EELC

EUROPEAN EMPLOYMENT LAW CASES

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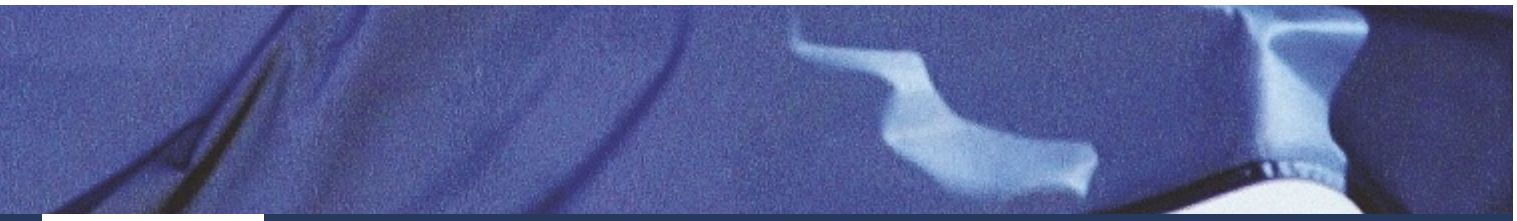
UK: disability adjustment too expensive

Germany: cross-border transfer to Switzerland

France: parent company liable as "co-employer"

Denmark: age may play small role in rejection

Belgium: posted workers benefit from local law



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Editors
Peter C. Vas Nunes (NL)
Deborah Ishihara (UK)

Contact for material
Peter C. Vas Nunes
BarentsKrans
P.O. Box 30457
2500 GL The Hague
The Netherlands
Tel: +3170 3760685
email: vasnunes@barentskrans.nl

Design
SD Communicatie (IZI publish)

For further details please email
eelc@sdu.nl

Advertising
To inquire please call +31703789850 or email:
eelc@sdu.nl

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Sdu UITGEVERS

INTRODUCTION

This edition of EELC should reach you just before the annual EELA conference in Dublin, where the following topics are on the programme:

- developments in data protection law
- challenges facing the new EU Member States
- relationship between confidentiality/non-competition/non-solicitation and free movement/EU competition law
- religious discrimination
- ECJ update
- transfer of undertakings and non-transferable rights
- implementation of Temporary Agency Work Directive 2008/104
- disability discrimination
- financial sector remuneration

Many of these topics are also addressed in this issue of EELC, which contains several case reports that should be of interest to many employment law specialists around Europe, such as:

- an English case that explores the limits of the employers' obligation to accommodate disabled employees
- a German case where the court accepted cross-border transfer of undertakings
- a French case illustrating the risk for foreign parent companies of meddling in the business operation of its French subsidiaries
- a Danish case which raises the difficult question of whether a decision, in this case the decision to reject a job application, is discriminatory if the principal reason for the decision has nothing to do with discrimination but a discriminatory ground played an accessory role
- a Belgian case where a manager posted from Canada was able to benefit from local dismissal law.

Peter Vas Nunes, editor

2012/1

Cross-border transfer of undertaking from Germany to Switzerland (GE)

CONTRIBUTOR PAUL SCHREINER*

Summary
The cross-border relocation of a German establishment to a foreign country can constitute a transfer of undertaking according to section 613a of the German Civil Code.

Facts
The plaintiff was employed with the defendant, a German subsidiary of an international company. He worked in an establishment consisting of two separate, organizationally independent departments. On 22 October the defendant's managing director informed the employees that one of these departments – the one in which the plaintiff worked - was being closed and the employees' contracts would therefore be terminated. On 24 October the employer terminated the contracts of the plaintiff and 19 other employees working in that department. On the same day the plaintiff and ten of his colleagues received an offer to enter into an employment contract with another company in the group, in Switzerland, located about 60 kilometers from the German company's premises. Six employees accepted the offer, but the plaintiff and four other employees rejected it.

Subsequently, the defendant sold the department's equipment, machinery and inventory to the Swiss company, which also took over the customer lists and continued the production of existing orders. The customers were informed that their contracts had been taken over by the Swiss company.

The plaintiff contested his dismissal with the argument that the department in which he was employed had not been closed but was the subject of a transfer of undertaking, that this transfer constituted the grounds for his dismissal and that therefore his dismissal was invalid and void pursuant to section 613a of the German Civil Code, which is the German transposition of the Acquired Rights Directive. The local labour court and the Higher Labour Court followed this argument and decided that the termination was invalid.

Judgment
The German Federal Labour Court (*Bundesarbeitsgericht*, the "BAG") upheld the decisions of the lower instance courts and decided that the termination was invalid. It began by rejecting the defendant's argument that the termination of the plaintiff's employment was justified by operational reasons, namely the closure of the department in which the plaintiff worked. The BAG, in accordance with its own longstanding case law, agreed that the closure of a business can be a valid reason for terminating an employment contract, but it noted that not every discontinuation of production qualifies as a closure. The closure of an establishment is defined as the termination of the productive collaboration between the employee and the employer by reason of a final and binding decision of the employer to cease the economic activity. A decision to cease an activity does not exist if the employer simply wants to sell the economic activity. Such a situation is considered to constitute the transfer of an undertaking, not the closure of an establishment - provided the entity's identity is retained.

The court found that the situation at hand qualified as a transfer of undertaking and not as a closure, mainly based on the reasoning that the main tangible and intangible assets had been sold and that the customer relations and production methods were continuing.

The next step in the court's reasoning was that the distance between the transferor's premises in Germany and those in Switzerland was approximately 60 kilometers. Thus, the employees were able to reach the new location by car within an hour. The court held that this relatively short distance between both facilities did not prevent there being a transfer of undertaking.

Finally, the court had to decide whether or not these arguments were applicable to the case at hand, given that a cross-border transfer occurred. The court answered this question affirmatively, holding that a transfer of undertaking can also occur in a cross-border situation. The court reasoned that the decisive question, namely whether the transaction qualified as a closure or as a transfer of undertaking, should be decided by applying German law. Since the place of work, as provided in the employment contract, was Germany and the work had actually been performed in Germany, the relationship between employer and employee was governed by German law. The fact that the assets were sold to a company outside Germany has no influence on the legal position in this respect even if it causes a transfer of undertaking, because a transfer, of itself, does not cause a change in the place of work. The sole consequence of a transfer of undertaking is a change to the employer: in all other respects the employment contract remains as it is. Consequently the question of whether the termination was a valid closure - or invalid because it was in fact a transfer of undertaking – was a matter that should properly be determined under German law.

Since from a German point of view the employer could not demonstrate that a closure of the establishment had occurred, the termination was declared void. The court did not decide whether the plaintiff also had a salary claim against his new Swiss employer, since the plaintiff had not brought such a claim.

Commentary
With this judgment, the BAG continues in the same vein as previous case law, essentially ruling that a discontinuation of production and the sale of all tangible and intangible assets to another entity leads to a transfer of undertaking and not to the closure of an establishment.

I concur with the BAG that the question "transfer of undertakings – v – closure" needed to be answered on the basis of German law, since all of the decisive facts took place in Germany. The fact that the employer did not take a final and binding decision to give up the economic activity, but chose instead to sell the assets, was – correctly – the decisive factor in determining that the dismissal was invalid.

The BAG did not put much emphasis on whether a cross-border transfer of undertaking is possible. It merely addressed the issue of whether the distance between the locations prevented it from qualifying as a transfer of undertaking (as it had done in older case law, e.g. in case 8 AZR 335/99, where a distance of one hundred kilometers was found to be too far).

Unfortunately, the BAG did not have to explain the consequences of this decision as regards to possible claims against the Swiss transferee, because the latter was not the subject of legal action. As already mentioned, the plaintiff did not want to work in Switzerland and he rejected the Swiss transferee's offer to work there. In *obiter dicta* however, the BAG did explain that the transfer of undertaking could lead to Swiss law becoming applicable, in which case the plaintiff could face a reduction of his rights as an employee.

I think this is only partly true, because the decisive factor for the governing law is that of the *locus labori*: the place of work. The mere transfer of an undertaking does not change the place of work, merely the identity of the employer. Only if the employee chooses to follow the assets or is forced to do so by a so-called *Änderungskündigung* (a German legal concept under which an employer can force an employee to choose between accepting a change in his terms of employment or losing his job), does the place of work change, in which case, as the BAG rightly stated, the foreign law becomes exclusively applicable and the consequences of the transfer of undertaking become subject to that foreign law.

Further, my view is that the governing law and the rights usually derived from the applicability of a certain law do not transfer as a result of a TOU. In addition, in non-cross-border cases a TOU might lead to a situation in which different legal rules apply to the employment. Take the following example. Let us assume that a company is split up into different entities and establishments. Before the TOU the establishment had 15 employees, whereas after the split one establishment has eight and the other seven employees. In such a situation it is undisputed in Germany that the Dismissal Protection Act (*Kündigungsschutzgesetz*) only applies before the TOU, because there need to be at least ten employees working in an establishment for the Act to become applicable. After the transfer this minimum of employees would no longer be reached by either establishment.

In a cross-border situation, the consequences would be the same in terms of the applicability of any given law: the rights under that law would not transfer with the employment but would terminate at the moment the transfer takes place.

Editorial note

See EELC 2011/3 for an English case of cross-border TUPE.

Comments from other jurisdictions

Austria (Martin Risak): Cross-border transfers often involve a change in the place of work of the employees concerned and therefore result in a change to the applicable law, i.e. the law governing the employment relationship. Though no jurisprudence exists in Austria on this point, the prevailing opinion holds that the law of the country of the transferor governs the question of whether a transfer takes place and the law of the country of the transferee governs the effects of the transfer. They should not differ too much within the EU as the national legal provisions are all based on Directive 2001/23/EC, but it becomes more complicated if one of the countries involved is not a member state. If no change to the place of work takes place (especially if the applicable law and/or employment contract does not provide for such a change) the law of the transferor continues to apply.

Czech Republic (Nataša Randlová): In our opinion the case at hand is important, because in the Czech Republic we do not have any judgments on cross-border transfers of undertakings. Moreover, cross-border transfers of undertakings are not expressly regulated in the applicable law of the Czech Republic. So, for the moment, we can only be guided by judgments of other jurisdictions.

We agree with the opinion from the Netherlands given below that the importance of this judgment is also to do with the fact that it considers the distance between the transferor's place of business and that of the transferee to be one of the decisive factors in determining whether or not a transfer of undertaking has occurred.

The Netherlands (Peter Vas Nunes): Judgments on cross-border transfers of undertakings ("TOUs") are rare. Judgments by the highest courts are rarer. For this reason alone, this judgment by the BAG is important. There are also other reasons. One is that the BAG seems to hold the view that if the distance between the transferor's place of business and that of the transferee exceeds a certain number of kilometers (100?), there is no TOU. Paul Schreiner tells me that the reasoning behind this is that the further away a business relocates the more likely it is to lose its identity. I find this reasoning strange and heartily concur with Paul Schreiner's observation that a mere TOU does not alter the employee's place of work - only the identity of the employer. What this means is that, according to EU/German law, the plaintiff in this case became an employee of the Swiss transferee, retaining his place of work in Germany. Obviously, if the Swiss company had no use for an employee in Germany, it might well have dismissed the plaintiff for an ETO reason. That, however, does not alter the fact that the Swiss transferee had become the plaintiff's employer.

