruled that Section 10(6) AGG itself does not violate EU law because it was justified by a legitimate aim of the national government (Article 6(1) Regulation 2000/78 and see also BAG 26 May 2009 – 1 AZR 198/08). The BAG considered that section 10(6) AGG takes into account the fact that older employees typically have more difficulty finding a job than younger employees. The judgment is supported by statistics of the Federal Employment Centre, which show that job prospects decrease with age.

Commentary
This judgment is in line with previous ones (notably the BAG's decision of 26 May 2009 – 1 AZR 198/08) in that it is compatible with the AGG to calculate severance payment based on the period of employment.

In the case at hand the BAG had to decide whether a severance payment in a social plan based on age **as well as** length of service was lawful. Such rules are not unusual in social plans, yet the wording of the law only permits the calculation of severance payments based on age **or** period of employment.

From our point of view, Section 10(6) AGG should be read as 'and/or'. German law allows parties plenty of scope in terms of what is provided in a social plan, provided this does not amount to unlawful age discrimination. Although the calculation of the severance payment in the social plan at hand does amount to age discrimination, it is justified by the legitimate aim of taking into account the fact that job prospects increase with age.

Subject: age discrimination
Parties: not published
Court: *Bundesarbeitsgericht* (Federal Labour Court)
Date: 12 April 2011
Case number: 1 AZR 764/09
Hardcopy publication: DB 2011, 1758-1759
Internet-publication: www.bundesarbeitsgericht → Entscheidungen →case number

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(Footnotes)

1 Section 3 (1) and (2) AGG read as follows: "(1) Direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on any of the grounds referred to under Section 1.

(2) Indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons at a particular disadvantage compared with other persons on any of the grounds referred to under Section 1, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary."

2011/57

Facts that constitute sexual harassment may be found outside working hours (FR)

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Summary

Sexual remarks and inappropriate behaviour by an employee towards an individual who he is in contact with through his work do not fall under the scope of his private life. Such behaviour may therefore be considered as sexual harassment, which justifies a dismissal for serious misconduct, even if it occurred outside working hours and outside the workplace.

Facts

In 2000, SNGT hired Mr Daniel A., the plaintiff, as a telemarketer. In 2006 he was dismissed for serious misconduct, having allegedly sent two female colleagues obscene text messages and behaved inappropriately towards female co-employees outside working hours and outside the workplace.

The plaintiff brought the case before the labour law tribunal, disputing the legality of his disciplinary dismissal and claiming compensation. He claimed, in particular, that his dismissal was decided on grounds of mere rumour, and not on conclusive evidence.

The court of first instance ruled in favour of the employer. It decided that the dismissal was based on serious misconduct. However, by a decision rendered on 22 October 2009, the Versailles Court of Appeal reversed the judgment of the court of first instance, ruling that the dismissal did not have a genuine and proper cause. The Court of Appeal was unconvinced by the inconclusive testimonies of the plaintiff's co-employees that the company had used as evidence to justify the dismissal. The testimonies were either based on rumours or contained invitations to female co-workers to have a drink. Moreover, the Court of Appeal held that the facts that occurred outside working hours fell within the scope of the legislation protecting an employee's private life, and could therefore not be considered in establishing the existence of professional misconduct.

Judgment

In a decision rendered on 19 October 2011, the French Supreme Court overruled the Court of Appeal's decision that the matter was beyond the scope of the law, on the grounds that *"sexual remarks and inappropriate behaviour from an employee towards persons he is in contact with through his work do not fall within the scope of his private life"*. The Supreme Court restricted the scope of the concept of *"private life"* and, in doing so, extended that of misconduct in cases of sexual harassment.

Commentary

The Supreme Court focuses on the definition of *"private life"* in this decision, without reference to the rule, recalled by the Court of Appeal, according to which facts that fall within the scope of an employee's private life cannot be held against the employee as constituting professional misconduct (e.g. notably: Cass. Soc. 26/09/2001, n°99-43.636; Cass. Soc. 19/12/2007, n°06-41.731).

The Supreme Court could have based its reasoning on the existence of a disturbance caused within the company, which according to its own jurisprudence allows for derogation from the principle that matters concerning private life cannot constitute professional misconduct (e.g. Cass. Soc. 28/11/1989, n°86-41.268, which concerns the *"indecent repeated behaviour of an employee towards his female colleagues")*. This was, in fact, the employer's primary argument. However, the Supreme Court ruled otherwise.

The decision to adjudicate the matter by defining the scope of *"private life"* rather than of sexual harassment, may be seen as a radical way of penalising sexual harassment, given that it makes it easier to show harassment (in this case, by excluding from the scope of employee's private life behaviour that could be linked to the working relationship). This principle has already been seen in French case law: Cass. Soc. 24/09/2008, n°06-46.517, concerning the *"harassment of an employee towards his female colleague at her home"*; and Cass. Soc., 3/03/2009 n°07-44082, concerning the *"harassment of an employee towards his female colleague outside of working hours"*.

Thus, the Supreme Court followed existing case law in treating sexual harassment as a serious matter that can, after all, constitute a criminal offence. In terms of employment, once sexual harassment has been established, this implies the existence of serious misconduct (Cass. Soc. 5 March 2002, n° 00-40.717).

However, the Court did not focus on the definition of sexual harassment provided by Article L.1153-1 of the French Civil Code, although the employer had invited the Court to do so, as it wished to speak more generally about what may or may not be regarded as a working relationship in the application of disciplinary measures. Indeed, the Court held that it is *"towards persons that the employee was in contact with **through his work**"* that his behaviour was inappropriate. In doing so, the Supreme Court rejected the notion that a work context necessarily means that the conduct in question takes place within working hours: the link between the facts and a work context may be deduced simply from the nature of the relationship between the individuals concerned.

As a result, in the choice that the Court had to make between (i) the principle of *"private life"*, deriving from Article 9 of the French Civil Code, which protects the right to private life; (ii) the procedural and probationary guarantees granted to employees during disciplinary dismissal; and (iii) the sanctioning of the violation of intimacy, which characterises sexual harassment, the Supreme Court decided to prioritise the sanction. However – and this is the meaning of the exact phrase it has chosen – the Court does not give this priority at the cost

of the integrity of the principle of the right to private life: although it found that the facts alleged against the employee *"did not fall within the scope of his private life"*, the Court considered that the question of privacy simply did not arise, thus ensuring that both respect for private life and the sanction of sexual harassment at work remain intact.

Subject: Sexual harassment, dismissal
Parties: Daniel A. – v – SNGT
Court: Supreme Court
Date: 19 October 2011
Case Number: 09-72672
Hard copy publication: Not yet published
Internet publication: http://legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000024701795&fastReqId=1314899651&fastPos=1

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2011/58

Automatic termination at age 67 lawful (NO)

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Summary
Automatic termination of employment at age 67 solely on the basis of a company policy setting an age limit does not infringe Directive 2000/78 as there is a general and historical acceptance under Norwegian law of a 67 year age limit.

Facts
The case concerned a company policy of automatic termination of employment at the age of 67 and its conformity with the Norwegian legislation implementing Directive 2000/78/EC (the "Directive"), and ultimately the Directive itself. The employer – an insurance company, Gjensidige Forsikring ASA ("Gjensidige") – enforced an age limit of 67 years. The employee, a female senior advisor, had been employed by Gjensidige since 1982. She turned 67 in October 2009, at which time she received a pension from a 70% defined benefit pension scheme.

When the pensionable age in the Social Insurance Act was reduced from 70 to 67 years in 1972, dismissal protection until the age of 70 was maintained. It was however presupposed in the preparatory works to the amendment legislation that age limits of less than 70 years based, *inter alia*, on unilateral company schemes, would be permissible. The prevailing view, on which the Court also rested in the present case, was that age limits of 67 years are lawful under Norwegian law, provided that such age limits (i) are consistently applied; (ii) are known to the employees in question; and (iii) coincide with satisfactory pension schemes (the "traditional criteria").

The Directive is not a part of the EEA Agreement since its legal base in EU law has no parallel in that agreement. However, Norway decided unilaterally to adopt the Directive which was accordingly implemented in Norwegian law by the enactment of new provisions in the Working Environment Act in 2004. These provisions have since been included in the superseding Act of 2005. The preparatory works to the Act make clear that it was to be interpreted in line with the Directive. However, no clear statement was made in the Act or in the preparatory works on whether an age limit of 67 years would still be valid if only the traditional criteria were met.

In the Gjensidige case, the employee asked the court to declare that her termination was invalid. She wished to continue working for Gjensidige. She argued that the age limit of 67 years was incompatible with the statutory provisions in the Act, read in conjunction with the Directive. Principally, she argued that the Supreme Court needed to make a concrete assessment of whether the age limit in Gjensidige was applied in pursuance of legitimate aims and submitted that no such aims were present. In the alternative, she argued that the age limit was not appropriate and necessary in order to meet the alleged aims.
Gjensidige argued that there was no need to make a concrete assessment of the provisions of the Directive, as the Directive only imposes obligations on the legislator. Further, Gjensidige emphasised the wide margin of discretion that Member States have in this sphere. Gjensidige contended that the age limit of 67 years, which met the traditional criteria established in Norwegian law and accepted by the legislator, was in accordance with the Directive.

Judgment
General comments
The Supreme Court began by stating that an age limit of 67 years constitutes an act of direct discrimination under the Act, thus raising the question whether it could be deemed lawful.
The Court noted that pursuant to the Act, employees lose their employment protection at the age of 70. The Supreme Court further noted that company age limits of 67 years are relatively widespread and common in Norway, and that even without a foundation in individual or collective agreements, they have traditionally been deemed lawful under Norwegian law, provided that the traditional criteria are met.

It was not disputed by the employee that Gjensidige's age limit met these traditional criteria. The crucial issue for the Supreme Court was whether the age limit of 67 years had ceased to be valid as a result of the implementation of the Directive into Norwegian law.
The Court referred to Article 6(1) of the Directive, pursuant to which the legality of age discrimination rests on (i) whether the discrimination is objectively and reasonably justified by a legitimate aim and (ii) whether the discrimination is appropriate and necessary.

The Court pointed to ECJ rulings under Article 6 of the Directive, indicating that Member States have a wide margin when it comes to choosing what kind of social policy and employment aims to pursue, and the measures to be used in pursuance of those aims. On the other hand, the Court, in keeping with prior decisions, stated that domestic law should be construed in such a way as to conform with the Directive.
On the question of whether the age limit was objectively and reasonably justified by a legitimate aim, the employee submitted that Gjensidige's pension and age limit scheme rested solely on the employer's individual needs. The Court dismissed this argument as being too narrow. It noted that the Directive is addressed to Member States and focused its attention first of all on the general requirement that a 'legitimate aim' within the meaning of Article 6(1) of the Directive must be of a social

policy nature. The Court referred specifically to the ECJ decision in *Age Concern* (C-388/07, paragraph 46) in this regard.

The issue then, as the Court saw it, was whether the Norwegian authorities accept unilateral company schemes imposing the application of an age limit of 67 years. Discussing the legislative history from 1972 up to the present Act, the Court concluded that there was nothing to indicate that such company-based schemes were not acceptable. Invoking inter-generational considerations and citing the ECJ case of *Rosenbladt* (C-45/09), the Court held such company schemes to be "objectively and reasonably" based on general social policy considerations. It seemed to be implied that this applied also to the contested company scheme.

On the question of whether the limit was appropriate and necessary, the Court was rather cursory. It again found support in the ECJ's ruling in *Rosenbladt,* seeing no reason to distinguish the present case from *Rosenbladt* on the basis that it was a collective agreement that was at issue in that case. The Supreme Court focused instead on the existence of a right to financial compensation, emphasising that in the present case the age limit was combined with a favourable pension scheme. On this basis the Court concluded that the contested age limit was not in conflict with the relevant provision of the Act.

Commentary

The Gjensidige case is the first Supreme Court ruling in Norway to consider the legality of age limits of 67 years since the implementation of the Directive.

The ruling is that age limits of 67 years which meet the traditional criteria are generally compatible with the Directive. However, the Court emphasised that Gjensidige's pension scheme was "very generous", whereas it had previously been sufficient that a pension scheme was "satisfactory" under the traditional criteria. Therefore, whether this aspect of the traditional criteria has been changed is unclear. It appears that what the Court considered decisive in finding that the age limit of 67 years was justified by a legitimate aim was that the Norwegian authorities had accepted such age limits and in so doing had considered them to be justified by national social policy objectives, in this case, the distribution of work between the generations.
Four comments could be made:

Firstly, the Norwegian labour market has in recent years been characterised by lack of labour supply, rather than lack of job opportunities. In its ruling in *Age Concern*, the ECJ stated that mere generalisations indicating that a measure is likely to contribute to social policy objectives are not enough to show that the aim of the measure is capable of derogating from the principle of non-discrimination. Thus, it is notable that the Supreme Court does not consider the need for age limits of 67 years in the light of today's national employment policy and labour market conditions. The Supreme Court only emphasised the legislator's historic assessment, despite initially stating that it could not base its judgment on the legislator's assessment alone.

Secondly, in its assessment of whether the age limit of 67 years was justified by a legitimate aim, the Court found support in the *Rosenbladt* case (paragraph 40-43). In *Rosenbladt*, the ECJ stated that legislation allowing age limits in collective agreements does not imply that clauses of collective agreements are exempt from review by the courts. However, in the Gjensidige case, the Court did not fully assess Gjensidige's 67 years age limit, but merely reviewed the legislator's assessment of such a limit in general terms. Inasmuch as only general social policy objectives are legitimate under the Directive, as opposed to individual considerations particular to the employer, it is arguable that the courts need to assess the employer's underlying reasons for imposing its age limit. In holding the national authorities' reasons for accepting age limits of 67 years to be decisive, the Court's decision suggests that employers do not have to prove the legitimacy of the aim pursued by adopting an age limit of 67 years, provided that the traditional criteria are met. This seems difficult to reconcile with the emphasis given in the *Rosenbladt* case to having an effective review.

Thirdly, in assessing whether the age limit was proportionate the Court did not address the matter of necessity. This is a part of the proportionality test required by Article 6(1) and is replicated, in principle, in the relevant domestic provision. According to this test, the age limit of 67 years must be appropriate to achieve the pursued aim and no alternative means would be equally effective. The Court thus side-stepped an important aspect of the proportionality test.
As a closing observation, in the *Palacios de la Villa* case (C-411/05) and in *Rosenbladt* the age limits concerned were based on collective or individual agreements. In the present case, the Court declined to distinguish between an age limit established unilaterally by the employer and one established by an individual or collective agreement, even though a unilateral age limit would, by definition, not have been mutually negotiated and would not necessarily balance both the employer's and the employees' interests.

Subject: age discrimination
parties: *Karin Haare Johansen – v – Gjensidige Forsikring ASA*
Court: *Norges Høyesterett* (Surpreme Court)
Date: 29 June 2011
Case number: 2011/366
Hard copy publication: HR-2011-01291-A
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2011/59

Employer must consider employee's personal circumstances (SP)

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Summary

An employer's refusal to grant an employee's request for a change in his working hours in order to achieve a better work-life balance must take into account the decision's impact on the employee's family. Failure to do so may amount to discrimination.