United Kingdom (Bethan Carney): A recent UK case reported in issue 2011/1 of EELC also found that there could be a cross-border transfer of undertaking (*Holis Metal Industries Ltd – v - (1) GMB (2) Newell Ltd* UKEAT/0171/07). In this case, part of a UK business was sold to a company based in Israel. Employees working in the affected part of the business brought claims for a failure by the transferor and transferee to consult them about the transfer. The transferee (Holis) applied for the claims to be struck out on the grounds that they had no reasonable prospect of success because TUPE did not apply where a business was being transferred outside the UK. The Employment Tribunal refused to strike out the claims and the Employment Appeal Tribunal (EAT) dismissed Holis's appeal. The EAT held that, as a matter of principle, there could be a transfer of an undertaking where a business situated immediately before the transfer in the UK is transferred overseas. It also held that it would make no difference if the business was transferred to within or outside the European Union. Unlike the BAG, the EAT did not see the distance between the transferor's and transferee's locations as having any bearing on the issue of whether or not there would be a transfer of an undertaking.

If this case had happened in the UK, the dismissal would still have been effective because there is no real concept of an invalid dismissal in the UK (although it is sometimes possible for an employee to obtain an order for re-instatement or reengagement following a dismissal). However, the employee would have had a potential claim for unfair dismissal. Dismissals for a reason connected with a transfer of an undertaking are automatically unfair unless there is an economic, technical or organisational reason entailing a change in the workforce (ETO reason). If the employee was automatically unfairly dismissed by the transferor, liability for the claim would transfer to the transferee. There is some debate about whether or not a relocation, such as this one, can amount to an ETO reason entailing a change in the workforce. A "change in the workforce" has been held to mean a change in the

number or the function of the employees. In one first instance decision, an Employment Tribunal held that a change in location on its own was not an ETO reason because it did not "entail a change in the workforce". (*Tapere – v - South London and Maudsley NHS Trust ET/2329562/07)*. There have not been any higher court decisions on this issue. In any event, the reason for the dismissal was the transferee's reason (because it wanted production to take place in Switzerland rather than Germany). Therefore, in order to be able to rely on the ETO exception in the UK, the transferee should have carried out the dismissals instead of the transferor.

Subject: Transfer of undertaking
Parties: not published
Court: *Bundesarbeitsgericht* (Federal Labour Court)
Date: 26 May 2011
Case number: 8 AZR 37/10
Hardcopy publication: NZA 2011, 1143
Internet-publication: www.bundesarbeitsgericht.de → Entscheidungen → case number

* Paul Schreiner is a partner with Luther Rechtsanwaltgesellschaft in Essen, paul.schreiner@luther-lawfirm.com.

2012/2

One company cannot transfer staff to another against their will in the absence of a transfer of undertaking (CZ)

CONTRIBUTOR: ROMANA KALETOVÁ*

Summary
An employment transfer may only take place if there is a legal basis for it. Provision for a transfer of tasks or activities (or part of them) from one employer to another - which is a legal basis for employment transfer under the Labour Code - must be made in the contract or in another legal act, or it must consist of another legal fact. In this case, a contract between two employers stating that employees would be transferred was held not to be sufficient legal grounds for a transfer and, as such, the transfer was invalid.

Facts
Employer A was a joint-stock company providing communication and technical services. Employer B was also a joint-stock company in the technical services market, providing services to the building industry relating to security systems and health and safety at work.
Employer A concluded an agreement on providing activities and services (the "Agreement") with Employer B. The Agreement concerned the operation of security systems and the protection of the health and safety of staff and property. One part of the Agreement made provision for the transfer of rights and obligations arising from employment relationships from Employer A to Employer B. Essentially, they agreed that the employment rights and obligations of specified employees would be transferred to the provider of the services (Employer B). However, the Agreement provided that the specific services to be provided by Employer B to Employer A would be specified in individual orders.

After the transfer, the employment relationships of those who transferred from Employer A were either altered to the detriment of the employees or terminated by Employer B by reason of redundancy. The employees considered the employment transfer to have been invalid because of their diminished rights and, on 21 January 2008, they filed a claim against Employer A for having transferred them. They argued that the Agreement did not specify the activities and services to be transferred from Employer A to Employer B. Hence, the employees should not have transferred to Employer B. They claimed for reinstatement with Employer A.

The court of first instance found in favour of Employer A, on the basis that the employment transfer had been carried out pursuant to the Agreement, which contained certain provisions relating to the transfer of part of the services. The court found the Agreement was valid and therefore that the transfer of the employees to Employer B was also valid. In consequence, the employees had no entitlement *vis-a-vis* Employer A arising from the original employment relationship.

The court of second instance upheld the decision. It found that the crucial element was that not only were some of the tasks and activities being transferred but, simultaneously, the employees who performed them were also transferred. The Agreement remained operative and Employer B continued to perform the activities transferred to it. Therefore, the employees had been transferred to Employer B. If the employment relationships of these employees with Employer B were terminated, the court would have no power to impose on Employer A an obligation to re-employ the employees in their original jobs.

One of the employees filed an extraordinary appeal to the Supreme Court arguing that under the Agreement it was not possible to conclude which activities had been transferred.

Judgment
The transfer of undertakings in the Czech Republic is subject to Directive 2001/23, as transposed by the Czech Labour Code.

The Supreme Court's starting point was that the transfer of tasks and/or activities from one employer to another constitutes a legal basis for the transfer of rights and obligations of employees. Indeed, in accordance with the Directive, where the conditions for a transfer are satisfied, the transfer of rights and obligations is automatic under Czech law. Czech law provides for broader conditions for a transfer than the Directive, i.e. transfer occurs in any case involving the transfer of tasks and activities to another employer. Thus, for these purposes, the tasks or activities of the employer means, in particular, tasks performed on behalf of the employer and for which it was responsible, related to provision for production and the provision of services, along with similar activities performed either on the premises intended for them or where they were usually performed . As explained below, the Supreme Court considered that it was not proven that these conditions had been fulfilled in the case at hand.

In accordance with applicable law, rights and obligations arising from employment relationships may transfer only where there is a legal

act (contract) or other legal fact providing for transfer to another employer. Any legal fact which, in effect, transfers production, services or similar activities (whether or not ownership changes) to another employer, provides legal grounds for a transfer of the employer's tasks or activities to another employer. In addition, for a transfer to be effective, the employer to which the production, services or similar activities are transferred must have the capacity as an employer to continue to perform those tasks and/or activities (or similar ones) that were performed by the original employer. If the conditions stipulated by the Labour Code are met, the consent of the transferred employees is not required.

No transfer of rights and obligations other than those provided for by the Labour Code or other legal regulations is possible. Any agreement between two employers concerning the transfer of rights and obligations arising from the employment relationships which does not constitute a legal basis for transfer is invalid according to the Supreme Court's decision.

In the Supreme Court´s view, the purpose of the Agreement was to define the process by which services could be ordered and provided between the contractual parties, and not to transfer tasks and/or activities from one employer to another. Even though the Agreement made mention of the transfer of certain tasks and activities connected with the provision of services, none of the individual clauses of the Agreement referred to the transfer of tasks and activities in the way that was subsequently argued by the employers.

Unfortunately, the way in which the Supreme Court arrived at this decision was not explained in any more detail, but it concluded that the Agreement did not constitute legal grounds for the transfer of tasks and activities and it reversed the lower courts' decisions, stating that the decisions had been based on an incorrect legal assessment of the case. The case will now be heard afresh in a lower court.

Commentary

The Supreme Court's ruling was that the Agreement did not specifically provide for a transfer of tasks and/or activities and did not constitute sufficient legal basis for the transfer of employees. It will now be for the lower courts to assess whether any other legal basis that Employer A and Employer B claim existed for the transfer of tasks and activities, did, in fact, exist. In doing so, it should be noted that the lower courts will be bound by the legal opinion of the Supreme Court. If they find no grounds, they must rule that the employees should continue to be employed by Employer A.

Comments from other jurisdictions

The Netherlands (Peter Vas Nunes): What this judgment seems to say is simply (and to my mind logically) that employees cannot transfer against their will as a result of an agreement between their employer and a third party unless the requirements for a transfer of undertaking, in this case a transfer of activities, have been satisfied.

Subject: Transfer of rights and obligations from an employment relationship
Parties: S.D. and others – v – Telefónica Czech Republic, a.s.
Court: The Supreme Court of the Czech Republic
Date: 22 November 2011
Case number: 21 Cdo 1840/2010
Hard copy publication: -
Internet publication: http://www.nsoud.cz/

* Romana Kaletová is a lawyer with the Prague firm of Randl Partners, kaletova@randls.com.

2012/3

Age was not a factor (DK)

CONTRIBUTOR MARIANN NORRBOM*

Summary
A 55-year-old temp applied for a vacant permanent position in her department. When the employer decided not to consider her for the position, the temp was convinced it was because of her age. The employer explained that the decision was based on a lack of personal qualities. The Supreme Court agreed with the employer and, accordingly, did not find that the principle of equal treatment had been breached.

Facts
The Danish Anti-Discrimination Act prohibits employers from, among other things, discriminating against applicants for a vacancy on grounds of age. Under the Act, there is a shared burden of proof in such matters, as per Article 10 of Directive 2000/78. This means that the employee or applicant must establish facts from which it may be presumed that there has been discrimination. If successful, the burden of proof shifts and it will be for the employer to prove that the principle of equal treatment has not been breached.

The plaintiff in this case was a 55-year-old temp with a position in a Danish municipality. When there was an opening for a permanent position, she decided to apply. It was of great importance to the municipality that the new employee should be customer-service oriented, because the work involved contact with the general public. However, the municipality did not find that the temp's personal qualities were as good as those of the other applicants. She was therefore told that she would not be taken into consideration for the position.

When the temp asked for a written explanation of her non-appointment, the municipality wrote that the decision not to offer her the position was based on an assessment of her personal and professional qualities. However, it added that it was necessary to take into account the "coming generational change" in the department. The temp interpreted this as meaning that her age was the real reason for her non-appointment. She brought proceedings.

The court of first instance and the appellate court accepted that there was sufficient *prima facie* evidence to shift the burden of proof to the municipality, which then needed to provide evidence that it had not discriminated. In the course of the proceedings five witnesses were heard, namely the temp, her manager, her former manager, an HR advisor and a co-worker. Based on their testimony, the court of first instance and the appellate court both found in favour of the municipality.

The temp was granted leave to appeal to the Supreme Court.

Judgment
In assessing whether the employer had discharged the burden of proof, the Supreme Court attached great importance to the statements of the witnesses. They provided explanations of the temp's personal qualities to enable the employer to prove that her lack of personal qualifications was the reason for the non-appointment. The witnesses also confirmed that the temp and her manager had already discussed the decision not to take the plaintiff into consideration for the position **before** the written explanation had been drafted. Both the temp and the manager explained that the manager had in fact stated that age had nothing to do with the non-appointment. The remaining part of the written explanation – focusing on the temp's personal qualities – also indicated that the temp's age was not a factor. Furthermore, other representatives of the employer had explained that personal qualities were an important factor when finding the right candidate for the vacancy.

On these grounds, the Supreme Court found that the municipality had discharged the burden of proof, because it had proved that the decision not to appoint the 55-year-old temp was based on the fact that she did not have the personal qualities required for the position. Accordingly, the Supreme Court found in favour of the municipality.

Commentary
Danish case law on the principle of equal treatment shows that it can be very difficult for an employer to satisfy the burden of proof once it has shifted. In this case, the employer was furthermore faced with the challenge that the only evidence consisted of the statements given by the persons involved.

The fact that the Supreme Court agreed with the employer illustrates that it is possible for an employer to prove that no discrimination has taken place even though there is written documentation suggesting that the employee's age was a factor in the rejection. So even though a heavy burden of proof often rests on the employer in discrimination cases, it is possible – by means of thorough and reliable witness statements – to prove that no discrimination has taken place.

Comments from other jurisdictions
Germany (Paul Schreiner): In general, I share the view of Peter Vas Nunes printed below, but would like to add some specifics of the German case law. From the German point of view it does not really matter whether the discriminatory motive was the only one or whether it was one of many motives. If the employer had at least one discriminatory motive to turn down the application, he is liable for damages to the applicant. The question is how these damages are to be calculated and on which basis they are granted. German law distinguishes between claims for material damages or losses resulting from discrimination and immaterial damages resulting from infringement of the applicant's personal rights. In the case at hand therefore a court would have had to evaluate whether or not the applicant would have got a job in the absence of the discrimination. Only in this case material damages could be awarded. Since the employer apparently proved that there were different other, legitimate motives for the rejection, it is to be assumed that the applicant would not have been employed even without the discriminatory motive. As for immaterial damages, however, a claim is definitely possible. The rejection of the application showed that it was based, , on age. Therefore, the employer under German law would need to show that the use of the criterion age was justified. In the case at hand the defendant had argued that age was not a relevant criterion, therefore there was hardly a justification for using this criterion.

The Netherlands (Peter Vas Nunes): Suppose an employer turns down a job applicant for two reasons: you lack the required qualities and you are pregnant. I doubt whether such an employer would get away with his action in any European jurisdiction, even if it manages to prove beyond all doubt that it would still have rejected the application if the candidate had not been pregnant. I see no reason why this should be different where a job applicant is rejected for 99 non-discriminatory

reasons and one discriminatory reason. In other words, even if a decision not to hire (or to dismiss, not promote, etc.) is tainted even slightly by discrimination, it is still discriminatory. The fact that the penalty may differ depending on the likelihood that the application would have been turned down in the absence of the discrimination, is another matter. The principle is the same.

In the Danish case reported above, as I understood it, the municipality managed to prove (1) that the applicant lacked essential qualities and (2) that this was the reason for the non-appointment. The municipality did not prove that the applicant's age played no role whatsoever in the process that led to its decision. It was merely proven that the applicant's manager had stated that age had played no role.

I expect that the Dutch Equal Treatment Commission, and perhaps the courts as well, would have been less lenient on the municipality.

United Kingdom (Bethan Carney): In the UK, the burden of proof would shift to the employer to show that it had not discriminated if there are facts from which the tribunal could decide that there had been discrimination in the absence of any other explanation. In other words the claimant must show a *prima facie* case of discrimination in order for the burden of proof to change to the employer. It seems likely that a tribunal would shift the burden of proof to the employer in these circumstances, given the express mention of an age-related factor in the written explanation for the non-appointment. Once the burden of proof has shifted, the employer must prove that there was no discrimination by providing an "adequate explanation" for the facts shown in the employee's *prima facie* case. "Adequate explanation" means that the employer's reasons for acting in the way that it did were not discriminatory. In other words, in this case the employer would have had to provide a non-discriminatory explanation for why it had said an age-related factor played a part in its decision making.

An employer might have multiple reasons for acting in the way it did. A discriminatory factor does not have to be the sole or even the principle reason for the conduct for an employer to be guilty of discrimination provided the discriminatory factor "had a significant influence on the outcome" (*Owen and Briggs – v – James* [1982] ICR 618 CA, *Nagarajan - v - London Regional Transport* [1999] IRLR 572 HL and *Bahl – v - Law Society* [2004] IRLR 799 CA) .

The employer's written explanation seems to suggest that it had multiple reasons for the non-appointment: personal and professional qualities and generational change in the department. Once the burden of proof has shifted, the employer would have to prove that the "generational change"' factor was not discriminatory. It could do this by proving that the factor was "justified"' or possibly that the written explanation had been misleading and "generational change"' had not in fact had a significant influence on its decision to reject the claimant. On this account, it is difficult to see that the employer actually proved either of these things. The employer may well have lost this case if it had been heard in the UK.

Subject: The Danish Act on Equal Treatment of Men and Women as regards Access to Employment which implements the Directive on Equal Treatment in employment and occupation (2000/78/EC)
Parties: HK/Denmark on behalf of A - v - B municipality
Court: Danish Supreme Court (*Højesteret*)
Date: 7 December 2011
Case number: 102/2010
Hard Copy publication: not yet available
Internet publication:
http://www.domstol.dk/hojesteret/Documents/102-2010.pdf

* Mariann Norrbom is a partner of Norrbom Vinding, Copenhagen, mn@norrbomvinding.com.

2012/4

When is an adjustment to accommodate a disability too expensive to be reasonable? (UK)

CONTRIBUTOR ALISTAIR CARMICHAEL*

Summary
An employer withdrew a job offer to a disabled employee upon realising that the cost of adjustments to enable the employee to do the job would exceed £250,000 a year. The employee alleged direct disability discrimination and a failure on the part of her employer to make reasonable adjustments. The employee was unsuccessful at first instance in the Employment Tribunal ("ET") and appealed. The Employment Appeal Tribunal ("EAT") dismissed the appeal.

Facts
Ms Cordell, a profoundly deaf employee of the Foreign and Commonwealth Office ("FCO") posted to the British Embassy in Warsaw, was approached to take up the position of Deputy Head of Mission in the British Embassy in Astana, Kazakhstan. To perform this role she required full time English speaking lipspeaker support. The FCO had a 'reasonable adjustments policy' which set out that an offer of a post was conditional upon whether and at what cost arrangements can be made to accommodate an individual's disability. This would be determined by the Director of HR following an assessment and recommendation by a member of the disability team in the HR department upon which the individual could comment. This policy had come into force after Ms Cordell was posted to Warsaw. Ms Cordell had been provided with the required support during her posting in Warsaw and her previous posting in London.

Ms Gallagher, on behalf of the FCO, undertook the assessment and initially estimated that the cost of providing Ms Cordell with lipspeaker support for the proposed three year posting would exceed £1,000,000. Ms Cordell disagreed and proposed an alternate shift pattern under which the support could be provided. Ms Cordell costed her proposal at a little over £200,000 per annum. While Ms Gallagher suggested Ms Cordell's proposal was altogether optimistic, she revised her own

costing down to about £300,000 per annum. As the ambassador-designate had agreed that the posting could be reduced to two years, the total cost of the support was assessed as being a little over £600,000. The Director of HR, noting the cost and the potential difficulty of finding sufficient lipspeakers prepared to work in Astana, decided that the adjustments required for Ms Cordell were not reasonable. As Ms Cordell could not complete the posting without the support, the offer of the posting to Astana was withdrawn.

Ms Cordell raised a grievance, which was not upheld, and then commenced proceedings in the ET alleging:

- direct disability discrimination (under s.3A(5) of the Disability Discrimination Act 1995 (the "DDA"); and
- a failure by the FCO to make reasonable adjustments for her disability (under s.3A(2) of the DDA).

Direct disability discrimination, under s.3A(5) of the DDA (now under s.13(1) of the Equality Act 2010 (the "EqA")), occurs when, on the grounds of his disability, a disabled person is treated less favourably than a person who does not have that particular disability whose circumstances (including his abilities) are the same or not materially different from those of the disabled person.
Under s.3A(2) of the DDA (now under s.20 of the EqA), an employer discriminates against a disabled person if the employer fails to comply with their duty to make reasonable adjustments. That duty arises in circumstances set out in s.4A(1) of the DDA – i.e. if a physical feature, premises, or provision, criteria or practice used by the employer places a disabled person at a substantial disadvantage in comparison with persons who are not disabled, the employer must take such steps as are reasonable to prevent it having that effect.

Ms Cordell, in support of her application, referred to a so-called "Continuity of Education Allowance" ("CEA") provided to FCO staff posted abroad. The CEA was an allowance provided to FCO staff with school age children to enable the children to continue their education during the period when their parent or parents were posted abroad. It was capped at £25,000 per annum per child plus the cost of up to three journeys a year for each child to visit its parents. Ms Cordell compared her treatment unfavourably to the recipients of CEA, who were financially supported to undertake their postings.

Employment Tribunal judgment
The ET did not find direct disability discrimination or a failure by the FCO to comply with its duty to make reasonable adjustments.

The ET thought that Ms Cordell and the FCO staff receiving CEA were in materially different circumstances and as such the FCO staff in receipt of the CEA were not the relevant comparators: i.e. to ignore that the CEA recipients had children and Ms Cordell did not, was, in the ET's opinion, artificial. The ET noted that this was especially so since Ms Cordell would have received a CEA if she had children of school age and logically a complainant cannot be their own comparator.

In considering the question of whether the adjustments sought were reasonable, the ET looked at the cost and practicality of the adjustments and decided that it would not be reasonable to make the adjustments. The ET calculated the cost of the adjustments to be at least £249,500 a year which amounted to:

- five times Ms Cordell's annual salary;
- more than the entire personnel cost of the local staff at the Embassy in Astana;
- almost equivalent to the personnel cost of the entire diplomatic staff at the Embassy;
- over £200,000 more than had been spent to date to make adjustments for any other individual FCO staff member;
- equal to almost half of the annual disability budget of the FCO;
- £100,000 more expensive than the cost of providing the same service in Warsaw; and
- £180,000 more expensive than the cost of providing the same service in London.

The ET also found that there was genuine uncertainty about the availability of lipspeakers for such a difficult posting (which would be regarded as a less attractive destination than Warsaw). The ET considered that the adjustments were not reasonable and, as such, the FCO had not failed in its duty to make reasonable adjustments.

Ms Cordell appealed the ET's decision, on both direct discrimination and reasonable adjustments. She suggested that the ET had relied on the comparisons with other costs (such as the cost of local staff) in reaching its decision and that most of these comparisons were irrelevant to the issue of whether it was reasonable to make the adjustment. She also submitted that the ET's decision was perverse given the amount the FCO was prepared to pay in CEAs.

Employment Appeal Tribunal judgment
The EAT considered that determining whether direct discrimination has occurred requires two questions to be answered. Firstly, whether the disabled person has been treated less favourably than an actual or hypothetical comparator with the same characteristics (other than his or her disability). Secondly, whether that treatment was on the grounds of the disability. The first question is known as the "less favourable treatment question" and the second, the "reason why question".

The EAT, noting the real challenges that come with identifying an appropriate comparator when no actual comparator exists, preferred to focus on the "reason why question". They suggested that, while the two questions should produce the same answer, the reason why question was the more fundamental. Ms Cordell preferred to focus on the less favourable treatment – comparing herself to colleagues with children who benefitted from the CEA and saying that in both cases the FCO was making an allowance to enable an employee to take an overseas posting who would not otherwise be able to do so. The fact that, in one case the difficulty lay in the cost of educating children and in the other in the cost of lipspeaker support, was irrelevant. The EAT did not accept this.

Starting by looking at the reason why question, the EAT said that the posting in Astana was withdrawn owing to the cost of the adjustments, along with ongoing uncertainty over whether lipspeaker support could be provided at all. While this related to Ms Cordell's disability, her disability was not the ground on which the posting was withdrawn and as such no direct disability discrimination had occurred. The EAT held that the circumstances of the applicant and the beneficiaries under the CEA policy were different – they may both have needed financial support in order to accept an overseas posting but there was no general FCA policy to give support to anyone who needs it for any reason. There may well be other circumstances where a member of staff might be deterred from accepting an overseas posting because of financial consequences

but where no support was available. Because the circumstances of the applicant and those staff members with school age children were materially different, there was no direct discrimination when the FCO paid the CEA allowance and not the cost of lipspeaker support.