Facts

Mr X worked as an educator for the Education Board of Castilla y León in a centre for children with special needs. He worked in shifts (morning, afternoon and night). Mr X requested to be assigned to the night shift for the duration of one school year in order to balance his working and

family life more effectively. The employer refused to assign him to the requested shift, and the employee subsequently sued the Education Board. The action was dismissed twice, in the first and the second instance courts. The courts found the employer's decision to comply with s36.3 (i.e. work in shifts) and s34.8 (i.e. the right to adjust the length and distribution of working time to suit the employee's work-life balance needs) of the Workers Statute. Those courts dismissed the claim, disregarding the constitutional relevance of the case. The employee appealed the decision to the Constitutional Court, alleging violation of Article 14 of the Spanish Constitution, which provides that "Spaniards are equal before the law and may not be discriminated against on account of birth, race, sex, religion, opinion or any other personal or social condition or circumstance". Mr X based this allegation on the argument that the rejection of his request for a changed shift schedule discriminated directly or, alternatively, indirectly against his wife, who found herself having to reduce her working time because her husband's employer denied him the opportunity to work only at night.

The Constitutional Court ruled that there was no gender discrimination, since the employer's denial was not based on Mr X's gender. However, the Court did examine whether there was discrimination on the grounds of personal and social circumstances as provided in Article 39 of the Constitution, which enjoins the public authorities to ensure, *inter alia*, "legal protection of the family" and "full protection of children".

Although the Constitutional Court did not address directly the alleged discrimination against Mr X's wife, it did consider factors such as his wife's working situation and the impact of the employer's decision, which had been disregarded by the ordinary courts. The Constitutional Court therefore analysed the claim as a potential case of discrimination based on family reasons. In doing so, the ordinary courts had erred in that they had failed to balance the employee's desire to work at night for family reasons against any difficulties that such shift work would create for the employer. The measures adopted with the aim of balancing work and family must take into consideration all the circumstances and the interests of both parties.

Failure to consider the effects on an employee's work-life balance and the consequent denial of the opportunity to work night shifts was, in the Court's reasoning, tantamount to failure to adequately consider the constitutional dimension of Articles 14 (prohibition of discrimination) and 39 (protection of family and children) of the Constitution. The problem in the case was not only that the ordinary courts had failed to interpret the law in such a manner as to protect a fundamental right, but that they did not even realize that a fundamental right was at stake.

The constitutional policies aimed at reconciling work and family life, both from the perspective of the prohibition based on gender discrimination and personal circumstances (Article 14 of the Constitution), as well as the mandate to protect family and children (Article 39), must take priority. This case is helpful in clarifying the interpretation and application of these Articles of the Constitution. Spanish law aims to solidify such fundamental rights in the form of an assumption of shared family responsibilities and this is underpinned by a recognition that the traditional roles historically assigned to women have been at the root of gender discrimination in the past.

Though there was no gender discrimination in this case, discrimination was found based on family circumstances. The Constitutional Court granted these circumstances the same protection as it would have done gender discrimination.

It is worth mentioning that the case included a dissenting opinion. The dissenting judge considered that 1) having two children (family circumstances) does not equate to factors such as gender, which historically put women in positions below the level of human dignity, and that it therefore does not require equal protection, and 2) the ordinary courts had taken the employee's personal circumstances into consideration.

Commentary

Which personal circumstances should have been taken into account? According to the judgment, the number of the employee's children, their age and school year, the employment situation and the impact of the refusal to grant the night shift on Mr X's family and the employer should all have been considered. One might wonder, however, whether (or to what extent) employers are entitled to ask about such circumstances and whether those queries constitute a violation of the employees' right to privacy in themselves, so further complicating matters.

In addition, does this ruling mean that employees are entitled to choose a fixed working shift when balancing work and family life, even if they have not requested working time reduction? If the answer is yes, it could complicate the organisation of companies, as a fixed working shift necessarily affects other employees.

Comments from other jurisdictions

The Netherlands (Peter Vas Nunes): Although a Dutch court might well also have found in favour of Mr X, I doubt whether the concept of discrimination would have been applied. There is discrimination, briefly speaking, where (i) individuals in a similar situation are treated differently or (ii) individuals in relevantly different situations are treated in the same way. There is nothing in the case reported above to indicate that Mr X's employer discriminated within meaning (i), i.e. that any of Mr X's colleagues had been or would have been treated more favourably under similar circumstances. Maybe Mr X's situation was different from that of his colleagues in that none of them had a working wife and two children, in which case there might have been discrimination within meaning (ii), but there is no indication that this was the case.

Mr X alleged that his employer discriminated against his wife, but it is not clear on what argument this allegation (of associative discrimination?) rested.

The Constitutional Court found that Mr X's employer had discriminated (against Mr X himself?) on the grounds of "family circumstances". Perhaps his contention was that refusing a change of shift tends to impact married employees with children more than unmarried and/or childless employees?

Dutch law has for many years granted employees, subject to certain conditions being met, the right to reduce (or increase) almost unilaterally the number of hours of they work per week (the employer being able to object, but only on hard-to-satisfy conditions). Although there is not (yet) a statutory right to a change of working times without a simultaneous increase or reduction of working hours, the Working Hours Act does contain an obligation on employers to take into account, to the extent reasonably possible, each employee's personal circumstances, including, in particular, his family care duties and social responsibilities.

Subject: working time
Parties: Employee – v – *Consejería de Educación Junta de Castilla y León* (Board of Education).
Court: *Tribunal Constitucional* (Constitutional Court).
Date: 14 March 2011.
Case number: Recurso 9145/2009.
Internet publication:
http://www.tribunalconstitucional.es/es/jurisprudencia/Paginas/Sentencia.aspx?cod=10086

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2011/60

Dismissal for refusing pay cut may be fair provided employer has sound business reasons and acts reasonably (UK)

CONTRIBUTOR BETHAN CARNEY*

Summary
The Employment Appeal Tribunal ("EAT") has confirmed that it may be fair for an employer to dismiss an employee for refusing to agree to reduction in pay if it has good business reasons for implementing the change and acts reasonably in the circumstances. The focus in such cases should be on the reasonableness or otherwise of the employer's behaviour rather than the reasonableness of the employee's refusal to accept the new terms.

Facts
Mr Booth had been employed as a welding maintenance worker by Garside and Laycock Ltd ("Garside"), which provided building and maintenance services, for seven years. Garside's business started to experience trading difficulties and it decided to ask its employees to accept a five per cent pay reduction. Its managers held a number of meetings with employees to explain the problems the business was facing and to ask them to vote on whether to accept a pay cut in an attempt to avoid redundancies. Garside asked employees to accept a majority vote. It also decided that abstentions would count as votes agreeing the change.

A substantial majority of employees (77) voted to accept the pay cut, there were seven abstentions and four voted no. However, two of the 'no' votes were cast by individuals who were already facing disciplinary proceedings for gross misconduct and were subsequently dismissed. Ultimately, Mr Booth was the only employee who held out against the pay cut and Garside wished to impose it on him unilaterally.

Garside's Managing Director, Mr Garside, held three meetings with Mr Booth. At the second meeting, Mr Garside dismissed Mr Booth for refusing to agree to the pay cut but simultaneously offered him a new contract. Mr Booth was given the choice of either having the new terms and conditions that had been offered to all other staff, or maintaining the previous terms and conditions with the exception of pay but with the possibility of a bonus. Mr Booth refused both offers.

Mr Garside repeated the offers at a third meeting and Mr Booth refused again. He appealed (internally[1]) against his dismissal and at the appeal meeting he was offered a review of his pay after six months, but he refused this offer too. The appeal was unsuccessful and Mr Booth brought proceedings in the Employment Tribunal ("ET") for unfair dismissal.

The Employment Tribunal's Decision
Under the relevant legislation, the Employment Rights Act 1996 (the "ERA"), the ET had to establish whether the employer had a reason for the dismissal that was potentially fair. If so, the question was whether in the circumstances "the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee" which should be determined according to "equity and the substantial merits of the case".

The ET considered the potentially fair reasons for dismissal set out in the ERA, which are: conduct; capability; redundancy; illegality; and "some other substantial reason of a kind such as to justify the dismissal". The ET decided that Garside's reason for dismissing Mr Booth was "some other substantial reason" and therefore a potentially fair reason. However, the dismissal would only be fair if Garside had acted reasonably in treating it as a sufficient reason for dismissal.

When considering this second question, the ET said that it "sought to balance the relative advantages and disadvantages of the reduction in pay and the imposition of new terms and conditions". The ET decided that it had been reasonable for Mr Booth to refuse to accept the pay cut. It also said that it must consider whether the employer's financial situation was so "desperate" that the change to terms and conditions was the only way to save the business. The ET found that this had not been the case and that the employer's decision had lacked "cogency". It concluded that the dismissal was unfair. Garside appealed against this decision to the EAT.

The Employment Appeal Tribunal's Decision
The EAT held that it was not the case that a dismissal for refusing a pay cut would be unfair unless the employer's financial situation was "desperate". It is sufficient if the employer has a "sound, good business reason" for wanting to make the change.

The EAT also ruled that the ET had been wrong to focus on whether Mr Booth had been reasonable to refuse the pay cut. Rather, the focus should have been on whether Garside acted reasonably in dismissing him for his refusal to accept the change. The EAT observed that if the employee is acting reasonably, it does not necessarily follow that the employer is acting unreasonably.

Finally, the EAT found that the ET's reasoning was opaque when it decided that Garside's decision "lacked cogency". There was nothing lacking in cogency about a business that was facing difficulties trying to cut costs nor in it seeking to ensure that all staff were on the same pay scales.

The EAT did, however, observe that as the fairness of a dismissal has be determined "in accordance with equity", it might be relevant to consider upon whom the proposed pay cuts would fall. There may be cases where management propose to cut the pay of all staff except themselves, where consequent dismissals would not be fair.
The upshot was that the EAT decided to remit the case to a different Employment Tribunal to be reheard.

Commentary
This judgement usefully clarifies the principles that apply in determining whether a dismissal is unfair in the context of an employer unilaterally imposing changes to terms and conditions of employment. It confirms that, depending on the circumstances, it can be fair to dismiss employees who refuse to agree to such changes so long as the employer has a sound business reason for needing to make them. However, "some other substantial reason" is a broad category of case and simply to identify that a dismissal falls within it is not sufficient in itself to justify it. In addition, it must be reasonable for the employer to dismiss for that reason (i.e. the reason must be sufficient) and the

employer must follow a fair procedure.
The following are recommended as the minimum procedural steps that should be followed in this type of situation:

- The employer should consult with affected employees about the proposal to cut pay and any alternatives.
- The employer should give genuine consideration to the employees' views and any representations they make before reaching a final decision.
- The employer should consider alternatives to decreasing pay, such as short-time working, redundancies or other cost-saving measures.
- If the employer decides to press ahead with the pay reduction, it should ask employees on an individual basis for their consent to the variation of their contractual terms and conditions. If an employee consents, the change takes effect by mutual agreement.
- The employer should then consider how many employees have consented and how many have refused and decide whether to impose the pay cut on the latter. If so, it should warn them that any further refusal to agree will result in the termination of their employment.
- The employer should give contractual notice of termination and at the same time make an offer of new employment on the new terms to start when the notice period expires.
- The employer should offer the employee a chance to appeal against its decision to dismiss and at all stages consider any representations and suggestions put forward by the employee.

Generally speaking, an employer is likely to be in a strong position if the great majority of employees have agreed to the pay cut and there is just a small recalcitrant minority holding out against it.
Note that the procedural steps outlined above are principally relevant for the purposes of complying with the unfair dismissal legislation contained in the ERA. In addition, if an employer is proposing to change the terms of at least 20 employees – where this will potentially involve dismissing them and offering to re-employ them on the revised terms – the employer will have a duty of collective consultation with trade unions (if recognised) or elected employee representatives under the Trade Union and Labour Relations (Consolidation) Act 1992.

Comments from other jurisdictions

The Netherlands (Peter Vas Nunes): the Dutch Supreme Court has developed a three step approach when testing whether a unilateral change of terms of employment is acceptable:

1. Did the employer have a sufficiently sound reason, related to changed circumstances at work, and taking into account all relevant circumstances, to propose the amendment?
2. If so, was the employer's proposal reasonable, again taking into account all circumstances?
3. If so, could it be reasonably expected of the employee to accept the proposal?

If the answer to all three questions is yes, then the employer is entitled to implement the amendment, although it is not entirely clear how this is to be done.

There is debate on how steps 2 and 3 relate to one another – i.e., are they not basically the same test? One question is whether the circumstances to be taken into account may be entirely collective, as seems to be the case in the judgment reported above. Suppose one employee is in such financial difficulties that accepting a proposed pay cut would cause him to lose his house, whereas this is not the case for the other employees, would that put an obligation on the employer to exempt that one employee, for example on the basis of a hardship clause? In this case, even if such an exemption risks other employees not giving, or withdrawing, their consent? A Dutch court might refuse to accept an entirely collective weighing of interests.

Subject: Unfair dismissal; changing terms and conditions of employment
Parties: Garside and Laycock Ltd – v – Booth
Court: Employment Appeal Tribunal
Date: 27 May 2011
Case number: UKEAT/0003/11/CEA
Hard copy publication: [2011] IRLR 735
Internet publication: www.bailii.org

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(Footnote)

1 Having an internal appeal procedure is normally necessary to avoid a successful unfair dismissal claim. Also, if the employer does not offer an appeal against a decision to dismiss and the employee succeeds in an unfair dismissal claim, the Employment Tribunal has discretion to increase the damages payable by up to 25%.

2011/61

Forfeiture of holiday claims (GER)

CONTRIBUTOR PAUL SCHREINER*

Summary
The German Federal Labour Court (the "BAG") recently decided two cases regarding the forfeiture of entitlement to paid leave and to compensation in lieu of paid leave. Claims for compensation in lieu of paid leave, accrued in the course of long-lasting disability, may be subject to a forfeiture clause. Limitations on an employee's ability to transfer holiday entitlement to the following calendar year also apply to claims for paid leave accrued in previous years.

I. BAG case 9 AZR 352/10 (forfeiture clauses)

Facts
A nurse was completely unable to work owing to illness from October 2006 until the termination of her employment relationship at the end of March 2008. In February 2009, eleven months after she had left, she claimed compensation for unused paid leave for the years 2007 and 2008 from her former employer.

The employer invoked Section 37(1) of the applicable collective agreement (the "TV-L"). It provided that employment-related claims expire if they are not asserted in writing within six months of the due date of the claim.

Judgment
The Federal Labour Court held that the plaintiff's claim for compensation in lieu of paid leave had expired pursuant to Section 37(1) TV-L because the plaintiff had failed to assert his claim within the prescribed time-limit. According to the Federal Vacation Act (*Bundesurlaubsgesetz*, the

"BUrlG")[1] a claim for compensation in lieu of paid leave becomes due when the employment relationship terminates. In this case the claim therefore became due at the end of March 2008 and needed to be made before the end of September 2008.
A claim for compensation in lieu of paid leave is not a substitute for holiday entitlement but rather a simple claim for financial compensation. Contrary to claims for paid leave as such, a claim for financial compensation can be waived and is subject to the forfeiture clause in the relevant collective agreement. This applies both to claims for compensation for the statutory minimum holiday entitlement and to claims for contractual additional holiday entitlements, if any.