The EAT noted that Ms Cordell's *"real point as regards the CEA policy is simply that it is wrong that the FCO should not be prepared to pay the sums in question in order to enable her to work overseas as a disabled employee when it is prepared to pay broadly commensurate sums to, or for the benefit of, members of staff with school-aged children"*. In terms of what was considered *"broadly commensurate"*, the court decided that CEA costs could potentially amount to up to about £175,000 per family per year if there were a number of children.

However, although the EAT thought that this was a relevant question when considering the 'reasonableness' of the adjustment, it felt it did not give rise to direct discrimination which would bypass the question of reasonableness or proportionality completely.
On the issue of whether the FCO had failed to make reasonable adjustments, the EAT noted that there was no objective method by which the disadvantage suffered by an employee if adjustments are not made could be balanced with the cost of making them. A tribunal asked to adjudicate upon whether adjustments were reasonable was to do so *"on the basis of what they consider right and just"*. Informing this, the tribunal was to have regard to all relevant considerations including:

- the benefit to the employee of the adjustments being made;
- the size of the budget of the employer which may be used to make adjustments;
- what the employer had spent in comparable situations;
- what other employers are prepared to spend in comparable situations; and
- any collective agreement or other indication of what level of expenditure is regarded as appropriate by representative organisations.

These considerations, while helpful, were to be of no more than suggestive or supportive value to the tribunal making the decision. The EAT said that the ET, when making the cost comparisons Ms Cordell considered irrelevant, was undergoing this exercise and attempting to put the cost of making the adjustments into context. This was perfectly legitimate.

Finally, on the issue of whether the Tribunal's decision that the adjustments were not reasonable was perverse, the EAT held that it was not. Ms Cordell's submission was that in light of the payments falling to be made under the CEA policy, the only possible conclusion the Tribunal could have reached was that it was unreasonable not to make the payments for her lipspeaker support. The EAT did not think this could be said, as there might be various reasons for paying the CEA and what an employer is prepared to pay for other things can only be suggestive of what it may be reasonable to pay for an adjustment.

The EAT expressed its sympathy for Ms Cordell's situation but noted that the law did not require the FCO to compensate her *"at any cost"*. It therefore dismissed Ms Cordell's appeal.

Commentary
The judgment in the case is of interest for several reasons. Firstly, the EAT's determination on the "reason why question". The EAT determined that the job offer was withdrawn because of the cost and practicality of finding lipspeaker support and whilst this related to Ms Cordell's disability, it was not on the grounds of her disability and therefore could not amount to direct discrimination.

Another interesting aspect of this case is that it is one of the only appellate decisions to consider the question of how far cost alone can make an adjustment unreasonable. The EAT has recognised how difficult it is to make a decision on this issue: resources are always limited and even large organisations (such as the FCO) have to balance different spending priorities. The EAT has essentially given tribunals a very large discretion to decide what they think is 'right and just' in the circumstances. This will mean that, provided the tribunal considers all the relevant factors, it will be very difficult to overturn their decision on appeal.
This case was brought under the DDA, which has now been replaced by the EqA. Section 15 of the EqA contains a new provision under which Ms Cordell could have brought a claim if these facts had arisen after 1 October 2010, namely "discrimination arising from disability".

Under this section a person discriminates against a disabled person if he treats her unfavourably because of something arising in consequence of her disability and he cannot show that the treatment is a proportionate means of achieving a legitimate aim. If Ms Cordell could have brought her claim under this provision, the ET would have had to decide if the withdrawal of the job offer was unfavourable treatment because of something arising in consequence of her disability and whether this treatment was a proportionate means of achieving a legitimate aim. The UK courts have traditionally said that cost alone cannot be a proportionate means of achieving a legitimate aim, although cost can be joined to other factors to amount to justification (known as "costs plus"). However, this area of law is currently in a state of flux and the "costs plus" rule is being criticised. Further guidance from the courts in this area would be useful.

Comments from other jurisdictions
Germany (Markus Weber): According to Section 81(4)(5) of the German Social Security Code IX (§ 81 Abs. 4 Nr. 5 *Sozialgesetzbuch* IX (SGB IX)) every employer is obliged to equip the working place of disabled employees with all necessary (technical) equipment. Therefore an employer may not reject a disabled applicant in view of the fact that the respective working place is not accessible for handicapped employees. However, he may do so if the adjustment would lead to "disproportionate" costs for the employer. As the case may be, there may be no costs for the employer at all as the agency for seriously disabled persons grants financial support for any required adjustment (§ 81 Abs. 4 S. 2 SGB IX). The support of the agency is not limited to financial support of structural adjustments, also the subsidisation of personnel costs (e.g. for lip-speaker support) is not unlikely. In the event major adjustments are necessary, the amount that exceeds the agency's subsidy is relevant in order to determine whether the financial burden for the employer is disproportional. In the end it depends on the financial capability of the employer if the cost involved is really disproportionate. Only if the cost is truly disproportionate may the employer reject a disabled applicant on the grounds of the job requirements.
In the event the employer rejects an application without having verified the necessary adjustment measures and in particular without having contacted the agency for seriously disabled persons, the applicant may argue that the rejection was for discriminatory reasons. According to Section 15(1) of the German Non-Discrimination Act (§ 15 Abs. 1 *Allgemeines Gleichbehandlungsgesetz* (AGG)) the person is entitled

to damages if the employer does not prove that the rejection had no discriminatory background.

The Netherlands (Peter Vas Nunes): The judgment reported above addresses two questions, both of which are interesting from a legal point of view as well as important for everyday practice:
1° how to identify an appropriate hypothetical comparator?
2° how much may a reasonable accommodation cost?

Re 1°: comparator
It is understandable that the EAT dodged the plaintiff's contention that she - a deaf employee without children - should be compared to a hypothetical unimpaired employee with CEA-eligible children. Directive 2000/78 provides that 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 one of the protected grounds, such as disability. Directives 2000/43 (race) and 2006/54 (sex) contain similar definitions. This definition, like that of the English DDA, makes clear that discrimination cases are all about comparing individuals with other (real or hypothetical) individuals (*less favourably than*) and comparing situations with other (real or hypothetical) situations (*in a comparable situation*).

Until a few months ago the relevant Dutch anti-discrimination laws contained a definition of direct discrimination (referred to as *unequal treatment*) that, although generally held to be compatible with EU law, downplayed the comparison element. It defined direct discrimination, almost by way of a circular definition, as *"making a distinction"* on certain grounds. On 3 December 2011, following lengthy prodding by the European Commission, the definition was brought in line with that of Directive 2000/78. The government stated that the changed definition brings no material change in the law. Nevertheless, the amendment may bring increased awareness among Dutch courts, which have a tendency to avoid identifying a comparator, that allegations of discrimination frequently cannot be adequately adjudicated without comparing persons and/or situations.

In this English case, the plaintiff alleged that she was not promoted to the vacant position in Astana because of her deafness. At first sight this contention seems plausible and the plaintiff's non-promotion did indeed constitute direct disability discrimination, which by law cannot be justified. The only defence against the allegation was to argue that (i) the plaintiff was not treated less favourably than someone in a comparable situation, i.e. that the person who got the position or would be getting it was not a comparator and/or (ii) that the non-promotion was not on the grounds of disability. Both defences seem to rest on one and the same argument: we are turning down your application for a transfer to Astana, not because of your deafness but because of the cost of providing you with lipspeaker support. Perhaps this is why the plaintiff compared herself, not to an unimpaired colleague without children, as might seem logical, but to an unimpaired (hypothetical) colleague with children: sending someone with CEA-eligible children to Astana will cost you almost as much as providing me with lipspeaker support.

Although I can see the logic of this reasoning, it requires mental acrobatics which, I expect, a Dutch court would find too far removed from common sense to take seriously.

Re 2°: accommodation:
To my knowledge there have been few Dutch rulings, if any, where the question of how much an accommodation may cost was addressed so head-on as in this case. On the one hand, having to spend five times an employee's salary on accommodating his or her disability strikes me as patently absurd. On the other hand, the plaintiff had a point where she compared that cost to the cost of providing CEA assistance to two or three children. She compared (the cost of) the adjustment she sought to (the cost of) children: providing a bachelor with lipspeaker support is almost as costly as having a married couple with children.
The EAT identified five considerations to take into account when balancing the individual's need for a costly accommodation against the costs for the employer, but in the end the EAT failed to be more explicit than the rather broad and vague but hard-to-criticise statement that (in the author's words) *"what an employer is prepared to pay for other things can only be suggestive of what it may be reasonable to pay for an adjustment"*.

Subject: Disability discrimination: duty to make reasonable adjustments
Parties: Cordell – v – Foreign and Commonwealth Office
Court: Employment Appeal Tribunal
Date: 5 October 2011
Case number: [2011] UKEAT/0016/11/SM
Hard copy publication: not yet reported
Internet publication: www.bailii.org

* Alistair Carmichael is a solicitor with Lewis Silkin in London, alistair.carmichael@lewissilkin.com.

2012/5

Not allowing male waiter to wear earrings is discriminatory (FR)

CONTRIBUTOR: CAROLINE FROGER-MICHON*

Summary
A waiter alleged that his employer had discriminated against him on grounds of gender when he dismissed him because he was wearing earrings. In January 2012, the Supreme Court ruled in favour of the employee and considered that a dismissal based on the fact that a waiter wears earrings constitutes sex discrimination.

Facts
A man is hired as a waiter in a gourmet restaurant. Five years later, the waiter comes to work wearing two earrings. Despite his employer's request, he refuses to remove them.

His employer sends him a formal letter asking him to remove said earrings while serving (he could wear them when preparing tables but not when clients are present), considering that this is not consistent with the standards of the restaurant and associated clientele.

The employee does not comply with this instruction and as a consequence is dismissed for personal reasons. The dismissal letter sets out the facts and the employee's refusal and states *"your status in the service of our customers does not permit us to tolerate the wearing of earrings by a man, which you are"*.

The employee lodges a case before the Industrial Tribunal against this measure, alleging that his feminine colleagues wore earrings without any problem for the clients or the employer.

The Industrial Tribunal dismissed the employee's claim, ruling that the dismissal was valid and justified.

The Court of Appeal of Montpellier overruled the first instance judgment and ruled in favour of the employee, considering that the dismissal letter demonstrated the existence of direct discrimination on grounds of gender. As a result, the dismissal was declared void.

Under French law, when a dismissal is declared void, the employee can:

- ask for reinstatement in his previous position or in similar position, in which case he is entitled to payment of his salary from the dismissal to the date of reinstatement; or, in the event he elects to be reinstated and the employer refuses to reinstate him, claim entitlement to all termination indemnities as well as salary from the termination date until the date of renunciation; or
- elect to be awarded salary in lieu of notice, severance pay and damages with a minimum equivalent of six months' salary.

Supreme Court

The Supreme Court ruled in the employee's favour on 11 January 2012 on the grounds that *"by virtue of Article L. 1132-1 of the Labor Code, no employee may be dismissed because of his or her sex or physical appearance"* and that the dismissal letter of the employee provided evidence that the employee's dismissal was because of his appearance based on his gender.

Commentary

Like judgments pronounced in the past about wearing bermuda shorts or track suits to work, the decision by the Supreme Court on 11 January 2011 is one that brings on a smile at first glance.