II. BAG case 9 AZR 425/10 (expiration in the event of inability to work)

Facts
The plaintiff had worked for the employer since 1991. He was entitled to 30 days of paid leave per calendar year. Between 11 January 2005 and 6 June 2008 the plaintiff was permanently unable to work owing to illness. After his recovery he came back to work in 2008, 145 working days before the end of the year. Within the course of that year the employer granted the plaintiff 30 holidays (i.e. his complete annual holiday entitlement for 2008). The plaintiff applied for a declaratory judgment that he had not lost his entitlement to 90 days of paid leave for the years 2005, 2006 and 2007 (i.e. 3 x 30 days).

Judgment
The plaintiff's claim was denied. According to the law[2] annual leave generally needs to be granted and taken within the current calendar year, and a transfer of leave days to the following calendar year is only possible for urgent business or personal reasons[3]. In the event of such a transfer, the leave must be granted and taken before 31 March of the following calendar year[4].

In the view of the Federal Labour Court, the plaintiff's claim in respect of the paid leave that had accrued in the years 2005-2007 expired on 31 December 31 2008. In the absence of an individual agreement or a provision in a collective agreement to the contrary, leave that is not taken before the end of the leave year (31 December) expires if there is no reason for it to transfer. This applied to the transferred holiday entitlements from 2005-2007.

If an employee recovers within the calendar year, including the subsequent transfer period, he must take his leave if he wants to avoid losing it.

Commentary
Employees who are unable to work for reasons of sickness are entitled to compensation for their holidays, as they are unable to take them because of their illness (cf. *Schultz-Hoff* decision of the ECJ, 1 January 2009, case C-350/06; Federal Labour Court of Germany, 3 March 2009, case 9 AZR 983/07). In the case of a termination of the employment relationship the former holiday entitlement transforms into a claim for compensation under s7(4) of the BUrlG. Such claims may have a significant financial impact on employers.

Following *Schultz-Hoff*, the BAG decided two cases relating to holiday entitlement and corresponding claims for compensation in a way that went against the earlier, more employee-friendly stance. According to the earlier BAG case law, forfeiture clauses that apply more generally, do not apply to holiday compensation claims. The reason for this was that the application of a forfeiture clause was considered to violate s13 of the BUrlG, which prohibits contractual provisions that deprive an employee of his statutory right to paid leave. By contrast, the BUrlG only requires the employee to claim leave within the calendar year, and therefore, a shorter forfeiture period was invalid and void.

Until now, the BAG has not ruled on whether claims for holiday compensation are also subject to contractual forfeiture clauses. In our view, it would be logical to apply contractual forfeiture clauses in claims for holiday compensation.

The second decision of the BAG appears to be sound: if the employee did not wish to lose his holiday entitlement he should have taken his accrued leave before the end of 2008. This would also apply in the case of termination of the employment relationship, in which case all accrued leave should be taken before the termination date, even if this means not performing any work for the remainder of the year.

In essence, both decisions achieve the aim of integrating the new case law of the ECJ into the German legal practice and are useful in that sense.

It is likely that statute and/or collective bargaining agreements relating to long-term illness and holiday entitlement will develop in future: On 22 November 2011 the ECJ (case C-214/10, *"KHS"*) delivered another judgment on the limitation of holiday entitlements in the case of long-lasting incapacity to work. The judgment concerned national legislation and national practice, such as is contained in collective bargaining agreements, that restrict the accumulation of holidays. The court held that these national rules may, within certain limits, stipulate a limitation in the accrual of holidays during illness. If the leave is not taken within the time the entitlement to it expires, even if the employee was unable to make use of the holidays due to illness the employee will have forfeited his right to it. According to the ECJ, as stated in this judgment, such rules are compatible with the applicable holiday entitlement directive. It remains to be seen whether a provision to that effect will be incorporated into the BUrlG, but it is likely that the relevant provisions will be found in collective bargaining agreements.

Subject: paid leave
Parties: not known
Court: *Bundesarbeitsgericht* (Federal Labour Court)
Date: 9 August 2011
Case numbers: 9 AZR 425/10 and 9 AZR 352/10
Hardcopy publication: case I published in NJW Spezial 2012, 19; case II not published yet
Internet-publication:
www.bundesarbeitsgericht → Entscheidungen →case number

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(Footnotes)
1 Section 7(4) of the Federal Vacation Act (Bundesurlaubsgesetz, the "BUrlG"): *"If the holiday cannot be granted in its entirety or in part on account of termination of the employment relationship, appropriate holiday compensation must be granted."*
2 Section 7(3)(1) BUrlG: *"Holiday must be granted and taken within the current calendar year."*
3 Section 7(3)(2) BUrlG.
4 Section 7(3)(3) BUrlG.

2011/62

No doubt about EU law (DK)

CONTRIBUTOR MARIANN NORRBOM*

Summary
In a case about entitlement to replacement holiday in the event of sickness during a holiday, the Danish High Court did not believe that EU law was unclear. The Court therefore denied an application for a preliminary reference to the ECJ.

Facts
Under Danish law, employees are not entitled to replacement holiday if they fall ill during their holiday. This principle was called into question in September 2009 when the ECJ ruled in case C-277/08 (*Pereda*), which was about a Spanish employee who had fallen ill when his scheduled holiday began. The ECJ ruled that Article 7(1) of Directive 2003/88 must be interpreted as precluding national provisions which provide that a worker who is on sick leave during a holiday period is not entitled, after his recovery, to take his annual leave at another time.

With the ECJ's ruling, doubt was cast on whether the Danish holiday rules were compatible with EU law. Therefore, a task force was set up by the Danish Ministry of Employment to look into the matter. In October 2010, the task force published its report. However, the social partners could not agree on whether the Danish rules should be amended.

In the view of the Danish Minister for Employment at the time, if a case concerning the Danish rules was referred to the ECJ, the Court would probably conclude that the EC Directive precludes the Danish rules. However, he announced that the Ministry would await the outcome of a case pending before the Danish High Court before any new rules would be introduced.

The case in question concerns a tool maker who took three weeks' holiday in July 2009. Three days into his holiday he was injured and did not return to full health until his holiday was over. When he was given notice of termination shortly after his return, he claimed compensation for the 13 days of holiday he had lost as a result of the injury.

His employer refused the tool maker's claim because his holiday had begun on a day on which he would otherwise have worked, in this case on a Monday, and therefore the sickness commenced after the holiday had begun. Under Danish law, this means that the tool maker bore the risk of sickness. Had the sickness started at the weekend before the holiday began, the responsibility would have been on the employer.

The tool maker, however, argued that the Danish rules should be interpreted in light of the ECJ's ruling in *Pereda*, entitling him to compensation for the holiday he had lost.

In court, the employer argued that current law is still unclear, even with the ECJ's ruling. The employer therefore requested the High Court to ask the ECJ for guidance. The tool maker and his trade union, however, did not believe that a preliminary reference was necessary – in their view, it is clear from the ECJ's ruling in *Pereda* that Danish employees are entitled to replacement holiday in the event of sickness that occurs during their holiday.

Judgment
The High Court held that the issue of entitlement to replacement holiday has already been settled with sufficient clarity pursuant to the ECJ's ruling of 2009. Accordingly, there was no reason to ask for the ECJ's guidance in the matter.

Commentary
The Danish ruling indicates that the High Court was not in doubt about how to interpret the relevant EU law. However, the High Court ruling concerned only the issue of whether a preliminary reference to the ECJ should be made and therefore the High Court did not apply its interpretation of EU law to the case.

It is not yet known when the High Court will hand down its judgment as to whether the tool maker is entitled to replacement holiday for the 13 days of holiday he lost.

Subject: paid leave
Parties: The Central Organisation of Industrial Employees in Denmark on behalf of A – v – the Confederation of Danish Industry on behalf of the employer
Court: The Danish Eastern High Court (*Østre Landsret*)
Date: 14 April 2011
Case number: B-2021-10
Hard Copy publication: Not yet available
Internet publication: Please visit info@norrbomvinding.com

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2011/63

American "employer" cannot be sued in Italy (IT)

CONTRIBUTOR CATERINA RUCCI*

Summary
An Italian salesman may sue the American company with which he has a contract before an Italian court, but only if his work is connected sufficiently to Italy, which was not the case in this dispute.

Facts
The plaintiff in this case was an Italian man who lived in Monaco. The defendant was an American company without any legal presence in Europe. The plaintiff worked for the defendant on the basis of a contract that was governed by Massachusetts law. It was not clear from the contract whether the parties' relationship was one of employment, as the plaintiff claimed, or one of self-employment, as alleged by the defendant.

The plaintiff's duty was to promote sales in various countries including Italy, North Africa, Syria and Jordan. He spent most of his working time travelling. However, he did have an office in Nice in France, the address of which was mentioned on his invoices and correspondence. He usually departed on his business trips from Nice and returned there afterwards.

The plaintiff also worked for an Italian company which, although completely independent of the defendant, did distribute its products.

In 2008, after a collaboration of over 20 years, the defendant dismissed the plaintiff. The latter brought an action against the defendant before an Italian court.

Judgment
The court, applying the Brussels Convention of 27 September 1968 and the ECJ's case-law on that Convention, in particular the *Mulox* case (C-125/92), along with the Italian law implementing both the Brussels Convention and Regulation 44/2001, declared that it lacked jurisdiction to rule on the case. It found that the dispute was in no way connected to Italy. In particular, the place of performance of the contract ("the place where or from which the employee principally discharges his obligations towards his employer") was not in Italy but in France.

Commentary
Strangely, the plaintiff invoked the Brussels Convention, which had been replaced by Regulation 44/2001 in 2002. Initially, the Brussels Convention had no special provisions relating to employment. The Convention, as amended on the occasion of the accession of Spain and Portugal (which was after the *Mulox* judgment), provided that a person domiciled in a contracting state may be sued either in his own state or: *"in matters relating to a contract, in the courts of the place of performance of the obligation in question; in matters relating to individual contracts of employment, this is where the employee habitually carries out his work, or if the employee does not habitually carry out his work in any one country, the employer may also be sued in the courts of the place where the business which engaged the employee was or is now situated".*

The Brussels Convention is different from Regulation 44/2001 in many respects. One difference is that the Regulation has a specific provision dealing with employers who are located outside the EU. Article 18(2) provides that:
"Where an employee enters into an individual contract of employment with an employer that is not domiciled in a Member State, but has a branch, agency on other establishment in one of the Member States, the employer shall, in disputes arising out of the operation of the branch, agency or establishment, be deemed to be domiciled in that Member State".

In this case, the plaintiff failed to establish facts evidencing that the defendant had a branch, agency or establishment in Italy. Given its finding that it lacked jurisdiction, the court could not rule on whether the plaintiff was an employee or on whether his contract was subject to Italian law.

This judgment illustrates rather nicely that an employer located outside the EU can be sued in an EU Member State, but only by an employee whose work is somehow connected to that Member State, which was not the case in this dispute.

Subject: International jurisdiction
Parties: anonymous
Court: Court of Rome, Labour section
Date: 29 May 2011
Publication: not published

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2011/64

Irish system of setting sectoral terms of employment is unconstitutional (IR)

CONTRIBUTOR GEORGINA KABEMBA*

Summary
The plaintiffs in this case sought a declaration that certain provisions of the Industrial Relations Acts 1946 and 1990 were invalid having regard to the provisions of the Constitution, and a declaration that an Employment Regulation Order ("ERO") made by the Labour Court in May 2008 was an unlawful and disproportionate interference with the plaintiffs' property rights. The High Court agreed with the plaintiffs and found that the system of setting sectoral wage rates and conditions of employment was unconstitutional.

Facts
Industrial Relations Act 1946[1] gives power to the Labour Court to establish Joint Labour Committees ("JLC's"). Such Committees were established in respect of a class, or group of workers. The 1946 Act[2] provides that a JLC may submit proposals to the Labour Court "for fixing the minimum rates of remuneration...". The Catering Joint Labour Committee (Catering JLC) is a body established under the Industrial Relations Act 1946 and the Catering JLC Establishment Order 1977. The Catering JLC is responsible for formulating proposals for pay and conditions of workers employed in establishments engaged in the preparation or service of food or drink. The JLC proposals are submitted to the Labour Court, and, if approved, the Labour Court creates an Employment Regulation Order (ERO) which legally binds employers to wage rates and conditions of employment.

The Industrial Relations Act 1946 prohibits JLCs from submitting a proposal to revoke or amend an ERO unless the order had been in force for at least six months. Once the proposals are submitted, the Labour Court can refer the proposals back to the JLC or make an ERO[3]. There is no supervision from the Irish Parliament (*Oireachtas*) under this statutory scheme. With regard to the enforcement of an ERO, the 1946 Act[4] provides that if an employer fails to pay the remuneration fixed under an ERO, the employer is guilty of an offence and shall be liable to pay a fine on summary conviction.

The Quick Service Food Alliance (QSFA) whose members include multi-national franchise operations such as Burger King and Subway, as well as numerous national and local operators of takeaways and sandwich bars, argued that the Oireachtas had already put in place a statutory national minimum wage, under the Minimum Wage Act 2000, and provided for the payment of a fair Sunday premium under the Organisation of Working Time Act 1997. In addition, they outlined that there is a raft of employment legislation establishing minimum conditions of employment. The QSFA argued that this existing employment legislation properly protects employees, and that the Catering JLC and the Labour Court had fixed minimum wages and Sunday premia in excess of the national statutory minimum, and set conditions for catering staff that were more favourable than those provided for in employment legislation enacted by the Oireachtas.

These proceedings were instituted by the plaintiffs in circumstances where the National Employment Rights Agency[5] had expressed the opinion that the first named plaintiff was not meeting its obligations under the 2008 ERO. The plaintiff continued to challenge the 2008 Order, notwithstanding that it had since been replaced, on the basis that if the plaintiff had underpaid its employees under that Order, it would still be subject to both civil and criminal prosecution in respect of its failure to comply with the Order for the period it was in force.

The QSFA sought a declaration from the High Court that certain sections of the Industrial Relations Acts, 1946 and 1990, from which the JLC's derive their power are unconstitutional on the grounds that:

- Article 15 of the Constitution states that the sole and exclusive power to make laws is vested in the Oireachtas and no other authority has power to make laws for the State, and therefore, the ERO's created by the Labour Court were an unconstitutional delegation of this law making function which should be done by the Oireachtas;
- the imposition of higher rates of pay and conditions on QSFA employers represented an unwarranted and disproportionate interference with their property rights under the Irish Constitution;
- the application of different rates for Sunday pay for employers in the Dublin/Dun Laoghaire area unlawfully infringed property rights of members outside of that area; and
- the relevant sections of the Industrial Relations Acts, 1946 and 1990, were incompatible with the State's obligation to protect property rights under the European Convention of Human Rights.

In effect, the QSFA were seeking to quash the current EROs and the entire JLC system.

Judgment

Mr Justice Feeney found that the plaintiffs were entitled to a declaration that the relevant sections of the Industrial Relations Acts 1946 and 1990 were invalid having regard to Article 15.2.1[6], Article 40.3.1[7] and Article 43[8] of the Constitution.