But beyond the anecdote, this decision is in fact particularly interesting when we examine the sanction pronounced. Whereas, until now, decisions relating to clothing and accessories had been found to be without real and serious cause in relation to dismissal, and the issue was damages for unfair dismissal, in this case, the dismissal was declared void on grounds of discrimination concerning the physical appearance based on the sex of the employee.

Thus, forbidding a man to wear earrings constitutes discrimination.

This is the first time this has been accepted by the Supreme Court. However, such an unprecedented approach is not without consequences, notably concerning the sanction incurred and the burden of proof.

Up until now, in matters concerning jewellery and clothing, the case law was based on breach of the principle of proportionality laid down by Article L.1121 of the French Labor Code. Dismissals not complying with this principle led solely to award of damages.
For example, it was held that a salesman wearing a small diamond was not at fault. The judges considered that the piece of jewellery in question was both discreet and of a type often worn by men of his generation and therefore found his dismissal not to have been based on a real and serious cause (Court of Appeal, Toulouse, 27 November 1998) On the other hand, this same principle of proportionality justified a dismissal for a real and serious cause in a case of a nose-piercing and earrings worn by a waiter, as these accessories were of a nature likely to "shock" clients (Court of Appeal of Versailles, 22 September 2006).

The decision of last 11 January innovates by being grounded on Article L.1132-1 of the French Labor Code relating to discrimination.

One consequence of this is on the burden of proof. In order to establish discrimination, an employee need only furnish elements showing the existence of discrimination (here, the terms of the dismissal letter) and it is up to the employer to demonstrate that his decision rests on objective factors that have nothing to do with discrimination.

In the case in point, the fact that the employee was in direct contact with the clients of a high class restaurant was not considered by the judge as being an objective factor unrelated to discrimination. Witness statements about this from clients were submitted by the employer, but these were not considered as sufficient to justify the differential treatment (quite apart from the fact that direct sex discrimination cannot be objectively justified other than in circumstances not relevant to this case).

Secondly, there are consequences for the sanction. By ruling on grounds of discrimination, the Supreme Court had no option but to declare the dismissal void. The employee thus had the right to be reinstated and/or to receive higher damages.

However, the actual significance of this decision remains uncertain. Certain authors see it as a serious warning by the Supreme Court concerning discrimination. Others consider that the dismissal letter in this case was so badly drafted that it left little leeway to the Supreme Court. Stay tuned for the next episode...

Subject: Sex discrimination
Parties: Mr Alister WYLOCK v. SARL BESSIERE FRERES
Court: Cour de Cassation (Supreme Court)
Date : 11 January 2012
Case number: 10- 28213
Internet publication: www.legifrance.gouv.fr

* Caroline Froger-Michon is a senior associate with CMS Bureau Francis Lefebvre in Paris, www,bfl-avocats.com.

2012/6

Parent company liable as "co-employer" for unfair dismissal (FR)

CONTRIBUTORS CLAIRE TOUMIEUX AND SUSAN EKRAMI*

Summary
A confluence of interests, activities and management between two entities in the same group can result in a co-employment relationship. If such a co-employment relationship exists a Job Preservation Plan drawn up by only one of the entities is unlawful and each co-employer will be required to bear the consequences and pay damages to redundant employees.

Facts
The BSA Ceramic Products Company ("BSA") is specialized in the manufacture and marketing of ceramics. It was bought by Novoceram in 1989. In 2004, after having become a subsidiary of the Italian company Gruppo Concorde, Novoceram concluded an agreement with BSA that set BSA's product prices. One year later, BSA decided to shut down its production site and, as a result, put a Job Preservation Plan in place. However, BSA became insolvent before the collective redundancy procedure was completed and all its staff were dismissed by the liquidator.

The redundant employees argued that Gruppo Concorde and Novoceram were their co-employers and brought an action on that basis against both companies for unfair dismissal, seeking damages.

Judgment
The Court of Appeal of Nîmes held on 16 June 2009 that Novoceram did have co-employer status on the basis that there was a confluence of interests, activities and management between BSA and Novoceram.

The Court cited Article L.1233-61 of the Labour Code, pursuant to which an employer company must draw up a Job Preservation Plan if it has at least 50 employees and decides to make at least ten of them redundant within a period of 30 days. In this case, a Job Preservation Plan had been drawn up by BSA, but it had only consulted its own works council about it. Novoceram, being completely unaware of its status as joint-employer, had not consulted its works council. Further, according to the Court of Appeal, the Job Preservation Plan – not having been drawn up by both BSA and Novoceram - did not comply with the legal requirements. Consequently, the Court of Appeal held Novoceram liable to pay damages to the redundant employees and to reimburse the Unemployment Agency for unemployment benefits paid to those employees up to a limit of six months.[1]

Novoceram challenged this decision before the Supreme Court. It argued that a confluence of interests, activities and management amongst companies belonging to the same group was insufficient to make them co-employers with BSA and that only the existence of a subordinate relationship between Novoceram and BSA's employees could have resulted in co-employment. The Court of Appeal had based its conclusion that the two companies were co-employers on the fact that BSA's technical director and other executives were seconded to Novoceram; that the two companies had common directors; and that Novoceram executives were present during the consultation procedure with BSA's works council on the proposed redundancy project. However, Novoceram contended that the Court of Appeal had failed properly to demonstrate a subordinate relationship.

Novoceram also argued that even if there were a co-employment relationship, the validity of the redundancies should be assessed at the level of the company that had made the redundancy decision, and not the co-employer.

The French Supreme Court upheld the Court of Appeal's decision, holding that:

"Since Novoceram had taken control of BSA, the latter had lost all autonomy in the management of its operations and was entirely dependent on Novoceram, which had become its sole client, setting the price of its products and sharing its products, materials, general services, equipment and manufacturing processes. Moreover, the administrative, accounting, financial, commercial, technical and legal management of BSA was handled by Novoceram, which also managed BSA's staff. Senior executives of BSA merely implemented decisions made by Novoceram pertaining to its staff, industrial and technical management. Therefore, it could be concluded that there was a confluence of interests, activities and management between the two companies, manifested by the involvement of Novoceram in the management of BSA, which was sufficient to give it the status of co-employer"

The Supreme Court also confirmed that Gruppo Concorde did not have co-employer status, since:

"It had not replaced BSA in the information procedure of the staff representatives, there were no close links between the two companies, nor was there any involvement in the management of the latter, or confusion between their assets. Therefore, it could be deemed there was nothing to support the notion that there was a confluence of interests, activities and management between these companies and therefore Gruppo Concorde could not be considered as a co-employer and could not, as such, be sued by the dismissed employees".

In terms of the consequences of the co-employment relationship between Novoceram and BSA, the Supreme Court confirmed the position of the Court of Appeal by holding that: *"Given that the Job Preservation Plan was drawn up at the level of BSA alone, whereas it should have been done by each of the co-employers, the Court of Appeal was correct to rule that the Job Preservation Plan did not meet the requirements of French law"* and therefore *"As a co-employer, Novoceram must bear the consequences of the termination of the employment contracts, even though BSA had taken the initiative in relation to these redundancies"*.

Commentary
De facto co-employment relationship is a legal technique which allows for the involvement of a company which is not the direct employer in the employment relationships with employees of another company in the group, resulting in the joint liability of the two companies. Here, the existence of the co-employment relationship was confirmed by the Supreme Court and Novoceram was required to bear, as co-employer, the financial consequences of redundancies initiated by BSA.
In its decision, the Supreme Court confirmed its intention, as reflected in several 2011 decisions, to use the concept of a *"confluence of interests, activities and management between different entities"* as an additional criterion by which to characterize the existence of a co-employment relationship.[2]

The Supreme Court implies by this that, contrary to past practice - whereby the only criterion for a co-employment relationship was that there was a subordinate relationship between the dominant company and (directly) the employees of the subsidiary - co-employment can now be also deduced from the business relationship at company level.

The Supreme Court appears to have been cautious in assessing whether there is a confluence of interests, activities and management between the two entities. The co-employment relationship between Novoceram and BSA was not simply deduced from the fact that Novoceram was involved in the management of its subsidiary, but was considered in the light of a number of factors that together demonstrated BSA's lack of autonomy.

In particular, the Supreme Court highlights the fact that Novoceram had taken total control of BSA's activities: it had set the price of its products and was providing administrative, commercial, financial, corporate and social support. Novoceram was also involved in the management of BSA's staff and its industrial and technical organisation. Such a high level of involvement, as the Supreme Court commented, had caused BSA to completely lose its autonomy.

That being said, this ruling creates considerable uncertainty for groups of companies, and also concern, in that the financial consequences for co-employers will inevitably be high. The ruling means that, as was the case here, when a situation of co-employment is recognized by the courts, any Job Preservation Plan that has been drawn up without taking into account the co-employment relationship, would inevitably be unlawful. This case certainly involved dire consequences for Novoceram, even though it was a separate legal entity with no direct employment contracts with the redundant employees - and more importantly, it was completely unaware of its status as a joint-employer.

This would explain why the Supreme Court took care to show that lack of autonomy of the subsidiary is a necessary feature of co-employment. But even so, the case shows that companies with subsidiaries in France need to be vigilant in observing corporate governance rules and avoiding direct involvement with their subsidiaries, whether or not it appears that there is any relationship of subordination between them and the employees of the subsidiaries.

Although so far the extended notion of co-employment has been solely used in relation to termination of employment, it should also be borne in mind that co-employment could have heavy financial consequences for *de facto* co-employers during employment as well. For example, employees could conceivably claim for collective benefits in force within the parent company, if those benefits are more favourable than the ones in place within the subsidiary. So, parent companies beware!

Comments from other Jurisdictions

Germany (Paul Schreiner): In Germany a comparable concept of co-employership is not known, although it is possible to hold the parent company indirectly liable for a social plan in a group company. In principle, the social plan is concluded between the works council and the employing entity and, in the absence of insolvency, it can only give rise to claims against the employing company. However, this may be different where the financials of the employing company have been influenced by a parent company, i.e. the parent company has taken decisions that resulted in the closure of the employing company and reduced potential benefits for the employees. In such a case, the financial situation in the parent company is taken into account when determining the appropriate volume of a social plan at the level of the employing company.

The Netherlands (Peter Vas Nunes): The Dutch courts have developed a similar concept of "co-employership", but only for works council consultation purposes. A parent company that plans to take a decision impacting on its subsidiary may need to consult with the subsidiary's works council, and failure to do so may result in a court order against the parent company to refrain from taking or to implement a decision. Alternatively, if the decision has already been implemented, it might be required to undo the (consequences of) it. This is far-reaching case law, but the French rules seem to go further. In The Netherlands, once a decision has been validly taken and implemented, there is no longer any co-employership and the parent company has no liability *vis-a-vis* the subsidiary's staff, with the exception of certain bankruptcy situations, in which the parent company has been negligent towards creditors (i.e. not only employees).

Subject: Co-employment
Parties: Novoceram - v - Redundant employees & CFDT union
Court: French Supreme Court
Date: 22 June 2011
Case Number: N° 09-69021
Hard copy publication: This decision has not been published in the Official Journal
Internet publication: http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000024258463&fastReqId=1717754239&fastPos=1

* Claire Toumieux and Susan Ekrami are a partner and lawyer with the Paris firm of Flichy Grangé Avocats, toumieux@flichy.com and ekrami@flichy.com.