Article 15.2.1 of the Constitution vests the sole and exclusive power of making laws for the State in the Oireachtas. In considering whether there had been an unconstitutional delegation of this law making function, the Court referred to the principles and policies test as set down in the seminal decision of the Irish Supreme Court in *Cityview Press Co. Ltd v AnCo*[9]. Mr Justice Feeney identified this test in the following terms:

"The Cityview Press case identifies that the Oireachtas may delegate a power to put flesh on the bones of an Act, thereby giving effect to principles and policies but that a delegation of parliamentary power which goes beyond that is not authorised and would amount to a purported exercise of legislative power by an authority which is not permitted to do so under the Constitution."

In essence, this test provides that such a power may be delegated only where it amounts to giving effect to the principles and policies contained in the legislation. Mr Justice Feeney found that the power to make EROs is a power of a fundamental nature and that there was no guidance as to principle or policy provided in the legislation. In the circumstances, the Court held that the delegation of this power to the Labour Court offended against the provisions of Article 15.2.1.

Mr Justice Feeney also found that the plaintiffs were entitled to a declaration that the ERO was an unreasonable, unlawful and disproportionate interference with the first and second named plaintiffs' property rights. The Court found that the determination of rates and conditions had been undertaken in an arbitrary and illegal manner, in breach of the plaintiffs' property rights.

The Court also considered the lack of uniformity in terms and conditions, where businesses immediately adjacent to one another (e.g. food establishments in Dublin/ Dun Laoghaire next to establishments in neighbouring counties) were required to adhere to significantly different statutory obligations. Mr Justice Feeney found that there was no identifiable basis for this discrimination. On this basis, the Court found that 2008 ERO[10] unlawfully interfered with the property rights of the first two plaintiffs.

As a result of the Court's finding on the above issues, the declaration sought pursuant to the European Convention on Human Rights Act did not arise.

Commentary

This was a landmark judgment in Ireland. The decision has ramifications for other sectors in the economy, including the contract cleaning, agriculture and hotel sectors, which are governed by the JLC system. Following this judgment and the Report of the Independent Review of Employment Regulation Orders (EROs) and Registered Employment Agreement Wage Setting Mechanisms[11] published in May which concluded that the current JLC/ REA regulatory system should be retained but *"requires radical overhaul so as to make it fairer and more responsive to changing economic circumstances and labour market conditions"*, the Minister for Jobs, Enterprise and Innovation Richard Bruton announced reforms to the JLC and Registered Agreement Agreement ("REA") wage setting mechanisms on 28 July 2011.

The principal planned measures include inter alia:

(a) The number of JLCs will be reduced from 13 to 6, either through a process of abolition or amalgamation;

(b) JLCs previously set more than 300 different rates of pay. They will now have the power to set only a basic adult rate, and will have the discretion to set two additional higher rates to reflect experience. Sub-minimum rates which will be a percentage of the basic adult rate will apply to employees aged under 18 years, first time job entrants, and employees undergoing training;

(c) JLCs will no longer set Sunday premium rates, instead Sunday working will be governed by the Organisation of Working Time Act 1997. The Minister will also request the LRC to prepare a statutory Code of Practice on Sunday working in these sectors. Employees will be able to bring a complaint to a Rights Commissioner about any breach of the Code of Practice governing Sunday working, with appeal to the Labour Court in the event of non compliance with the Rights Commissioner's decision;

(d) Companies will be able to derogate from EROs in cases of financial difficulty, this might be similar to the "inability to pay" mechanism which exists in National Minimum Wage legislation;

(e) The Government will legislate to provide the new criteria (principles and policies) to be observed in the making of EROs. JLCs will have to take into account factors such as unemployment rates, competitiveness and wage trends. Legislation will also provide changes to the decision making process of JLCs, where there is no agreement by both parties within the JLC, new adjudication procedures will be introduced whereby the matter can be referred to the Labour Court for a recommendation and the casting vote of the Chair of the JLC can only be exercised having regard to that recommendation; and

(f) Record-keeping requirements for employers in these sectors will be reduced.

Whilst the ruling may not affect existing workers employed in areas covered by the JLC system, depending on the particulars of their contractual arrangements, pending the implementation of this legislative reform, employers will be permitted to pay new employees the national minimum wage, currently set at € 8.65. Employers will not be obliged to pay JLC rates for employees recruited going forward, and such employees will, in many cases, be engaged on lesser terms and conditions but subject to the National minimum Wage Act 2000, and other relevant statutory minima.

Subject: Constitutional challenge to Industrial Relations Acts 1946 and 1990
Parties: John Grace Fried Chicken Limited, John Grace and Quick Service Food Alliance Limited v The Catering Joint Labour Committee, The Labour Court, Ireland and the Attorney General
Court: The High Court
Date: 7 July 2011
Determination Number: [2011] IEHC 277
Hardcopy publication: Not yet available
Internet publication: www.courts.ie.

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(Footnotes)
1. Section 35.
2. Section 42.
3. Pursuant to section 43 of the 1946 Act.
4. Section 45.
5. The National Employment Rights Authority (NERA)'s primary purpose is to promote a national culture of employment rights compliance in the labour market and to assume responsibility for the enforcement of employees' rights. NERA is responsible for the Labour Inspectorate units that investigate non-compliance in a range of areas including annual leave, wages, working hours, notice, redundancy and dismissal. NERA can request redress on any discrepancies or, alternatively, can prosecute employers.
6. Article 15.2.1 of the Constitution (State's exclusive powers): "The sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State."
7. Article 40.3.1 of Constitution (personal rights) : "The State guarantees in its laws to respect, and, as far as is practicable, by its laws to defend and vindicate the personal rights of citizens."
8. Article 43 of the Constitution (property rights): "The State acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods."
9. [1980] IR 381.
10. SI 142/2008 Employment Regulation Order Catering Joint Labour Committee (For areas other than the area known, until 1 January, 1994, as the County Borough of Dublin and the Borough of Dun Laoghaire), 2008.
11. Authored by Kevin Duffy and Dr Frank Walsh, May 2011.

2011/65

Dismissal for marrying a woman of Chinese origin is unfair (GER)

CONTRIBUTOR: MARTIN NEBELING*

Summary
The Regional Labour Court in Schleswig-Holstein has recently decided that dismissing an employee for marrying a woman of Chinese origin is unfair.

Facts
The plaintiff was an engineer who had worked for the company (a supplier for the German armed forces) as a secondee since May 2006. Whilst doing so (via a third party employment agency), the plaintiff visited his girlfriend in China on several occasions (trips in relation to which he received security clearance from the company). In 2009 the company offered the plaintiff a permanent job which he planned to take up in February 2010 after his marriage in China in December 2009. After the wedding, however, the plaintiff's wife remained in China. As a result of this situation, the plaintiff was in frequent contact with his wife from Germany and he intended to continue visiting China on a regular basis. On 5 March 2010 the plaintiff was suspended by the company as it had "security concerns". In June 2010 the company dismissed the plaintiff.

Legal arguments
In Germany, an employee is protected against dismissal pursuant to the Protection Against Unfair Dismissal Act (the "Act") once he or she has completed six months of service, whether on the basis of a permanent or a fixed-term contract. Accordingly, in this case, where the plaintiff had only been directly employed by the company for a brief period, the employee was not protected. If the Act applies, dismissal is only fair provided it relates to the employee's conduct or personal situation or operational reasons relating to the company. Nevertheless, even where the Act does not apply, pursuant to the German Civil Code dismissals may not be arbitrary. Moreover, the German anti-discrimination legislation applies to dismissals even in cases where the Act does not apply.

The company argued that the dismissal was not arbitrary, as a real security risk existed. According to the company, the fact that the plaintiff's wife lived in China constituted a risk because the Chinese government could use her in order to pressure him to disclose information. Furthermore, he would be travelling back and forth between Germany and China on a regular basis, giving the Chinese government more opportunities to put pressure on the employee. In explaining why the dismissal was not discriminatory, the company argued that while place of origin and nationality are both "protected characteristics" in relation to which discrimination is prohibited (also by association), residency is not. The company argued that the problem was not that the plaintiff's wife was Chinese, but merely that she lived in China. Had she decided to move to Germany following the wedding no security risk would have arisen.

Decision
The Local Labour Court in Elsmhorn judged in favour of the company. However, on appeal, the Regional Labour Court in Schleswig-Holstein held that the company's decision was arbitrary, in that the plaintiff's

situation had not materially changed as a result of his marriage (his trips to China as a secondee had previously been approved with no issue) and the security risk alleged by the company was not factually supported. Interestingly, the anti-discrimination angle was not touched upon by the court when issuing its ruling. However, the court did reference the protection of family life contained within the German Constitution (which protection includes the right to marry whomever one chooses) and, importantly, concluded that the company's decision was contrary to German public policy as well as to established norms of decency.

Normally, under German law the remedy where a dismissal is deemed to be unfair is reinstatement. However, as the court found the company's decision to be contrary to public policy, it was able to decide to terminate the (automatically reinstated) employment relationship between the parties and order the company to pay the plaintiff a lump sum in the amount of seven months' salary. A typical lump sum in unfair dismissal cases equals half or (at most) one month's salary for each complete year of service so the court's award in this case (where the employee has only been employed for four months) was perhaps designed to send a message that dismissals on these grounds will not be tolerated.

Appeal

The company immediately sought leave to appeal to the German Federal Court, but this was initially denied by the Regional Court. However, the company has lodged a special application for permission to appeal and is currently awaiting the result of this application.

Commentary

The plaintiff in this case also grounded his initial claim on indirect associative racial discrimination within the meaning of Directive 2000/43. In its judgment in the *Coleman* case, which concerned disability discrimination, the ECJ held that the prohibition of direct discrimination laid down in Directive 2000/78 was not limited to people who themselves were disabled. There is no reason why the ECJ's reasoning regarding 'associative discrimination' in *Coleman* would not also apply to the other discrimination strands listed in Directive 2000/78 (age, belief etc.) and in Directive 2000/43 (race).

Whether that doctrine could also be applied to indirect discrimination is more controversial, but in any event, the ECJ in the *Coleman* case had no need to address this question as the referring court had limited its questions to the issue of direct associative discrimination. In any event, it is perhaps not easy to come up with examples of indirect discrimination on the basis of another person's protected characteristics.

However, this case is the perfect example of such a situation. The plaintiff was treated less favourably than his colleagues on account of the residency of his wife. While residence is not a protected characteristic, it is obvious that a policy that disfavours people living in China affects relatively more Chinese than non-Chinese people. It is also obvious that the characteristic "Chinese" is one that relates to racial or ethnic origin within the meaning of Directive 2000/43. However, on first instance, the Local Labour Court in Elsmhorn dismissed the plaintiff's argument in this regard on the basis that "residence" is not a protected characteristic and the plaintiff appeared to accept this reasoning: he did not raise the issue again before the Regional Labour Court.

Subject: Unfair dismissal
Parties: Autoflug GmbH – v – Blase
Court: Regional Labour Court in Schleswig-Holstein, Germany
Date: 22 June 2011
Case Number: 3 Sa 95/11
Hard copy publication: ArbRAktuell 2011, 494 (summary only, full report pending)
Internet publication: BeckRS 2001, 75153

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ECJ COURT WATCH

SUMMARIES BY PETER VAS NUNES

RULINGS

ECJ 7 April 2011, case C-305/10 (*Commission – v – Luxembourg*) (WORKING CONDITIONS)

The ECJ finds that the Grand Duchy of Luxembourg has failed to transpose Directive 2005/47 on certain aspects of the working conditions of mobile workers engaged in interoperable cross-border services in the railway sector.

ECJ 15 September 2011, case C-240/10 (*Cathy Schulz-Delzers and Pascal Schulz – v – Finanzamt Stuttgart III*) **("Schulz")** German case (FREE MOVEMENT)

Facts

Mr Schulz was a German national, employed in Germany. His wife was a French civil servant who was employed by a Franco-German school in Germany. Her salary was paid by the French State, which also paid her two special untaxed allowances: a cost of living supplement and a family allowance in respect of her children.

Mr Schulz's salary was taxed in Germany. Mrs Schulz's salary was taxed in France. However, when determining Mr Schulz's German income tax, Mrs Schulz's salary and her untaxed allowances were taken into consideration, leading to a higher tax bracket because of the progressive nature of the income tax. The fact that Mrs Schulz's salary was taken into consideration in this manner was not at issue: what Mr and Mrs Schulz contested was that Mrs Schulz's untaxed allowances were also taken into consideration. They argued that this contravened Article 39 of the EC Treaty in respect of freedom of movement, noting that if Mr Schulz had been seconded by his employer to work in France and had received similar allowances, those allowances would not have been taken into consideration.

National proceedings

Mr and Mrs Schulz brought proceedings before the competent German tax court, which referred questions to the ECJ, asking:

1a. whether the German tax rule at issue is compatible with the freedom of movement of workers pursuant to Article 39 EC (now Article 45 TFEU);

1b. whether that rule constitutes covert discrimination on the basis of nationality, as prohibited by Article 12EC (now Article 18TFEU);

2. if not, whether that rule is compatible with the freedom of movement of EU citizens under Article 18 EC (now Article 21 TFEU).

ECJ's findings

1. Article 39 EC prohibits, *inter alia,* national provisions which deter a national of a Member State from leaving his or her country of origin to exercise the right to freedom of movement (§ 34).
2. Mrs Schulz, who exercised her right to free movement by going to work in Germany, is not treated less favorably in Germany than a German national would be treated in a purely internal situation. Mrs Schulz could only rely on Article 39 if the refusal to confer on her the advantage that a German national working in France enjoys, could be regarded as discriminatory for other reasons, which presupposes that her situation is comparable to that of German nationals working in France (§35-36).
3. In the case of Mr and Mrs Schulz no such comparability exists in the light of the objective pursued by the application of a progressive tax scale. Contrary to the tax advantages accorded to German nationals working abroad, the allowances enjoyed by Mrs Schulz are specifically intended to adjust her remuneration to the cost of living in Germany and therefore to enhance her ability to pay tax. (§37-39).
4. The comparability of the situations can be assessed only in the context of one and the same tax system and, in the absence of unifying or harmonising measures at EU level, the Member States retain the competence to determine the criteria to be used to tax income. The EC Treaty offers no guarantee to an EU citizen that transferring his or her activities to another Member State will be tax-neutral (§42).

Ruling

Article 39 EC must be interpreted as not precluding a provision, according to which allowances granted to a civil servant of a Member State working in another Member State in order to compensate for loss of purchasing power at the place of secondment, are not taken into account in determining the tax rate applicable in the first Member State to other income of the taxpayer or of his spouse, whereas equivalent allowances granted to a civil servant of that other Member State working in the territory of the first Member State are taken into account for the purposes of determining that tax rate.