(Footnotes)

1 The payment of damages and reimbursement of the Unemployment Agency are amongst the legal sanctions imposed by the courts on a case by case basis when the redundancy procedure is in breach of French law.
2 Supreme Court, 18 January 2011 n° 09-69199; Supreme Court 8 June 2011 n°09-41019; Supreme Court 6 July 2011 n° 09-69689; and Supreme Court 28 September 2011 n° 10-12278.

2012/7

German works council rules do not override lex loci labori (AT)

CONTRIBUTOR MARTIN RISAK *

Summary

An employee based in Austria was employed by a German company, which dismissed him. The dismissal was valid according to Austrian law but not according to German law because the employer had not informed its works council (in Germany) adequately in advance. Did

the German works council rules override Austrian employment law? Based on German case law, the Austrian Supreme Court replied in the negative.

Facts

The plaintiff was employed in Austria by the German defendant. He was hired in 1995. His employment contract was silent on governing law. As he was the only person employed by the defendant in Austria, there was no works council there. In June 2007 the defendant dismissed the plaintiff after having informed its German works council of its intention to do so. However, the defendant did not provide that works council with information on the plaintiff's social and employment circumstances (his age, type of work, other opportunities of work for him within the company, comparison of his social circumstances with other employees) as required by German law. Had German law applied, the dismissal would have been void. It was common ground between the parties that the plaintiff had no recourse under Austrian law, given that that law provides no dismissal protection to companies employing less than five people.

The plaintiff brought proceedings against his employer. He asked the court to declare that the termination of his employment contract was void and that, therefore, his contract was still ongoing. One of his arguments was that the employer had failed to inform its works council as required under German law. The employer argued that, according to the Austrian Act on International Private Law, given that there was no choice of law clause, only the *lex loci laboris* - in this case Austrian law - applied. The employer added that it had had no obligation to inform its works council, merely having done so out of habit.

Judgment

The Labour and Social Court of Vienna (*Arbeits- und Sozialgericht Wien*) dismissed the claim holding that the contractual relationship at hand was governed by Austrian labour law and that this included consideration of whether it would persist following a breach of the duty to inform the works council. As there was no works council established under Austrian law no obligation to inform existed and therefore, no breach was possible.

The plaintiff's appeal to the Appellate Court of Vienna (*Oberlandesgericht Wien*) succeeded: The court argued that the rules governing the participation rights of the German works council in the case of dismissals are overriding mandatory rules that apply to all cases that have some connection with Germany even if, according to international private law, the employment relationship is governed by foreign law. This is because the collective character of the participation rights of the German works council is such that the lawmaker intended the rules to be mandatory irrespective of whether the case had a cross-border element to it.

The Supreme Court (*Oberster Gerichtshof*) quashed the decision of the appellate court and upheld the decision of the court of first instance. It argued as follows:

The Rome Convention on the law applicable to contractual obligations of 19 June 1980 ("Rome Convention") does not apply to employment contracts concluded before 1 December 1998. This is a result of Article 17 Rome Convention, which states that it shall apply in a Contracting State to contracts made after the date on which the Convention has entered into force with respect to that State. In the case of Austria this was 1 December 1998. All former contracts were governed by the Austrian Act on International Private Law (*Internationales Privatrechtsgesetz – IPRG*), which does not include a provision similar to Article 7 of the Rome Convention. Article 7 says that nothing in that Convention shall restrict the application of the rules of the law of the forum, in a situation where they are mandatory irrespective of the law otherwise applicable to the contract. Despite the lack of an explicit provision, unanimous opinion nevertheless holds that the Act on International Private Law does not cover overriding mandatory provisions (*Eingriffsnormen*).

As its next step, the Supreme Court examined whether the German provisions on information for works council in cases of dismissals should be considered, not only as overriding mandatory provisions, but as applying to employees whose employment contract is governed by Austrian law and who work in Austria. The German courts have ruled that this is only the case where the employee is temporarily but not permanently posted in Austria, as in the case at hand. If the employee works abroad for an indefinite time without any planned follow-up employment in Germany, he or she is not part of the staff represented by the German works council – and therefore the works council has no information rights concerning him or her.

In the end, the Austrian Supreme Court did not resolve the dispute on the merits of the case but resorted to a technical argument, namely that even if the German rules had applied, the claim was not raised within the time limit of three weeks provided for in German law and was therefore too late. The claim had to be rejected on this basis.

Commentary

The international dimension here is an old and familiar matter of dispute. It results from the rather unique fact that the Austrian dismissal protection rules are part of the collective labour law and, despite protecting the individual employee, are construed as an integral element of the legislation in respect of works councils. A heavily debated 1995 ruling by the Austrian Supreme Court (9 Ob A 183/95) held that protection against dismissal was not part of the individual rights of the employee governed by the rules of international private law but subject to the territorial principle – i.e. all employees working in Austria are automatically covered by this, whether or not their contract is subject to Austrian employment law. Conversely, protection against dismissals only applies to employees working abroad if they are subject to the Austrian works constitution, in other words, they are part of an Austrian organisational unit represented by an Austrian works council.

The second aspect of the case was the possible application of foreign works council rules concerning employees working in Austria whose employment contracts are governed by Austrian law as a result of the provisions of international private law. Although in the end, the Supreme Court based its ruling on a technicality (the expiry of the time period for raising the claim), it has provided some important arguments for solving the substantial questions.

The decision was based on the Austrian Act on International Private Law, which applies to all employment contracts concluded before 1 December 1998. For contracts concluded after this date but before 17 December 2009, the Rome Convention applies and for employment contracts concluded after the latter date Regulation 593/2008 ("Rome I") applies. The Rome Convention and "Rome I" include an explicit provision for overriding mandatory provisions (respectively, Article 7 and Article 9), and, although the court in the case reported above took

pains to stress that it did not consider either the Rome Convention or "Rome I", it seems to me that the outcome of the case would not have been different had the court applied either of those international instruments.

Subject: Governing law
Parties: Wolfgang K***** – v – B***** AG, D-****
Court: Austrian Supreme Court (*Oberster Gerichtshof*)
Date: 16 September 2011
Case number: 9 ObA 65/11s
Internet publication: http://www.ris.bka.gv.at/Jus/

* Professor Martin Risak is an associate professor in the Department of Labour Law and Social Security of the University of Vienna, www.univie.ac.at.

2012/8

Posted workers may benefit from the application of Belgian law (BE)

CONTRIBUTOR THIJS DE WAGTER*

Summary
The Belgian courts have jurisdiction over foreign employers who post their workers in Belgian territory. Belgian law on temporary work, temping and the lending of employees constitutes mandatory law within the meaning of Article 7(2) of the Rome Convention (now Article 9 of "Rome I") and thus applies to posted workers on Belgian territory, notwithstanding any choice of law to the contrary. If the legislation is not complied with, the employee will be deemed to be employed by the receiving company under an open-ended employment contract subject to Belgian labour law.

Facts
At the end of 2005, S, who is a Canadian citizen and employee of I LLC in the United States, was offered the post of Vice President of Innovation as part of a secondment to I SA, the headquarters of the group in Belgium.
To this end, a secondment agreement was signed by the three parties concerned, in which it was provided that S should be posted to I SA for a period of 36 months.
From 1 January 2006, S worked at the group's headquarters in Belgium without interruption.
In December 2007, before the fixed period of three years was up, S was informed by I SA that his assignment to Belgium would be prematurely terminated on 30 June 2008 and that as of 1 July 2008, he would be reintegrated within I LLC in the United States. Yet, at the same time it was made clear to S that his overall employment with the group would come to an end on 30 June 2008.
Subsequently, S received a draft "separation agreement" prepared by I LLC under the laws of the State of New York and US federal law.
S rejected the separation agreement based on his view that the (more beneficial) mandatory provisions of Belgian labour law applied and that these had not been taken into account in the proposed settlement agreement. He requested an improved offer.
In the absence of any reaction by I LLC or I SA, S concluded in April 2008 that it was clear that not only had the group decided to terminate his assignment in Belgium but it had never intended to revive his employment contract in the United States.
S subsequently brought an action before the Belgian Labour Court against I SA and I LLC, which he considered to be his joint employers, claiming a severance payment under Belgian law on the basis of the termination of his employment contract.
The Labour Court held that it lacked jurisdiction to hear the action and dismissed S's claims. S appealed to the Labour Court of Appeal of Brussels.

Judgment
The Labour Court of Appeal was confronted with multiple fundamental questions in relation to international employment law, as follows:

1. *Do the Belgian courts have jurisdiction over I LLC, the US employer?*

The Court accepted that the Belgian Courts have jurisdiction over I LLC based on section 5 of the Belgian International Private Law Code. Section 5 contains the general rule that the Belgian courts shall have jurisdiction if, upon lodging the action, one of the defendants has his place of residence, its registered office or its place of business in Belgium, unless the action is brought solely in order to exclude the defendant from the jurisdiction of his or its country of origin. Since I SA, the second defendant, had its registered office in Belgium, I LLC could properly be subject to the jurisdiction of the Belgian courts.
Moreover, the Labour Court of Appeal specified that since the claim concerned the posting of a worker, account also had to be taken of Directive 96/71, the "Posting Directive". Article 6 of the Posting Directive provides that the worker must have the opportunity to bring proceedings in the country in whose territory he or she is (or was) posted, in order to enable the worker to enforce compliance with the terms and conditions of employment that apply as a result of the posting. This opportunity was transposed into Belgian law by the Act of 3 June 2007 on miscellaneous labour provisions.

2. *Does Belgian law apply?*

Although the secondment agreement was drafted under US law and it was therefore implied that US law would be the choice of law in any dispute, S was of the opinion that Belgian law applied to the termination of his overall employment with I.
S invoked Article 7(2) of the Convention on the law applicable to contractual obligations signed in Rome on 19 June 1980 (the Rome Convention, now Article 9 of "Rome I"), which provides that its provisions shall not operate to restrict the application of mandatory rules of the forum, irrespective of the law otherwise applicable to the contract. S argued that the Belgian Act of 24 July 1987 on temporary work, temping and the lending of personnel (the "Lending Act") constitutes mandatory law within the meaning of Article 7(2) of the Rome Convention.
In general terms, Article 31 of the Lending Act prohibits employers from lending employees to a third party (the "user") where the user requires them to perform professional activities for its benefit, if the user exercises any element of so-called "employer authority" over the employee. Effectively, employer authority means guidance and authority over employees. In practice employer authority can be established if, for example, the user stipulates the content of the employee's work; sets the amount of his or her salary; requires the employee to report to it; and/or takes the decision to terminate the assignment.
Article 31(3) of the Lending Act provides that, in cases of infringement of this prohibition, the employee is deemed to have been employed by the user under an open-ended employment contract as of the

commencement of his or her work with the user.

The Court accepted that the Lending Act constitutes mandatory law within the meaning of Article 7(2) of the Rome Convention, as being *"national provisions, compliance with which has been deemed to be so crucial for the protection of the political, social or economic order in the Member State concerned as to require compliance therewith by all persons present in the national territory of that Member State and all legal relationships within that State"* (ECJ 23 November 1999, C-369/96 and C-376/96 *Arblade - v - Leloup*, ECR [1999]-I, 8451).

In coming to this conclusion, the Court referred *inter alia* to the Posting Directive 96/71, which lays down a number of core provisions that apply when an employee is temporarily posted to another Member State, irrespective of the law applicable to the employment relationship. Article 3(1) of the Posting Directive 96/71 provides in this regard that the employer shall guarantee that its employees posted to another Member State are provided with certain minimal terms and conditions as per the law of that other Member State insofar they relate to, *inter alia*, "the conditions of hiring-out of workers, in particular the supply of workers by temporary employment agencies". In support, the Court also referred to the Belgian Act of 5 March 2002 on the posting of workers (which transposed the Posting Directive into Belgian Law). This refers to the Lending Act in its explanatory memorandum as being legislation that must be adhered to when employing personnel in Belgian territory.