ECJ 20 October 2011, case C-123/10 (*Waltraud Brachner – v – Pensionsversicherungsanstalt*) ("**Brachner**"), Austrian case (SEX DISCRIMINATION)

Facts

This case concerns the Austrian Old Age State Pension Act (*Allgemeine Socialversicherungsgesetz*) the "ASVG". It includes a provision that pensions are increased on 1 January each year by a percentage to be determined by the government. The regular increase as of 1 January 2008 was 1.7%. However, in that year there was a one-off special extra increase designed to compensate low-income pensioners for the increased cost of living (the "2008 special adjustment"). Pursuant to this one-off adjustment, pensions above a certain level ("747+ pensions") were increased by more than 1.7%, as shown in the following table:

pensions between € 746.99 and € 1,050 per month	+ € 21 (between 2% and 2.8%)
pensions between € 1,050 and € 1,700 per month	+ 2%
pensions between € 1,700 and € 2,161.50 per month	between + 1.7% and + 2%
pensions above € 2,161.50 per month	+ € 36.75 (= 1.7% or less)

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

Ms Brachner became entitled to an old age pension in 2007 at the age of 60, which in Austria was the normal retirement age for women, with that for men being 65. On 1 January 2008 her pension was increased from € 368.16 to € 374.42 per month (+ 1.7%). She was not eligible for compensatory supplements on account of the means test. She found it unfair, and indirectly discriminatory against women that her pension was increased by no more than 1.7%, whereas that of 747+ pensioners was increased by a higher percentage, particularly as she was not eligible for compensatory supplements. Accordingly, she claimed a pension increase of € 21, making a total pension of € 389.16 per month.

National proceedings

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

ECJ's findings

1. Question 1: an annual pension adjustment scheme such as that at issue comes within the scope of Directive 79/7 (§ 39-53).
2. Question 2: the unequal increase is not directly discriminatory, since it applies without distinction to male and female workers. The question is whether it discriminates indirectly (§ 55).
3. If the referring court accepts the statistics that 75% of male pensioners and only 43% of female pensioners benefited from the unequal increase and that 82% of the women in receipt of an under-747 pension do not receive compensatory supplements (mainly because they have a partner with income) whereas this is the case for only 58% of the male under-747 pensioners, then the unequal increase is indirectly discriminatory against women (§ 56-68).
4. Question 3: if the referring court indeed finds indirect sex discrimination, the question is whether that discrimination is objectively justified. Following a summary of its case law on objective justification, the ECJ proceeds to examine the first of the three justifications advanced by the Austrian government, namely that female workers become entitled to a pension at an earlier age (60) than male pensioners (65), with the result that the level of their contributions to the pension scheme is generally lower than that of their male counterparts. This fact cannot justify the exclusion of female under-747 pensioners from the 2008 special adjustment. That adjustment was designed to maintain purchasing power in the light of consumer price developments and is therefore not a benefit which represents consideration of contributions paid (§ 69-80).
5. The same applies to the second justification advanced by the Austrian government, namely that women have a longer life-expectancy than men. There is no link between this fact and the exclusion of under-747 pensioners from the special adjustment provided to 747+ pensioners. Thus, longer life-expectancy cannot justify the unequal increase (§ 81-86).
6. The Austrian government's third justification is that the threshold of income below which there is entitlement to means tested compensatory supplements was raised by 2.8%. The compensatory supplement is a benefit intended to ensure a minimum means of subsistence for its recipient where the pension is insufficient. It pursues a legitimate objective of social policy unrelated to gender. The ECJ has previously held that the Member States enjoy a reasonable margin of discretion as regards both the nature of the protective measures in the social sphere and the detailed arrangements for their implementation (§ 87-91).
7. The ECJ has held that supplements to a minimum social security scheme are in principle justifiable under Directive 79/7 even if they principally benefit men because they take the spouse's income into account. However, in the case at issue there is no relationship between the rule aggregating spouses' incomes and the objective of the 2008 special adjustment, which was to maintain the purchasing power of the pensions in the light of consumer price developments. Therefore, the Austrian government could not reasonably take the view that the extra increase of the compensatory supplements genuinely reflected a concern to obtain the objective of the 2008 special adjustment, which was to ensure maintenance of purchasing power (§ 92-98).
8. This conclusion is supported by the fact that for a very large majority of women in receipt of a minimum pension, the increase in the compensatory supplement is not such as to cancel out the effects of the exclusion from entitlement to the unequal increase. In such a situation the ECJ has held that exceptions to the provisions of a law can, in certain cases, undermine the consistency of that law, in particular where their scope is such that they lead to a result contrary to the objective pursued by that law.

Ruling

Article 3(1) of Council Directive 79/7/EEC must be interpreted as meaning that an annual pension adjustment scheme such as that at issue in the main proceedings comes within the scope of that directive and is therefore subject to the prohibition of discrimination laid down in Article 4(1) of that directive.

Article 4(1) of Directive 79/7 must be interpreted as meaning that, taking into account the statistical data produced before the referring court and in the absence of evidence to the contrary, that court would be justified in taking the view that the provision precludes a national arrangement which leads to the exclusion from an exceptional pension increase of a significantly higher percentage of female pensioners than male pensioners.

Article 4(1) of Directive 79/7 must be interpreted as meaning that if, in the examination which the referring court must carry out in order to reply to the second question, it should conclude that a significantly higher

percentage of female pensioners than male pensioners may in fact have suffered a disadvantage because of the exclusion of minimum pensions from the exceptional increase provided for by the adjustment scheme at issue in the main proceedings, that disadvantage cannot be justified by the fact that women who have worked become entitled to a pension at an earlier age or that they receive their pension over a longer period, or because the compensatory supplement standard rate was also subject to an exceptional increase in respect of the same year 2008.

ECJ (Grand Chamber) 15 November 2011, case C-256/11 (*Murat Dereci, Vishaka Heiml, Alban Kokollari, Izunna Emmanuel Maduike and Dragica Stevic – v – Bundesministerium für Inneres*) ("**Dereci**"), Austrian Case (FREE MOVEMENT)

Facts

All five plaintiffs are third country nationals wishing to live in Austria with their Austrian family members.

Mr Dereci is a Turkish national. He entered Austria illegally, applied for asylum, married an Austrian national and then withdrew his asylum request. By his wife he had three children, all having Austrian nationality and all still being minors. When Mr Dereci entered Austria, the law in force at that time gave him a right of establishment in Austria. On 1 January 2006 that law was repealed and replaced by more restrictive legislation.

Mr Maduike, a Nigerian national, also entered Austria illegally and married an Austrian national with whom he currently resides in Austria.

Mrs Heiml, a Sri Lankan national, married an Austrian before entering Austria, where she currently lives with her husband, despite the subsequent expiry of her residence permit.

Mr Kokollari, who entered Austria legally at the age of two with his parents who possessed Yugoslav nationality at the time, is 29 years old and is maintained by his mother, who is now an Austrian national.

Mrs Stevic, a Serbian national, is 52 years old and has applied for family reunification with her father who has resided in Austria for many years and obtained Austrian nationality in 2007. She has regularly received monthly support from her father, who would continue to support her if she resided in Austria. She currently resides in Serbia with her husband and three adult children.

All five plaintiffs had their applications for residence permits in Austria rejected. All except Mrs Stevic (who resided in Serbia) were ordered to leave the country. The rejection was based on one or more of the following grounds: procedural defects in the application, failure to remain abroad whilst awaiting the decision on the application, lack of sufficient resources and breach of public policy. None of the plaintiffs had exercised their right to free movement within the EU.

The plaintiffs appealed against the rejection of their applications, invoking Directive 2004/38 and Article 8 ECHR. Directive 2004/38 lays down, *inter alia*, the conditions governing the exercise of the right of free movement and residence within the EU by Union citizens and their family members. Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) grants everyone the right to respect for his or her private life.

National proceedings

Following the rejection of their appeals, the plaintiffs applied to the Austrian Constitutional Court (*Verwaltungsgericht*). It referred several questions to the ECJ. These related to the ECJ's recent ruling (8 March 2011) in the *Ruiz Zambrano* case (C-34/09). In that case, the ECJ had interpreted Article 20 TFEU on Union citizenship as precluding a Member State from refusing a third country national upon whom his minor children, who are EU citizens, are dependent, a right of residence in the Member State of residence and nationality of those children, and from refusing to grant a work permit to that third country national, in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of EU citizens.

ECJ's findings

1. The first question seeks to determine whether EU law precludes a Member State from refusing residence to a third country national who wishes to reside with a family member who is an EU citizen, resides in that state, is a national of that state who has never exercised his right to free movement and is not maintained by that third country national (§ 37).
2. Directive 2003/86 on the right to family reunification does not apply to the plaintiffs in this case, because Article 3(3) thereof specifically provides that the Directive does not apply to members of the family of a Union citizen. A proposal to expand its scope to EU citizens was rejected (§ 46-49).
3. Article 3 of Directive 2004/38 provides that the Directive applies to Union citizens who move to or reside in a Member State other than that of which they are a national and to their family members. Therefore, a Union citizen who has never exercised his right of free movement and has always resided in his own country, is not covered by the concept of "beneficiary" within the meaning of the Directive. If a Union citizen is not covered by that concept, his family members are not either (§ 50-57).
4. Even though Directives 2003/86 and 2004/38 do not apply, the plaintiffs could still rely on Article 20 TFEU. In *Ruiz Zambrano* the ECJ held that Article 20 TFEU precludes national measures which have the effect of depriving Union citizens of the genuine enjoyment of the substance of the rights conferred by virtue of that status (§ 59-65).
5. The criterion "denial of the genuine enjoyment of the substance of the rights conferred by virtue of EU citizen status" refers to situations in which the Union citizen is effectively forced to leave his country and the EU. The mere fact that it might appear desirable to a Union citizen, for economic reasons or in order to keep his family together within the EU, for his non-citizen family members to be able to reside with him in the EU, is not sufficient in itself to support the contention that the Union citizen will be forced to leave Union territory if such a right is not granted (§ 66-68).
6. This finding is without prejudice to the question of whether the right to the protection of family life, as provided in Article 7 of the Charter of Fundamental Rights of the EU and the corresponding Article 8 ECHR, precludes refusal of a right of residence (§ 69).
7. The provisions of the Charter are addressed to the Member States only when they are implementing EU law. It is for the referring court to determine whether this is the case and, if so, whether the refusal of the plaintiffs' right of residence in Austria undermines the right to respect for private and family life provided for in Article 7 of the Charter. If the referring court takes the view that the plaintiffs' situation is not covered by EU law, it must undertake the same examination in the light of Article 8(1) ECHR (§ 70-74).
8. The second and third questions are moot (§ 75).
9. The fourth question is limited to the case of Mr Dereci. It deals with provisions pursuant to the Association Agreement with Turkey, namely Article 13 of Decision No 1/80 and Article 4(1) of the Additional Protocol. These provisions prohibit the EU Member States from introducing new restrictions on the freedom of establishment and the freedom to provide services. The question is whether those provisions preclude a Member State from subjecting the initial entry of a Turkish national to stricter national rules than those which previously applied to such entry (§ 26).

10. The ECJ finds the 2006 amendment of the Austrian law to constitute a prohibited "new restriction" (§ 77-101).

Ruling

European Union law and, in particular, its provisions on citizenship of the Union, must be interpreted as meaning that it does not preclude a Member State from refusing to allow a third country national to reside on its territory, where that third country national wishes to reside with a member of his family who is a citizen of the Union residing in the Member State of which he has nationality, who has never exercised his right to freedom of movement, provided that such refusal does not lead, for the Union citizen concerned, to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of his status as a citizen of the Union, which is a matter for the referring court to verify.

Article 41(1) of the Additional Protocol [...] must be interpreted as meaning that the enactment of new legislation more restrictive than the previous legislation, which, for its part, relaxed earlier legislation concerning the conditions for the exercise of the freedom of establishment of Turkish nationals at the time of the entry into force of that protocol in the Member State concerned, must be considered to be a 'new restriction' within the meaning of that provision.

ECJ 17 November 2011, case C-435/10 (*J.C. van Ardennen – v – Raad van Bestuur UWV*) (**"Van Ardennen"**), Dutch case (INSOLVENCY)

Facts

Mr Van Ardennen's employer was declared insolvent on 28 November 2006. Having attempted, without success, to set up his own business, Mr Van Ardennen applied for unemployment benefits on 15 May 2007 and two weeks later he registered as a job-seeker. Pursuant to the Dutch legislation transposing Directive 80/987, he was awarded insolvency benefits for the period 29 November 2006 to 12 February 2007, being the period corresponding to the relevant notice period. However, the organisation responsible for paying insolvency benefits, the UWV (the "guaranteeing institution" within the meaning of the Directive), deducted 20% from the benefits awarded to Mr Van Ardennen as a penalty for not registering as a job-seeker immediately following his employer's insolvency, as required under Dutch law.

National proceedings

Mr Van Ardennen appealed, first to an internal UWV-body, then to the court of first instance and, finally, to the Court of Appeal (*Centrale Raad van Beroep*). The UWV argued that, according to Dutch law, income from work carried out during the period in which the right to insolvency benefit exists may be deducted from that benefit. Given that registration as a job-seeker increases the chances of the worker obtaining employment, and hence income, during that period, the obligation to register as a job-seeker immediately after insolvency minimises the cost to the guaranteeing institution and is, therefore, a reasonable requirement. The Court of Appeal was uncertain whether this underlying rationale for the obligation to register was compatible with the Directive. It referred to the ECJ's ruling in *Maso* (C-373/95), in which the ECJ held that a Member State may not prohibit the aggregation of amounts guaranteed by the Directive with an allowance such as the allowance that was at issue in the *Maso* case.

ECJ's findings

1. The first question is whether Directive 80/987 precludes a national rule which obliges employees in the event of the insolvency of their employer to register as job-seekers, in order to fully assert their right to payment of outstanding wage claims (§ 26).
2. Article 4 of the Directive, which allows Member States to limit the payment obligation of the guaranteeing institutions (in duration and amount), must be interpreted strictly (§ 34).
3. It would be contrary to the Directive's objective to interpret it in such a way that an employee is subject to an automatic and flat-rate reduction of the reimbursement of his salary claims as a result of not registering immediately as a job-seeker. Furthermore, an obligation to register as a job-seeker within a fixed period is not by its nature comparable with a time limit for the submission of an application for an insolvency benefit (§ 35-36).
4. There was no need to answer the second and third questions.

Ruling

Articles 3 and 4 of Directive 80/987 as amended by Directive 2002/74 must be interpreted as precluding a national rule which obliges employees to register as job-seekers in the event of the insolvency of their employer, in order to fully assert their right to payment of outstanding wage claims, such as those at issue in the main proceedings.

ECJ (Grand Chamber) 22 November 2011, case 214/10 (*KHS AG – v – Winfried Schulte*) **("KHS")**, German case (PAID LEAVE)

Facts

Mr Schulte was employed by KHS. His contract was governed by a collective agreement known as the EMTV, which entitled him to 30 days of paid annual leave. Article 11(1) of this collective agreement provided in paragraph 2 that "leave entitlement shall lapse three months after the end of the calendar year, unless the worker unsuccessfully attempted to exercise that right or he could not take leave for operational reasons" and in paragraph 3: "If leave could not be taken because of illness, entitlement to leave shall lapse 12 months after the end of the period referred to [...] above". In January 2002 Mr Schulte suffered a heart attack as a result of which he was unfit for work until 31 August 2008, on which date his employment relationship ended. In March 2009 he brought an action, claiming payment in lieu of paid annual leave not taken in 2006, 2007 and 2008 (the right to compensation for the years before 2006 having become time-barred).

National proceedings

The court of first instance upheld the action insofar as it related to (i) the minimum paid leave entitlement of 20 working days per annum under EU law and (ii) the five days per annum to which Mr Schulte was entitled under German law because he was severely disabled. KHS appealed, arguing that Mr Schulte's entitlement to paid leave for the years 2006 en 2007 had lapsed on account of the carry-over period provided for in the third paragraph of Article 11(1) EMTV (the "disputed provision"). The Court of Appeal referred two questions to the ECJ. It noted that, according to the disputed provision, at the time Mr Schulte's contract ended only his entitlement to paid leave for the year 2006 had lapsed [*namely on 31 March 2007 + 12 months = 31 March 2008: Editor*].

ECJ's findings

1. By its first question, the national court asks whether Article 7(1) of Directive 2003/88 must be interpreted as precluding national provisions or practices, such as collective agreements, which limit, by a carry-over period of 15 months on the expiry of which entitlement to paid leave lapses, the accumulation of entitlements to such leave in respect of a worker who is unfit for work for several consecutive years (§ 22).

2. In *Schultz-Hoff* the ECJ noted that the laying down of a carry-over period in national law forms part of the conditions for the exercise and implementation of the right to paid annual leave and therefore falls, as a rule, within the competence of the Member States. In that judgment the ECJ also held that Directive 2003/88 does not, as a rule, preclude national legislation which lays down conditions for the exercise of that right, including even its loss at the end of a carry-over period, provided that the worker must have actually had the opportunity to exercise his right (§ 25-26).
3. However, *Schultz-Hoff* must be qualified, because otherwise a worker who is unfit for work for several years in a row would accumulate annual leave without any limit. That would no longer reflect the actual purpose of the right to paid annual leave (§ 28-30).
4. The right to paid annual leave has the dual purpose of enabling the worker to rest from his work and to enjoy a period of relaxation and leisure. However, that right can only reflect these purposes insofar as the carry-over period does not exceed a certain temporal limit. Beyond such a limit annual leave ceases to have its positive effect. Therefore, a worker who is unfit for work for several consecutive years and who is prevented from taking his paid annual leave during that period cannot have the right to accumulate, without any limit, entitlements to paid annual leave acquired during that period (§ 31-34).
5. The right to paid annual leave is a particularly important right, laid down not only in Directive 2003/88 but also in Article 31(2) of the Charter of Fundamental Rights of the EU. Therefore, any carry-over period must take into account the specific circumstances of a worker who is unfit for work for several years in a row. It must ensure that the worker can have, if need be, rest periods that may be staggered, planned in advance and available in the longer term. Any carry-over period must be substantially longer than the reference period in respect of which it is granted. On the other hand it must protect the employer from the risk that a worker will accumulate periods of too great a length and from the difficulties for the organisation which such periods might entail (§ 35-39).
6. A carry-over period of 15 months is longer than the carry-over period of six months that was at issue in *Schultz-Hoff* (§ 40).
7. Article 9(1) of ILO Convention 132, to which the preamble of Directive 2003/88 makes reference, provides that "the uninterrupted part of the annual holiday with pay [...] shall be granted and taken no later than one year, and the remainder of the annual holiday with pay no later than eighteen months, from the end of the year in respect of which the holiday entitlement has arisen" (§ 41-42).
8. In the light of the foregoing it may reasonably be considered that a period of 15 months for carrying over the right to paid annual leave is not contrary to the purpose of the right, in that it ensures that that right retains its positive effect for the worker as a rest period (§ 43).
9. There is no need to answer the second question, which is whether a carry-over period must exist for at least 18 months.

Ruling

Article 7(1) of Directive 2003/88 must be interpreted as not precluding national provisions [...] which limit, by a carry-over period of 15 months, on the expiry of which the right to paid annual leave lapses, the accumulation of entitlement to such leave by a worker who is unfit for work for several consecutive reference periods. [*Advocate-General's opinion published in EELC 2011-3*]

ECJ 15 December 2011, case C-384/10 *(Jan Voogsgeerd – v – Navimer SA)* **("Voogsgeerd"),** Belgian case (CONFLICT OF LAWS)

Facts

In August 2001 Mr Voogsgeerd and the Luxembourg company Navimer entered into an employment contract. The contract was signed in Antwerp, Belgium, at the headquarters of Navimer's parent company, the Belgian company Naviglobe. The individual who signed the contract on behalf of Navimer was a Director of both Navimer and Naviglobe. The contract identified Luxembourg law as the applicable law. Pursuant to his contract of employment, Mr Voogsgeerd served as chief engineer on board vessels belonging to Navimer for approximately nine months. Those vessels plied routes on the North Sea. He received his instructions from Naviglobe and Antwerp was *de facto* his employer's place of business. Antwerp was also the place where his voyages started and ended. However, his salary was paid by Navimer and he was affiliated with the Luxembourg social security system. When Navimer dismissed Mr Voogsgeerd in April 2002, he took legal proceedings before a Belgian court, seeking compensation in lieu of notice as per Belgian law. He proceeded against both Navimer and Naviglobe. He based his claim that Belgian, not Luxembourg law governed the case on Article 6 of the Rome Convention: *"1. Notwithstanding the provisions of Article 3, in a contract of employment a choice of law made by the parties shall not have the result of depriving the employee of the protection afforded him by the mandatory rules of the law which would be applicable under paragraph 2 in the absence of choice. 2. Notwithstanding the provisions of Article 4, a contract of employment shall, in the absence of choice in accordance with Article 3, be governed:*
(a) by the law of the country in which the employee habitually carries out his work in performance of the contract, even if he is temporarily employed in another country; or
(b) if the employee does not habitually carry out his work in any one country, by the law of the country in which the place of business through which he was engaged is situated;
unless it appears from the circumstances as a whole that the contract is more closely connected with another country, in which case the contract shall be governed by the law of that country."

National proceedings

Mr Voogsgeerd claimed (i) that Naviglobe, not Navimer, was his actual employer and (ii) that he had principally carried out his work in Belgium. The courts of first and second instance disagreed with both claims. They found that Navimer, not Naviglobe, was Mr Voogsgeerd's employer and that Mr Voogsgeerd had not worked mainly in Belgian territorial waters. Therefore Luxembourg law applied. Given that Luxembourg law requires an action for wrongful dismissal to be brought within three months, Mr Voogsgeerd's claim was brought too late and was therefore turned down.
Mr Voogsgeerd appealed to the Belgian Surpreme Court, but only against Navimer. The Surpreme Court referred four questions to the ECT, in essence asking whether factors such as the place where an employer is actually employed, the place to which he is obliged to report and the employer's *de facto* place of business affect the determination of the law applicable to the employment contract under Article 6(2) of the Rome Convention.

ECJ's findings

General

1. There is a hierarchy between the criteria of Article 6(2)(a) of the Rome Convention (the place where the employee habitually carries

out his work) and Article 6(2)(b) (the employer's place of business). It is first necessary to examine whether the employee principally carries out his work within one single country. It is not until this examination had yielded a negative result that the secondary criterion of Article 6(2)(b) can come into play (§32-36).

2. The criterion of the country in which the work is habitually carried out must be given a broad interpretation. According to the ECJ's judgment in *Koelzsch* (case C-29/10), it refers to the place in which or from which the employee actually carries out his working activities and, in the absence of a centre of activities, to the place where he carries out the majority of his activities. Therefore, in the light of the nature of work in the maritime sector, such as that at issue in the main proceedings, the court seised must take account of all the factors which characterize the employee's activity and must, in particular, determine the State from which the employee carries out his transport tasks, receives instructions concerning his tasks and organises his work, and the place where his work tools are situated. If the place from which the employee carries out his transport tasks and also receives his instructions is always the same, that place is the place where he "habitually carries out his work" within the meaning of Article 6(2)(a) (§37-40).
3. The referring court asked the ECJ to rule on the interpretation of Article 6(2)(b). However, as is apparent from the above, the answer to the questions referred to the ECJ are only relevant in the event the national court cannot rule on the dispute before it under Article 6(2)(a). What follows below is therefore only relevant in that event (§42).

Questions 1 and 2

4. The referring court asks whether the concept of "the place of business through which the employee was engaged" within the meaning of Article 6(2)(b) refers to (i) the place of business which concluded the contract of employment or (ii) the place of business of the undertaking to which the employee is connected through his actual employment and, if so, whether that connection can follow from the fact that the employee must report regularly to and receive instructions from that undertaking (§ 43).
5. Since the criterion of the place of business of the undertaking which employs the worker is unrelated to the conditions under which the work is carried out, the fact that the undertaking is established in one place or another has no bearing on the determination of that place of business. Consequently, the referring court should not take factors relating to the performance of the work into account, but only those relating to the procedure for concluding the contract (such as the place of business which published the recruitment notice and that which carried out the recruitment interview), and it must endeavour to determine the real location of that place of business (§48-50).

Question 3

6. Must "the place of business through which he was engaged" fulfill some formal requirements, such as the possession of legal personality? No, the place of business need not have legal personality. The expression "place of business" covers any stable structure of an undertaking, such as an office, even if it has no legal personality. However, the undertaking must have a degree of permanence. The purely transitory presence in a State of an agent for the purpose of engaging employees cannot be regarded as constituting a place of business connecting the contract to that State. If, however, the same representative travels to a country in which the employee maintains a permanent establishment, that establishment can constitute a "place of business" within the meaning of Article 6(2)(b). Moreover, such a place of business must, in principle, belong to the undertaking which engages the employer, that is to say, forms an integral part of its structure (§53-57).

Question 4

7. Can the place of business of an undertaking other than that which is the employer be regarded as acting in that capacity even though the authority of the employer has not been transferred to that other undertaking? It is for the referring court to establish whether Naviglobe is the employer of the personnel engaged by Navimer. That court must, in particular, take into consideration all the objective factors enabling it to establish the actual situation which differs from that which appears from the terms of the contract. The absence of a transfer of authority from Navimer to Naviglobe to hire personnel is but one of the relevant factors in determining whether the employee was, in reality, engaged by a different company than that which is referred to as the employer. It is only where one of the two companies acted for the other that the place of business of the first could be regarded as belonging to the second for the purposes of applying the connecting criterion of Article 6(2)(b).

Ruling

1. Article 6(2) of the Rome Convention on the law applicable to contractual obligations [...] must be interpreted as meaning that the national court seised of the case must first establish whether the employee, in the performance of his contract, habitually carries out his work in the same country, which is the country in which or from which, in the light of all the factors which characterize that activity, the employee performs the main part of his obligations towards his employer.
2. In the case where the national court takes the view that it cannot rule on the dispute before it under Article 6(2)(a) of that convention, Article 6(2)(b) of the Rome Convention must be interpreted as follows:

- the concept of "the place of business through which the employee was engaged" must be understood as referring exclusively to the place of business which engaged the employee and not to that with which the employee is connected by his actual employment;
- the possession of legal personality does not constitute a requirement which must be fulfilled by the place of business of the employer within the meaning of that provision;
- the place of business of an undertaking other than that which is formally referred to as the employer, with which that undertaking has connections, may be classified as a 'place of business' if there are objective factors enabling an actual situation to be established which differs from that which appears from the terms of the contract, and even though the authority of the employer has not been formally transferred to that other undertaking.

Opinions

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

Facts

Ms Jansen worked as an employee of the *Nordrhein* provincial government on the basis of nine successive fixed-term contracts. Initially, the reason given for not employing her on a permanent

contract was that she was hired to replace permanent staff who were temporarily absent on account of parental leave, special leave or temporary working time reduction. However, her last contract (December 2005-June 2006) was justified by the temporary availability of funds pursuant to the provincial budget. When this last contract was not extended, Ms Jansen brought legal proceedings, applying for a declaratory judgment that her contract was permanent.

National proceedings

The court of first instance delivered a declaratory judgment as requested by Ms Jansen. The provincial government appealed. The appellate court referred four questions to the ECJ. Question 1(a) was whether, when assessing whether renewal of a fixed-term contract is justified by "objective reasons" within the meaning of Clause 5(1) (a) of the Framework Agreement annexed to Directive 1999/70, regard should be had exclusively to the situation at the time the contract was entered into without taking account of the number or duration of preceding fixed-term contracts. Question 1(b) was whether the reference in Clause 5(1) to the need to prevent abuse arising from the use of successive fixed-term contracts needs to be construed more strictly if a fixed-term contract has been preceded by numerous and/or lengthy fixed-term contracts. Question 2 was whether a Member State may provide that public sector employers may justify successive fixed-term contracts by budgetary constraints whereas private employers may not do so. Question 3(a) was whether the Framework Agreement allows successive fixed-term contracts to be justified by specific reasons, in particular restricting their use to a specified job and to specified conditions. If so, question 3(b) was whether this is also the case where the temporarily funded staff are charged with the normal duties of the staff they temporarily replace and where the temporary staff's activities are not connected to the specific duties of the person they temporarily replace. Alternatively (d), is the use of such temporary staff contrary to Clause 5(1), where in reality those staff are used to satisfy a permanent need? Question 4 was whether the "non-regression" Clause 8(3) of the Framework Agreement precludes introducing legislation aimed at transposing Directive 1999/70, where prior to that legislation there was no similar right to justify successive contracts on budgetary arguments (except in higher education).

Opinion

Question 1

1. The Member-States enjoy a broad margin of discretion both as to their choice of measures to combat abuse of successive fixed-term contracts and as to the means used to implement such measures. Moreover, the Framework Agreement fails to define the concept of "objective reasons". The ECJ has held that this concept must be defined taking into account the objective pursued by the Framework Agreement, which is to combat abuse. However, the ECJ has not yet ruled on the question of whether to take into account circumstances predating or postdating the last of a series of fixed-term contracts (§ 28-36).
2. The objective of combatting abuse cannot be achieved unless the concept of "objective reasons" is construed more strictly if that a fixed-term contract has been preceded by numerous fixed-term contracts or by fixed-term contracts with a lengthy total duration, particularly where the employee has performed work that is normal and permanent within the employer's business. In such a situation the employer needs to establish that it has made use of fixed-term contracts to satisfy a business need that is truly temporary and not in fact permanent. To this end the ECJ has ruled that national courts must examine the reality of the temporary need (see *Angelidaki* at § 103). Limiting the examination to the circumstances at the time the last of a series of fixed-term contracts is entered into would deprive Clause 5(1)(a) of its useful effect. The German government's argument that the authors of the Framework Agreement would surely have specified the nature of the objective reasons if they had considered it relevant, must therefore be rejected (§ 37-40).
3. Although the justifications listed in points b and c of Clause 5(1), namely a maximum total duration and a maximum number of renewals, are of equal value to the justification set out in point a (objective reasons), they are different in that they are directly applicable and specific (§ 41).
4. The notion of "objective reasons" must be interpreted in the light of all the relevant circumstances and in a purposive manner, focusing on the need to combat abuse (§ 42-45).

Question 2

5. Although the ECJ has accepted that a Member-State may penalise abuse of successive fixed-term contracts differently in the public and private sectors, it is not clear whether this case-law relates exclusively to Clause 5(2), which deals with the sanction, or also to Clause 5(1), which lists the possible types of justification (§ 47-50).
6. Clause 5(1) enjoins the Member-States to introduce certain measures "in a manner which takes account of the needs of specific sectors [in the German version: *bestimmter Branchen*] and/or categories of workers". The expressions "sector" and "*Branche*" refer to professional subdivisions, such as construction, banking, shipping, health, etc. and not to a public/private distinction (§ 51-55).
7. As recital Clause 6 makes clear, "employment contracts of an indefinite duration are the general form of employment relationships". Fixed-term contracts should be the exception, not the rule, and exceptions need to be construed restrictively (§ 56-57).
8. There is no relevant distinction between public sector employees and private sector employees. Moreover, allowing public employers to determine their budgetary rules in such a way as to allow them to conclude successive fixed-term contracts, risks making them abuse their own powers. This risk is particularly grave as it has been demonstrated that in Germany the percentage of workers on a fixed-term contract has increased in recent years (§ 58-65).