After an extensive examination of the facts, the Court concluded that I LLC had indeed delegated a substantial part of its employer authority to I SA. The Court stated that by stipulating the content of S's work; requiring S to report to it; taking the decision to terminate the assignment; and to release him from his duties, I SA had exercised the fundamental elements of an employer's authority.

The Court deemed S to have been associated with I SA under an open-ended employment contract as of the commencement of his work in Belgium and concluded that this contract was subject to Belgian labour law based on Article 6(2) of the Rome Convention.

However, the Court established that the existence of a Belgian employment contract between S and I SA did not alter the fact that an employment contract continued to exist with I LLC, albeit that it was temporarily suspended. The Court judged that this contract was subject to US law because the secondment agreement included an implied choice of law in favour of US law during the period of assignment. Thus, US law also remained in effect in terms of labour relations between the employee and I LLC during the temporary assignment.

S invoked Article 6(1) of the Rome Convention to establish the application of mandatory provisions of Belgian law to the American contract. According to S, referring to criteria set by European jurisprudence (see *Mulox* C-125/92 and *Rutten* C-383/95), Belgium was the country in which he habitually carried out his work (i.e. his "country of habitual employment"), as this was where he (i) had established the effective centre of his activities; (ii) had an office from which he carried out his work; (iii) resided; (iv) returned after each business trip. In consequence, S reasoned that the mandatory provisions of Belgian law applied to the overall termination of his employment with I.

The Court rejected this reasoning. It was of the view that, in terms of the "country of habitual employment", the parties' intentions should be taken into account, as confirmed in recital 36 of the preamble to Regulation (EC) No. 593/2008 of the European Parliament and of the Council dated 17 June 2008 on the law applicable to contractual obligations (the "Rome I Regulation"):

"As regards individual employment contracts, work carried out in another country should be regarded as temporary if the employee is expected to resume working in the country of origin after carrying out his tasks abroad. The conclusion of a new contract of employment with the original employer or an employer belonging to the same group of companies as the original employer should not preclude the employee from being regarded as carrying out his work in another country temporarily."

Although the Rome I Convention was not directly applicable to the case (because the employment contract in question had been concluded before 17 December 2009), the Court nevertheless found it instructive and the Court took the view that the secondment agreement illuminated the parties' intention that S should return to the US at the end of the assignment, where he had already been employed on an open-ended basis for seven years. The Court held that the US was the country of habitual employment and Belgium was the country of temporary employment.

3. Was the overall employment of S with I terminated?

S initially claimed a severance payment under Belgian law from I SA and I LLC, which he considered as his joint employers, on the basis of the overall termination of his employment with the group. In line with what had preceded, the Court was of the opinion that a distinction had to be made between the Belgian contract with I SA and the US contract with I LLC.

As regards the contract with I SA, the Court found that I SA had intended to terminate S's employment in Belgium without serving valid notice and that this unilateral release from duties constituted constructive dismissal under Belgian law. The Court granted S a severance payment equal to five months' salary.

As regards the contract with I LLC, the Court ordered a re-opening of proceedings, to allow the parties to make submissions as to the termination and its consequences under US law.

Commentary

The judgment of the Labour Court of Appeal of Brussels is remarkable in that it establishes some important legal and practical principles for multinationals employing posted workers in Belgium.

On the one hand, the Court has clearly confirmed that, within the scope of a lawful secondment to Belgium implying the employee's eventual return to his country of origin, Belgium cannot be considered as the country from which the seconded employee habitually carries out his work. Although the Rome I Regulation which confirms this principle did not apply to the case at hand, the Court used it to inform its interpretation of the Rome Convention, which did apply.

In doing so, the Court has marked a turn-around in the approach to seconded workers applied hitherto. Based on the ECJ cases of *Mulox* and *Rutten*, it had been thought that the mandatory provisions of Belgian law would apply to seconded employees as soon as they had been working for more than a year in Belgium. When that happened, the secondment could lose its character as "temporary employment" in the meaning of Article 6(2) of the Rome Convention and Belgium would become the country of habitual employment. The mandatory provisions of Belgian law - including the expensive termination laws - would apply.

In line with the Rome I Regulation, it is likely that Belgian judges will be reluctant to apply the mandatory provisions of Belgian law to lawful secondments where the employee is expected to resume working in the country of origin at the end of the secondment agreement. The door through which Belgian law entered lawful secondment relationships, appears now to have closed.

On the other hand, the Court seems to have opened another door for Belgian law, by allowing an employment contract which is exclusively subject to Belgian law under the Lending Act to come into existence if it appears that the employer in the country of origin has delegated, even partially, its employer authority to the employer in the host country. If the host country employer is allowed to stipulate the content of the work, the amount of (variable) salary and to require the employee to

report to it, for example, that will be considered to be a delegation of employer authority. In secondments within multinationals, delegation of this kind is quite common, but from now on there will be an increased risk that such delegation will lead to the unwanted application of Belgian law to the employment relationship.

It could be said that the judgment is excessive. This is particularly the case if one refers back to recital 36 of the preamble of the Rome I Regulation, according to which the conclusion of a new contract of employment with the original employer or an employer belonging to the same group of companies as the original employer should not preclude the employee from being regarded as carrying out his work in another country temporarily. According to this recital, the employment of a seconded employee should continue to be governed by the law of his or her country of origin.

But this needs to be put into perspective: the Lending Act allows a secondment to Belgium with delegation of employer authority within the scope of co-operation between companies belonging to the same economic and financial entity, provided the host employer fulfils certain formalities (approval or notification of the competent local authorities). In the case at hand, the host employer had omitted to do this and, as the delegation of employer authority to the host employer was so obvious, breach of the Lending Act was clearly established.

Logically, it is clear that the consequence of such a breach of the Lending Act should be the coming into existence of an employment contract between the employee and the host employer. If the host employer does in fact exercise employer authority over the seconded employee, it is not excessive to assume that it is bound by an employment contract. An almost identical mechanism was applied by the ECJ in its *Voogsgeerd* judgment of 15 December 2011 (C-384/10). The ECJ accepted in that case that the place of business through which the employee was engaged, could be the place of business of an undertaking other than that which was formally referred to as the employer. This could occur if that undertaking had connections with the country of the secondment, such that that country could be regarded as the "place of business". In order for this to be established, there needed to be factual evidence of a situation that differed in reality from what it said in the contract - but it was possible to establish this even if employer authority had not formally been transferred to the other undertaking.

Comments from other jurisdictions

United Kingdom (Rebecca Mullard and Hannah Price): It is likely that this case would have been decided differently in the UK. Firstly, it is unlikely that a UK court would find that the secondment arrangement had given rise to two employment contracts existing simultaneously, one between the individual secondee and the seconding company and another between the individual and the host company. There would have to be exceptional circumstances making it impossible to explain the contractual situation in any other way to give rise to such a dual-contract scenario, which are not present on these facts. Secondly, although it might be possible for a secondment to give rise to an employment relationship between a seconded individual and the host company, there is no equivalent to the Belgian Lending Act in the UK and secondees are most likely to remain employees of the seconding company whilst on secondment. A court would only find that the individual was employed by the host company if the seconding company ceased having any obligations to the individual and the host company started exercising full control over the secondee. For example, if the host company paid the individual, agreed holidays and time off, conducted performance reviews, controlled the individual's work and handled any disciplinary and grievance matters, it is possible that a court would find there was a contract between it and the individual and not between the seconding company and the individual. However, the court will not do so unless it is necessary to give effect to the reality of the relationship and provided there is a contract between the seconding company and the individual it is unlikely to be necessary to imply that relationship between secondee and host.

Whilst the UK courts (as in Belgium) would determine the secondee's contractual entitlements by reference to the Rome Convention (or the Rome I Regulation depending upon when the contract was made), the secondee might also have statutory claims in connection with the termination of his employment (regardless of the choice of law of the contract). Under principles set out in a House of Lords decision, *Lawson – v - Serco*, an individual working in Great Britain at the time of his dismissal is likely to be able to bring a claim for unfair dismissal in the UK employment tribunal against his US employer, in connection with the termination of his employment. Such an individual is also likely to be able to bring other statutory claims in the UK, such as discrimination claims. This would be so even if the employer does not have a place of business in the UK. A recent Employment Appeal Tribunal decision, *Pervez – v - Macquarie Bank Ltd (London Branch) and another*, found that an employer with no place of business in the UK who seconded an employee to a group company based in the UK and then terminated his employment could be sued for unfair dismissal in the UK.

Subject: Secondment
Parties: S - v - I. LLC and I. SA
Court: Labour Court of Appeal Brussels
Date: 28 June 2011
Internet publication: http://www.cass.be

* Thijs de Wagter is a lawyer in the Brussels firm of Lydian, thijs.dewagter@lydian.be.

2012/9

To which country was the contract more closely connected? (NL)

CONTRIBUTOR PETER VAS NUNES*

Summary

A Dutch employee lives in Germany but works in The Netherlands for a German employer. There is no choice of governing law, but all relevant circumstances other than the place of work point in the direction of Germany. Under these circumstances, is an exception to the principle that an employment relationship is governed by the *lex loci labori* warranted?

Facts

The plaintiff in this case was a Dutch woman who lived in Germany, not far from the Dutch/German border. In 1995 she entered into an employment contract with a German employer, the defendant. Her position was General Manager (*Geschäftsführerin/Vertrieb*) of the employer's Dutch branch office. The contract was drafted in the German language, her salary was expressed in German marks, she became a member of a German pension fund, she was insured under the German

social insurance system, she was paid a commuting expense benefit to cover the cost of commuting from her home in Germany to her work in The Netherlands and the contract made reference to a number of German statutory provisions. However, the contract was silent on governing law.

On 19 June 2006 the employer informed the plaintiff that as of 1 July 2006, by reason of redundancy, she was being relocated to the employer's office in Dortmund, Germany where her position would be Regional Manager (*Bereichsleiterin*). Under German law such a unilateral amendment of an employee's terms of employment is possible pursuant to the doctrine of Änderungskündigung. Pursuant to this concept, an employer is entitled to give notice of termination with a simultaneous offer of a new contract on amended terms. An employee who rejects the offer loses his or her job, unless acceptance is made on the condition that it is not socially unjustified *(social ungerechtfertigt)* and challenged on that basis. Under Dutch law an employer has no such right, at least not unconditionally.

The plaintiff did go to Dortmund, but after two days of work she called in sick. A number of court cases followed, in one of which a Dutch court award the plaintiff over half a million Euros. In the case reported here, the plaintiff applied, *inter alia*, for a court order declaring the (former) employment relationship between the parties to have been governed by Dutch law. The courts of first and second instance declared as requested. They based their judgments on Article 6(2) of the 1980 Rome Convention on the law applicable to contractual obligations (replaced in 2009 by Regulation 593/2008). Article 6(2) of the Rome Convention reads:

"Notwithstanding [..], 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) *[...];*

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."

It was common ground between the parties that the plaintiff habitually carried out her work in The Netherlands and that, therefore, Dutch law would govern her contract pursuant to subsection (a), were it not that the employer invoked the final sentence of Article 6(2). The employer argued that this sentence (*"unless it appears from the circumstances as a whole ...."*) applied, given that until the Euro was introduced the plaintiff's salary had been paid in German marks, that the employer was German, that the plaintiff's pension was insured in Germany, that she lived in Germany, that her contract made reference to several German statutory provisions and that she was paid a commuting allowance. The appellate court found these circumstances to be insufficient to justify applying the final sentence of Article 6(2).