Question 3

9. An objective reason must be connected directly to the employee's activities. A purely formal criterion that fails to take into account objective factors relating to those activities invites abuse. The German criterion at issue in the main proceedings (auxiliary staff or, in German, "*Aushilfskraft*") is too vague. It does not allow a court to verify whether the renewal of a fixed-term contract is truly more appropriate than its conversion into a permanent contract (§ 66-71).
10. It may be noted that in the case of Ms Jansen, the last of her fixed-term contracts was justified, not by the need to replace an individual absent employee, but by the need to use funding that had become available in connection with the temporary absence of several employees for different reasons. Thus, the flexibility created by employing Ms Jansen on a fixed-term basis was utilised to satisfy permanent needs of the employer, not needs related to the specific nature of the employee's activities (§ 70-72).
11. The vagueness of the criterion used to justify Ms Jansen's fixed-term contract allows public sector employers to enter into such

contracts on the basis of internal considerations which they can themselves influence and which are not of a socio-political nature (§ 23-74).

12. The foregoing is reinforced by Clause 4, which prohibits discriminating against fixed-term workers (§ 75-77).

Question 4

13. Reduction in the level of protection offered to fixed-term workers under national law is allowed, provided (i) such a reduction is not linked to the transposition of the relevant directive (otherwise a Member State could abuse the transposition as a pretext for reducing protection) and (ii) it does not reduce the "general" level of protection. It is for the national court to determine whether these criteria have been satisfied in the case of Ms Jansen.

Proposed reply

1. Clause 5(1)(a) of the Framework Agreement must be interpreted as meaning that, when assessing the existence of an "objective reason", a national court may take into account the number of fixed-term contracts preceding the renewal of the contract in question as well as the total duration of anterior contracts.
2. Clause 5(1) does not allow distinguishing between the public and private sectors for the purpose of determining whether there is an "objective reason".
3. Clause 5(1) precludes a provision based on budgetary considerations of a nature that is too general to satisfy the ECJ's requirements in respect of "objective reasons".
4. A Member State that introduces a provision allowing fixed-term contracts to be entered into in the public sector purely for budgetary reasons violates Clause 8(3) if (i) it utilises the transposition of the Directive to justify such an introduction and (ii) that introduction causes a reduction in the general level of protection.

In the event the referring court finds that the national legislation is in violation of Clause 8(3), that does not create an obligation for that court to disapply its domestic law, merely to interpret it in a manner consistent with EU law.

PENDING CASES

Case C-266/11 (*Frank Frandsen – v – Cimber Air*), reference lodged by the Danish *Vestre Landsret* on 27 May 2011 (AGE DISCRIMINATION)

Is Directive 2000/78/EC to be interpreted as meaning that the prohibition on all forms of discrimination on grounds of age precludes national rules from upholding a collective agreement between an airline company and the trade organisation representing that company's pilots which provides for compulsory retirement at 60 years of age, when that provision, which applied also before the entry into force of the Directive and before the entry into force of the national implementing legislation, has as its purpose the protection of aviation safety on the basis of a general consideration that performance reduces with age, without a specific assessment of the individual pilot's performance, but such that the individual pilot may apply to be allowed to continue in his employment for a year at a time following approval by a committee made up of employer and employee representatives?

Case C-398/11 (*Thomas Hogan and others – v – Minister for Social and Family Affairs*), reference lodged by the High Court of Ireland on 27 July 2011 (INSOLVENCY PROTECTION)

Does Directive 2008/94 on the protection of employees in the event of the insolvency of their employer apply to the plaintiffs' situation, given that their loss of pension benefits is not, in Irish law, a debt against their employer? When assessing whether or not Ireland has complied with Article 8 of the Directive, which entitlements to the State contributory pension and to the occupational pension scheme should be taken into account?

For Article 8 of the Directive to apply, is it necessary to establish any causal link between the plaintiffs' loss of their pension benefits and the insolvency of their employer apart from the facts that (i) the pension scheme is under-funded as of the date of the employer's insolvency and (ii) the employer's insolvency means that the employer does not have the resources to contribute sufficient money to the pension scheme to enable the members' pension benefits to be satisfied in full (the employer being under no obligation to do so once the scheme is wound up)?

Do the measures adopted by Ireland fulfill the obligations imposed by the Directive, having regard to the "need for balanced economic and social development in the Community" referred to in Recital 3 of the Directive?

Does the economic situation at issue in this case constitute a sufficiently exceptional situation to justify a lower level of protection of the plaintiffs' interests than might otherwise have been required and if so, what is that lower level of protection?

Is the fact that the measures taken by the State subsequent to the *Robins* case have not brought about the result that the plaintiffs would receive in excess of 49% of the value of their accrued pension benefits under their occupational pension scheme in itself a serious breach of the State's obligation such as to entitle the plaintiffs to damages (i.e. without separately showing that the State's actions subsequent to the *Robins* judgment amounted to a grave and manifest disregard of the State's obligations under Article 8 of the Directive)?

Case C-401/11 (*Blanka Soukupová – v – Ministertvo zemědělství*), reference lodged by the Czech *Nejvyšší správní soud* on 28 July 2011 (SEX DISCRIMINATION)

May the concept of "normal retirement age" at the time of transfer of a farm under Article 11 of Regulation 1257/1999 on support for rural development from the European Agricultural Guidance and Guarantee Fund (EAGGF), be interpreted as "the age required for entitlement to a retirement pension" by a particular applicant under national legislation?

If the answer to the first question is in the affirmative, is it in accordance with EU law for "normal retirement age" at the time of transfer of a farm to be determined differently for individual applicants depending on their sex and the number of children they have brought up?

If the answer to the first question is in the negative, what criteria should the national court take into account when interpreting the concept of "normal retirement age" at the time of transfer of a farm under Article 11 of Regulation 1257/1999?

Case C-424/11 (*Wheels Common Investment Fund Trustees and others – v – HM Revenue and Customs*), reference lodged by the UK First-tier Tribunal (Tax Chamber) on 11 August 2011 (PENSIONS)

The referring court seeks guidance on the VAT-status of collective investment undertakings (as defined in Directive 85/611) in comparison with regular pension funds.

ECJ C-426/11 (*Mark Alemo-Herron and others – v – Parkwood Leisure Ltd*), reference lodged by the UK Supreme Court on 12 August 2011 (TRANSFER OF UNDERTAKINGS)

Where an employee has a contractual right as against the transferor to terms and conditions which are negotiated and agreed by a third party collective bargaining body from time to time, and such right is recognised under national law as dynamic rather than static in nature as between the employee and the transferor employer, does Article 3 of Directive 2011/23 read with the ECJ's ruling in *Werhof v Freeway Traffic Systems*:

- require that such right be protected and enforceable against the transferee; or
- entitle national courts to hold that such right is protected and enforceable against the transferee; or
- prohibit national courts from holding that such right is protected and enforceable against the transferee?

In circumstances where a Member State has fulfilled its obligations to implement the minimum requirements of Article 3 of Directive 2011/23 but the question arises whether the implementing measures are to be interpreted as going beyond those requirements in a way which is favourable to the protected employees by providing dynamic contractual rights as against the transferee, is it the case that the courts of the Member State are free to apply national law to the interpretation of the implementing legislation subject, always, to such interpretation not being contrary to Community law, or must some other approach to interpretation be adopted and, if so, what approach?
In the present case, there being no contention by the employer that the standing of the employees' dynamic right under national law to collectively agreed terms and conditions would amount to breach of that employer's rights under Article 11 of the European Convention on Human Rights and Fundamental Freedoms, is the national court free to apply the interpretation of TUPE contended for by the employees?

Case C-427/11 (*Margaret Kenny and others – v – Minister for Justice, Equality and Law Reform and others*), reference lodged by the High Court of Ireland on 16 August 2011 (SEX DISCRIMINATION)

In circumstances where there is *prima facie* indirect gender discrimination in pay, in breach of Article 141 (now Article 157 TFEU) and Council Directive 75/117/EEC, in order to establish objective justification, does the employer have to provide:

- justification in respect of the deployment of the comparators in the posts occupied by them;
- justification of the payment of a higher rate of pay to the comparators; or
- justification of the payment of a lower rate of pay to the complainants?

In circumstances where there is *prima facie* indirect gender discrimination in pay, in order to establish objective justification, does the employer have to provide justification in respect of:

- the specific comparators cited by the complainants and/or
- the generality of comparator posts?

Is objective justification established notwithstanding that such justification does not apply to the chosen comparators?
Did the Labour Court, as a matter of Community Law, err in accepting that the "interests of good industrial relations" could be taken into account in the determination of whether the employer could objectively justify the difference in pay?
In circumstances where there is *prima facie* indirect gender discrimination in pay, can objective justification be established by reliance on the industrial relations concerns of the respondent? Should such concerns have any relevance to an analysis of objectification?

Case C-443/11 (*Jeltes and others – v – UWV*), reference lodged by the Dutch *Rechtbank Amsterdam* on 29 August 2011 (SOCIAL SECURITY)

The questions concern the replacement of Regulation 1408/71 by Regulation 883/2004 in relation to unemployed frontier workers and their freedom to choose the Member State where they are registered as a jobseeker.

Case C-461/11 (*Ulf Kazimierz Radziejewski – v – Kronofogdemyndigheten in Stockholm*), reference logded by the Swedish *Stockholms tingsrätt* van 2 September 2011 (FREE MOVEMENT)

Can the requirement for Swedish residence in the Law on debt relief be regarded as being liable to prevent or deter a worker from leaving Sweden to exercise his right to freedom of movement and thus be regarded as running counter to the provision on the freedom of movement for workers within the Union provided for in Article 45 of the Treaty on the Functioning of the European Union?

Case C-462/11 (*Victor Cozman – v – Teatrul Minicipal Târgovişte*), reference lodged by the Romanian *Tribunalul Dâmboviţa* on 5 September 2011 (HUMAN RIGHTS)

Must Article 1 of the First Additional Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms be interpreted as allowing the salaries of staff paid from public funds to be reduced by 25%, pursuant to Article 1(1) of Law no 118/2010 laying down certain measures necessary to restore budgetary balance?
If the answer is in the affirmative, is entitlement to salary an absolute right which the State may not make subject to any limitations?

Case C-476/11 (*Glennie Kristensen – v – Experian A/S*), reference lodged by the Danish *Vestre Landsret* on 19 September 2011 (AGE DISCRIMINATION)

Must the exception in Article 6(2) of Directive 2000/78 concerning the determination of age limits for admission to occupational social security schemes be interpreted as authorisation for the Member States to be able generally to except occupational social security schemes from the prohibition in Article 2 of the Directive of direct or indirect discrimination on grounds of age in so far as that does not bring about discrimination on grounds of sex?
Must the exception in Article 6(2) of Directive 2000/78 concerning the determination of age limits for admission to occupational social security schemes be interpreted as not precluding a Member State from maintaining a legal situation in which an employer can pay, as part of pay, age-graded pension contributions, implying for example that the employer pays a pension contribution of 6% for employees under 35, 8% for employees from 35 to 44 and 10% for employees over 45, in so far as that does not bring about discrimination on grounds of sex?

Cases C-512 and C-513/11 (respectively, *Terveys – v – Terveyspalvelualan Liitto ry, Mehiläinen Oy* and *Ylemmät Toimihenkilöt YTN ry – v – Teknologiateollisuus ry, Nokia Siemens Networks Oy*), reference lodged by the Finnish *Työtuomioistuin* on 3 October 2011 (SEX DISCRIMINATION)

Do Directives 2006/54 and 92/85 preclude national provisions of a collective agreement, or the interpretation of those provisions, under which an employee moving from unpaid child-care leave to maternity leave is not paid remuneration during maternity leave in accordance with the collective agreement?

Case C-546/11 (*Erik Toftgaard – v – Indenrigs- og Sundhedsministeriet*), reference lodged by the Danish *Højesteret* on 26 October 2011 (AGE DISCRIMINATION)

Is Article 6(2) of Directive 2000/78 to be interpreted as meaning that Member States may provide only that the fixing of age limits for access or entitlement to benefits under occupational social security schemes does not constitute discrimination insofar as those social security schemes relate to retirement or invalidity benefits?
Is Article 6(2) to be interpreted as meaning that the possibility of fixing age limits concerns only access to the scheme, or is the provision to be interpreted as meaning that the possibility of fixing age limits also concerns entitlement to the payment of benefits under the scheme?
If question 1 is answered in the negative:
Can the expression "occupational social security schemes" in Article 6(2) include a scheme such as the '*rådighedsløn*' (availability pay) as referred to in section 32(1) of the Danish Law on Civil Servants (*Tjenestemandslov*), under which a civil servant may, as special protection in the event of redundancy as a result of the abolition of his post, retain his current salary for three years and continue to be credited for years of pensionable service, provided he remains available for assignment to another suitable post?
Is Article 6(1) of the Directive to be interpreted as meaning that it does not preclude a national provision such as section 32(4)(2) of the *Tjenestemandslov*, under which an availability salary is not paid to a civil servant who has reached the age at which the State retirement pension becomes payable, if his job has been abolished?

ECtHR COURT WATCH

SUMMARIES BY PAUL DIAMOND, BARRISTER (UK)

ECtHR 21 July 2011 *Heinisch – v – Germany (Application No. 28274/08) (FREE SPEECH/WHISTLEBLOWING); ECtHR 12 September 2011 Palomo Sanchez and Others – v – Spain* (Application No. 28955/06, 28957/06, 28959/06 and 28964/06) (Grand Chamber) (FREE SPEECH).

Introduction

The European Court of Human Rights (ECtHR) has recently considered the free speech rights of employees to be critical of their employers. This is a very contentious issue, ranging from the rights of "whistle-blowers" to the rights of trade unions to openly criticise their employer.

A particular issue in both cases was the right of employees to speak to the media because of a grievance with their employer. In the United Kingdom, many employers use confidentiality clauses or the implied duty of trust and confidence to prevent employees from speaking publically about a dispute or about their grievance. The interest of the media in a labour dispute can often be more damaging than the dispute itself and the employee can place pressure on an employer by drawing the attention of the public to the dispute.

In *Heinisch – v – Germany,* the ECtHR considered a "whistleblowing" case where the employee made a criminal complaint to the authorities and thereafter used the media to draw attention to the standards of care in old people's homes. The ECtHR disagreed with the decision of the German National Courts in holding that the employee had acted responsibly and there was a breach of Article 10. The ECtHR gave guidance to the national court on the correct approach to whistleblowing cases.

In *Palomo Sanchez – v – Spain*, the ECtHR considered the wider question of the extent of the free speech of an employee in the context of a labour dispute. Clearly, the employee's duty of good faith cannot imply an absolute duty of loyalty to an employer in which the interests of the employee (including rights to discuss public issues) are subjected to the interests of the employer, but equally clearly there must be limits to the rights of freedom of expression of an employee working for an employer and the need to maintain cordial relations that this implies. The ECtHR agreed with the decision of the Spanish Courts, finding that the dismissal of the employees did not violate any rights under the Convention.

Facts

In *Heinisch – v – Germany*, an employee made a complaint through her lawyers about criminal liability for the inadequate care of elderly citizens owing to lack of staff and a further complaint on account of fraud by her employers. The employee had previously complained about staff shortages. The criminal complaint was dismissed by the Public Prosecutors Office on 5 January 2005. On 19 January 2005, Ms Heinsich was dismissed with effect from 31 March.

However the complaint had a distinctive "political" feel: the trade union issued leaflets about the dismissal, and the dispute was reported on television and in the newspapers, including the allegation of fraud. The Applicant asked the Public Prosecutor to resume the criminal investigation, who again dismissed the complaint as unfounded on 26 May 2005.

On 3 August 2005, the employee succeeded before the Berlin Labour Court (*Arbeitsgericht*), which found that her dismissal was unreasonable under the Unfair Dismissal Act (*Kündigungsschutzgesetz*). On 28 March 2006, this decision was reversed by the Berlin Labour Court of Appeal (*Landesarbeitsgericht*) on the grounds that the conduct of the employee had been unreasonable. Further, the Public Prosecutor's Office decided that the criminal complaint was without substance and that the relationship between the employer and employee had completely broken down.

On 6 June 2007 the Federal Labour Court (*Bundesarbeitsgericht*) refused leave to appeal. On 12 December 2007 the German Constitutional Court refused to admit her constitutional complaint. On 9 June 2008 the employee lodged a complaint with the European Court of Human Rights.

In *Palomo Sanchez,* a number of deliverymen were involved in a protracted labour dispute with their employer. The deliverymen were engaged in a number of disputes over their right to be recognised as special salaried workers, which would have entitled them to cover by a certain social security regime. During a trial in 1995, a number of non-salaried delivery staff had testified against the applicant deliverymen in domestic Spanish proceedings. This giving of evidence by worker against co-workers caused relationships to deteriorate.

In 2001, the applicants established a trade union, the NAA (*Nueva alternative asamblearia*) to defend their interests. The NAA published a monthly newsletter and the March 2002 issue of the newsletter reported on the above decision of the Spanish courts.

However, the newsletter was written in strong and offensive imagery and language. The cover of the newsletter showed two identifiable employees of the company giving (or waiting to give) sexual favours to the director of the company; one of the individuals was on all fours under a desk where the director was sitting. The commentary of the newsletter is simply too offensive to reproduce here. Suffice to state, the newsletter was personally insulting.

On 3 June 2002, the employer dismissed the applicants on grounds of misconduct based on impugning the reputations of the employees on the cover of the magazine pursuant to Article 54(1) and (2)(c) of Labour Regulations No. 1/1995 of 24 March 1995. The reason for their dismissal was stated to be the content of the newsletter and not their membership of a trade union. The applicants commenced proceedings in the Spanish courts.

The Employment Tribunal (No. 17 of Barcelona) dismissed their claim on 8 November 2002; their appeal to the High Court of Justice of Catalonia was dismissed on 7 May 2003; and their appeal to the Supreme Court was dismissed on 11 March 2004.

A further *amparo* appeal [*this is an application for a remedy for the protection of constitutional rights*] was made to the Constitutional Court, which was rejected on 13 January 2006, on the basis that it failed to disclose a breach of Article 28 (freedom of expression) of the Spanish Constitution. An application was made on 13 July 2006 to the European Court of Human Rights which held, on 12 September 2011, that there was no breach of Article 10 of the Convention.

ECtHR's judgments in Heinisch and Palomo Sanchez

In *Heinisch – v – Germany*, the ECtHR considered the principles upon which an employee was entitled to the protection of Article 10 of the Convention in making a (unsubstantiated) criminal complaint and in making public a dispute using the criminal complaint to attract media interest.

The Court held that Article 10 applied to the workplace in general, and whilst recognising a higher duty of loyalty on public sector employees, the Court held that the State has a positive obligation to protect the right of freedom of expression of employees in the private sector.

First, the Court held that an employee should first make disclosure to his employer or other competent body prior to any public statement. The Court will examine whether an applicant *'had any other effective means of remedying the wrongdoing'* and the public interest in the disclosure in circumstances in which the employer is unresponsive. Second, the Court held that any information should be disclosed in good faith and it should be verified by the employee, to the extent possible, that the information is accurate and reliable. Thus, the 'motive' of the disclosure is relevant. Finally, the Court will consider any penalty imposed on the applicant as a consequence of the disclosure (noting that dismissal is the most severe sanction and likely to inhibit the free speech of other employees).

The Court disagreed with the decision of the German Courts' finding that the disclosure was made in good faith; the employer had failed to respond to previous complaints. The fact that the Public Prosecutor had discontinued the investigation was not decisive. The Court held:

"As regards the Government's submissions that the polemic formulation of the criminal complaint was evidence that the applicant's true motive was to denounce her employer and put pressure on him, the Court considers that even if the applicant allowed herself a certain degree of exaggeration and generalisation, her allegations were not entirely devoid of factual grounds and did not amount to a gratuitous personal attack on her employer but rather constituted a description of the serious shortcomings in the functioning of the nursing home."

In *Palomo Sanchez*, the ECtHR had to examine whether the balance struck by the Spanish labour courts between the applicants' freedom of expression under Article 10 ECHR on the one hand, and the rights of the employer to protect the reputation of its employees and maintain a cordial environment in the workplace on the other, was satisfactory, The main question addressed by the ECtHR was whether the national courts in Spain had correctly balanced the conflicting interests of the employer and employee.

The ECtHR dismissed the applicant's claim, the issue being the extent of freedom of expression of employees, rather than a trade union dispute. The ECtHR considered a number of comparative laws and recognised that *"disciplinary authority is one of the essential prerogatives of an employer"'* and upheld the employer's right to dismiss and discipline their employees (paragraph 29), but went on to find that *"the proportionality of a measure of dismissal in relation to the conduct of an employee concerned underlies all the legislation analysed"* (paragraph 30).

Thereafter, the Court made a traditional review of the Convention's jurisprudence on freedom of expression and a number of findings specific to the labour context. At paragraph 56, the ECtHR held that:

"The members of a trade union must be able to express to their employer the demands by which they seek to improve the situation ... expression may take the form of news sheets, pamphlets, publications"

The ECtHR relied on the *Advisory Opinion OC- 5/85193* of the *Inter American Court on Human Rights* in asserting this principle. Further, the Court held that a labour dispute was a matter of *"general interest"* as it engaged the interests of workers (paragraph 72).

However, the Court went on to hold that Article 10 does not guarantee unlimited freedom of expression and expressed concern at the need to protect the reputation of those who had been targeted in the trade union publication. Individuals who had not chosen a public life had a right to a heightened threshold of privacy.

Thus, the decision of the Spanish Courts was upheld.

Commentary

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

With respect to whistleblowing cases, the ECtHR has given guidelines on the procedures that are necessary before public disclosure can be made. However it is clear that the Court has given primacy to free speech over the employer's interests where the disclosure is made in good faith.

It would appear that an employee is entitled to express grievances to the wider public on the premise that a labour dispute is of *"general interest"*. This indicates that provided the dispute is genuine, the expression of the employee is responsible and accurate, and the media or public are interested in the dispute, the dismissal of an employee for speaking publically about a dispute could be a breach of Article 10 of the Convention. This right to raise the contents of a labour dispute by means of *"news sheets, pamphlets, publications"* means that the employees can determinedly seek general public interest.

However, if the employee unnecessarily damages the reputation of any individuals or co- workers (including the managing director) or of the reputation of company itself, the protection of the Convention is lost. This is a question for national courts.

In the case of *Fuentes Bobo – v – Spain (Application No. 39293/98)*, the applicant was dismissed for describing the Directors of the Spanish National Broadcasting agencies, whilst live on air on a radio show, as *"leeches" who "xxxx on workers"*. Mr Fuentes Bobo was dismissed and ultimately the European Court held that the dismissal was disproportionate and breached his Article 10 rights. This was because the comments were made in the context of a live radio debate in which Mr Fuentes Bobo was encouraged to endorse the views of others. It would appear that words used in the heat of the moment and in certain contexts are protected by Article 10 even if they are insulting and add little to the quality of the debate.

In considering the balance between the rights of the employer and the employee a court would need to apply the following tests. First, the need for any restriction on freedom of expression must be *"established convincingly"* and any interference with that freedom must

be proportionate to this need (*Janowski – v – Poland, Application No. 25716/94)*. Secondly, the ECtHR will give the national court a *margin of appreciation* and this is dependent on the severity of the sanction imposed on the employee (*Malisiewicz-Gasior – v – Poland, Application No.43797/98)*. Thirdly, the ECtHR *"will have particular regard to the words used [...] the context in which they were made public and the case as a whole" (Fuentes Bobo – v – Spain (Application No. 39293/98)* and this includes whether the insulting words are used in the context of discussion of matters of public concern or in a private disagreement (*Janowski – v – Poland* and *Malisiewicz-Gasior – v – Poland)*. Fourthly, in the context of religious opinions and beliefs it is legitimate to *"'include an obligation to avoid as far as possible expressions that are gratuitously offensive to others [...] and which [...] do not contribute to any form of public debate capable of furthering progress in human affairs"* (*Gunduz – v – Turkey (Application No.35071/97).* Fifthly, in whistleblowing cases an additional hurdle must be crossed, in that a complaint must be made first to the employer and/or competent authority and the employer must have been unresponsive.

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8. Paid leave

10 September 2009, C-277/08 (*Pereda*): legislation that prevents an employee, who was unable to take up paid leave on account of sickness, from taking it up later is not compatible with Directive 2003/88 (EELC 2009-2).

15 September 2011, C-155/10 (*Williams*): during annual leave an employee is entitled to all components of his remuneration linked to his work or relating to his personal and professional status (EELC 2011-3).

22 November 2011, C-214/10 (*Schulte*): Member States may limit carry-over period for long-term disablement to 15 months.

9. Health and safety, working time

7 October 2010, C-224/09 (*Nussbaumer*): Italian law exempting the construction of private homes from certain safety requirements not compatible with Directive 92/57 (EELC 2010-4).

14 October 2010, C-243/09 (*Fuss*): Directive 2003/88 precludes changing worker's position because he insists on compliance with working hours rules (EELC 2010-5).

14 October 2010, C-428/09 (*Solidaires Isère*): educators fall within scope of derogation from working time rules provided they are adequately protected (EELC 2010-5).

21 October 2010, C-227/09 (*Accardo*): dispute about weekly day of rest for police officers; was Italian collective agreement a transposition of Directive 2003/88? (EELC 2010-4 and EELC 2011-1).

4 March 2011, C-258/10 (*Grigore*): time during which a worker, even though not actively employed, is responsible qualifies as working time under Directive 2003/88 (EELC 2011-2).

7 April 2011, C-519/09 (*May*): "worker" within meaning of Directive 2003/88 includes employer of public authority in field of social insurance (EELC 2011-2).

19 May 2011, C-256 and 261/10 (*Fernández*): Spanish law re noise protection in breach of Directive 2003/10 (EELC 2011-2).

7 April 2011, C-305/10 (*Commission – v – Luxembourg*) re failure to transpose Directive 2005/47 on railway services.

10. Free movement, social insurance

10 September 2009, C-269/07 (*Commission – v – Germany*): tax advantage exclusively for residents of Germany in breach of Regulation 1612/68 (EELC 2009-2).

1 October 2009, C-3/08 (*Leyman*): Belgian social insurance rules in respect of disability benefits, although in line with Regulation 1408/71, not compatible with principle of free movement (EELC 2009-2).

1 October 2009, C-219/08 (*Commission – v – Belgium*): Belgian work permit requirement for non-EU nationals employed in another Member State not incompatible with the principle of free provision of services (EELC 2009-2).

10 December 2009, C-345/08 (*Peśla*) dealing with German rule requiring foreign legal trainees to have same level of legal knowledge as German nationals (EELC 2010-3).

4 February 2010, C-14/09 (*Hava Genc*): concept of "worker" in Decision 1/80 of the Association Council of the EEC-Turkey Association has autonomous meaning (EELC 2010-2).

16 March 2010, C-325/08 (*Olympique Lyon*): penalty for not signing professional football contract with club that paid for training must be related to cost of training (EELC 2010-3).

15 April 2010, C-542/08 (*Barth*): Austrian time-bar for applying to have foreign service recognised for pension purposes compatible with principle of free movement (EELC 2010-3).

15 July 2010, C-271/08 (*Commission – v – Germany*): the parties to a collective agreement requiring pensions to be insured with approved insurance companies should have issued a European call for tenders (EELC 2010-4).

14 October 2010, C-345/09 (*Van Delft*) deals with health insurance of pensioners residing abroad (EELC 2010-5).

10 February 2011, C-307-309/09 (*Vicoplus*): Articles 56-57 TFEU allow Member State to require work permit for Polish workers hired out during transitional period (EELC 2011-1).

10 March 2011, C-379/09 (*Casteels*): Article 48 TFEU re social security and free movement lacks horizontal direct effect; pension scheme that fails to take into account service years in different Member States and treats transfer to another State as a voluntary termination of employment not compatible with Article 45 TFEU (EELC 2011-2).

30 June 2011, C-388/09 (*Da Silva Martins*) re German optional care insurance for person who moved to Portugal following retirement from job in Germany (EELC 2011-3).

15 September 2011, C-240/10 (*Schultz*) re tax rate in relation to free movement.

15 November 2011, C-256/11 (*Dereci*) re the right of third country nationals married to an EU citizen to reside in the EU.

11. Parental leave

22 October 2009, C-116/08 (*Meerts*): Framework Agreement precludes Belgian legislation relating severance compensation to temporarily reduced salary (EELC 2010-1).

16 September 2010, C-149/10 (*Chatzi*): Directive 97/75 does not require parents of twins to be awarded double parental leave, but they must receive treatment that takes account of their needs (EELC 2010-4).

12. Collective redundancies, insolvency

10 December 2009, C-323/08 (*Rodríquez Mayor*): Spanish rules on severance compensation in the event of the employer's death not at odds with Directive 98/59 (EELC 2010-2).

10 February 2011, C-30/10 (*Andersson*): Directive 2008/94 allows exclusion of (part-)owner of business (EELC 2011-1).

3 March 2011, C-235-239/10 (*Claes*): Luxembourg law allowing immediate dismissal following judicial winding up without consulting staff etc. not compatible with Directive 98/59 (EELC 2011-1).

10 March 2011, C-477/09 (*Defossez*): which guarantee institution must pay where worker is employed outside his home country? (EELC 2011-1).

17 November 2011, C-435/10 (*Van Ardennen*): Dutch law obligating employees of insolvent employer to register as job seekers not compatible with Directive 80/987.

13. Appliable law, forum

15 July 2010, C-74/09 (*Bâtiments et Ponts*): Belgian requirement for bidders to register tax clearance with domestic committee not compatible with public procurement Directive 93/37 (EELC 2010-4).

15 March 2011, C-29/10 (*Koelzsch*): where worker works in more than one Member State, the State in which he "habitually" works is that in which he performs the greater part of his duties (EELC 2011-1).

15 December 2011, C-384/10 (*Voogsgeerd*): where does an employee "habitually" carry out his work and what is the place of business through which the employee was engaged?