The employer appealed to the Supreme Court.

Judgment
The Supreme Court began by quoting from the ECJ's ruling in the recent *Koelzsch* case (C-29/10), in which the ECJ stressed that Article 6 of the Rome Convention aims to protect employees, who are the weaker party in a contract of employment, and that, therefore, the main rule of Article 6(2), namely that a contract of employment is governed by the law of the country in which the employee habitually carries out his work, should be construed broadly. In the *Koelzsch* case, the issue was whether subsection a of Article 6 (2) takes precedence over subsection b, but it seems logical to apply the same reasoning to the question of the relationship between subsection a and the final sentence of Article 6(2).

The Supreme Court went on to note that Dutch law provides employees with more protection against "Änderungskundigung" than German law.

The above considerations might lead to the conclusion that Dutch law governs the employment relationship in question. However, it must be said that there are circumstances (salary in marks, residence in Germany, etc.) indicating a closer connection to Germany. If Article 6(2) of the Rome Convention were to be interpreted as meaning that in a case such as this, with strong links to Germany, the law of the country where the work is performed always governs the employment relationship, the final sentence of Article 6(2) would be meaningless. Under these circumstances the Supreme Court decided to refer the following questions to the ECJ:

1. does Article 6(2) of the Rome Convention mean that, if an employee carries out his work in one country, not merely habitually but also for a lengthy period of time and without interruption, the laws of that country govern the employment relationship in all cases, even where all the other circumstances of the case point to a strong link between the employment contract and another country?

2. Is it necessary for an affirmative answer to question 1 for the employer and the employee to have had the intention (or to have been aware) at the time they entered into the contract, or at least at the time the work began, that the work would be carried out without interruption in one and the same country for a lengthy period of time?

Commentary
To my knowledge there is, surprisingly, little if any case law on the scope of the final sentence of Article 6 (2) of the Rome Convention, now Article 8 (4) of Regulation 593/2008. This referral to the ECJ provides a welcome opportunity for that court to enlighten us.

Subject: Governing law (conflict of laws)
Parties: *Anton Schlecker - v - Boedeker*
Court: *Hoge Raad* (Dutch Supreme Court)
Date: 3 February 2012
Case number: 10/10806
Hard copy publication: JAR 2012/69
Internet publication: www.rechtspraak.nl → LJN: BS8791

* Peter C. Vas Nunes is a partner with BarentsKrans N.V. in The Hague, www.barentskrans.nl.

2012/10

Schultz-Hoff with a twist (LUX)

CONTRIBUTOR: MICHEL MOLITOR*

Summary
The courts in Luxembourg are applying the *Schultz-Hoff* doctrine to set aside provisions of domestic law that are at odds with Directive 2003/88, but there are obstacles.

Facts
The plaintiff in this case suffered from a rare and incurable disease. On 29 January 2010 he called in sick. He was unable to work for a whole year. Luxembourg law provides that an employment contract terminates automatically following 12 months of uninterrupted disability. Thus, on 29 January 2011, the parties' contract ended. The plaintiff applied for a payment in lieu of the leave that he had been unable to take in 2010. The defendant refused to pay, for the following reason.

Luxembourg law provides that leave must be taken before 31 December in the year in which it accrues, unless this is impossible, in which case the leave must be taken between 1 January and 31 March of the following year (the "carry-over" period). Given that the plaintiff had been disabled, and therefore unable to take leave, during almost all of 2010, and given that the law entitles a worker to payment in lieu in the event his employment is "terminated" before he was able to take his leave, the plaintiff would normally have been eligible for payment in lieu. However, the applicable collective agreement for the Security and Caretaking Services Industry contained a special provision - Article 30.6 - on which the defendant based its refusal to pay. This provision stipulated that if the criteria for carrying over leave to the next year have been satisfied, a worker who wishes to make use of his carry-over right must apply for it in writing before 1 December. As the plaintiff had failed to make such a written application, his right to paid leave for the year 2010 had extinguished.

The plaintiff countered this argument by pointing to the ECJ's ruling in the *Schultz-Hoff* case (ECJ 20 January 2009, case C-350/06), in which the ECJ had ruled that Article 7(1) of Directive 2003/88 "*must be interpreted as precluding national legislation or practices which provide that the right to paid annual leave is extinguished at the end of the leave year and/or of a carry-over period laid down by national law, even where the worker has been on sick leave for the whole or part of a leave year and where his incapacity to work had persisted until the end of his employment relationship, which was the reason why he could not exercise his right to paid annual leave*".

Judgment
The Labour Court held that Article 30.6 of the collective agreement did not comply with Article 7(1) of Directive 2003/88, as interpreted in *Schultz-Hoff*, and should therefore remain unenforced. Therefore the plaintiff, who had been unable to take leave in 2010 on account of his disability and had been unable to apply for carry-over to 2011 before 1 December 2010, was entitled to payment in lieu of leave accrued in 2010.

Commentary
The Luxembourg legislature has until now failed to adapt the law to *Schultz-Hoff*. The transposition of Directive 2003/88 has therefore, of necessity, been carried out by means of case law: see the judgment of the Luxembourg Court of Appeal dated 31 March 2011 reported in EELC 2011/43. The case reported above follows that case law, but there are several interesting points to note.
One such point is that Luxembourg law grants employees the right to a payment in lieu of untaken leave in the event an employment contract is "terminated". It is silent on the situation where an employment contract expires automatically, such as where an employee remains sick for 12 months. In the said judgment of 31 March 2011, the Luxembourg Court of Appeal had to resort to ILO Convention 132 to resolve this issue. It is conspicuous that the Labour Court in the case reported above made no mention of this issue.

A second point is that the Labour Court set aside Article 30.6 of the collective agreement by applying EU law, whereas it could have done so more easily on the basis of domestic law, which provides that a collective agreement may only derogate from the law in favour of employees and that any derogation to their detriment is void. In my opinion Article 30.6 is a detrimental derogation from the law, as interpreted following *Schultz-Hoff*, which provides, unconditionally, that leave is carried over in the event an employee has been unable to use it due to prolonged sickness. Unfortunately, the Labour Court did not use the opportunity to rule that Article 30.6 was void, limiting its judgment to the situation where the employee was sick.

Thirdly, it is not clear from the published judgment what made the plaintiff unable to apply for a carry-over of his 2010 leave into 2011 before 1 December 2011. The court merely held that he was unable to apply for a carry-over since he was absent from the workplace.

Despite these three points of criticism, the judgment reported above should be welcomed, as it demonstrates that the Luxembourg courts are prepared to implement EU law despite the lack of domestic legal basis and to set aside incompatible provisions of domestic law, even where they are contained in a collective agreement.

Comments from other jurisdictions
The Netherlands (Peter Vas Nunes): This judgment does not specify whether the defendant was a public or a private employer. The title of the applicable collective agreement makes me suspect that it was a private employer. If this is indeed the case, the Luxembourg Court appears, conspicuously, to be giving horizontal direct effect to a Directive, which is conspicuous. Dutch employees and former employees of private companies, knowing that a *Schultz-Hoff* claim against their (former) employer will be unsuccessful, are making *Francovich*-type claims against the State for failure to transpose Directive 2003/88 adequately. Recently, the Lower Court of The Hague (*Ktr. Den Haag* 6 February 2012, LJN nrs. BV 7201, BV 7212 and BV 7318) held that the State is liable for the loss of (compensation in lieu of) paid leave suffered as a result of said failure.

Another point on which one might have expected debate is whether Article 30.6 of the collective agreement at issue (i.e. carry-over of untaken leave requiring an application in writing before 1 December) is a requirement for the existence of the right to paid leave that the Member States may not block, or merely a "*condition for entitlement to, and granting of, such leave laid down by national legislation or practice*" within the meaning of Article 7(2) of Directive 2003/88. In the latter case should not the court have held that Article 30.6 was perfectly valid except in cases where the employee is so sick that he is reasonably unable to file a carry-over application before 1 December?

Subject: Paid annual leave
Parties: not published
Court: *Tribunal du Travail* (Labour Court), Luxembourg
Date: 21 October 2011
Case number: 3941
Hardcopy publication: not published
Internet publication: not published

* Michel Molitor is a partner of Molitor Avocats in Luxembourg, michel.molitor@molitorlegal.lu.

2012/11

European works council cannot stop plant closure (GE)

CONTRIBUTOR PAUL SCHREINER*

Summary
In Germany a European works council, contrary to a domestic works council, has no option to seek a restraining order from the court. In this case the European works council was powerless to prevent a factory from being closed down.

Facts
The defendant in this case was a globally active supplier of spare parts in the automotive industry. On 22/23 June 2011 the parent company's management informed the European works council (the "EWC") that one of the company's factories in Germany would be closing down. It issued a press release to that effect, started negotiations with the trade unions and informed the factory's staff about a possible social plan aimed at alleviating the impact of the closure on redundant employees. The published judgment does not reveal whether the company's own works council, if there was one, was involved.

The EWC demanded written documentation with respect to the rationale for the decision, including whether there were alternatives to closing down the factory, and so forth. Management responded by holding a presentation on 12 July in which it provided detailed information about the group's finances and the need to close down the factory in question. The EWC was not satisfied. It demanded full compliance with the German Act on European Works Councils (the "EBRG"), which provides that, where management intends to make certain decisions, such as closing a factory, it must (i) inform and (ii) consult with the EWC before making the final decision. "Informing" means exchanging information in order to give the EWC an opportunity to verify and understand the rationale for the decision[1]. "Consulting" means having a genuine dialogue[2]. The EWC asked management to reverse its decision and cease the process of closing down the factory until the correct information had been given and the consultation process completed. Management refused to give in to this demand, whereupon the EWC applied to the local labour court for injunctive relief. The EWC asked the court to order management to cease all measures aimed at executing the decision to close down the factory until it was in full compliance with the information and consultation rules.

The court turned down the EWC's request. The EWC appealed to the *Landesarbeitsgericht*.

Judgment
The *Landesarbeitsgericht* found that management had breached the EBRG on two counts: (i) it should have provided the information that it gave on 12 July before making its decision, not afterwards and (ii) it made its decision without consulting with the EWC. However, the EBRG contains no sanction for non-compliance other than a fine. It is silent as to whether a EWC can apply for injunctive relief. It lacks a provision, such as that contained in the German domestic Works Councils Act, allowing a court to intervene in management's decision-making. The court saw no possibility of applying that provision by analogy.

Commentary
In my view this decision is in line with German law. The rights and obligations of a European Works Council are incomparably less far-reaching than those of a domestic German works council. Each institution is governed by different laws and one difference relates to the option to apply for injunctive relief.

Most large and medium-sized organisations in Germany have a works council. In the event management wishes to close down the organisation in whole or in part, it must consult with the works council with a view to concluding (i) a "compromise of interests" (*Interessenausgleich*, a document evidencing that closing down is the only viable alternative) and (ii) a social plan. In the "compromise of interests" document management must set out in detail why the closure is necessary. The social plan must specify, *inter alia*, the compensation offered to the redundant workers. In the event management and the works council fail to agree on a social plan, either of them can apply to an arbitrator. The arbitrator will then assess the company's financial situation and the anticipated financial impact on the staff. Having done that, the arbitrator will come up with a proposal for a social plan and, if the parties do not accept the proposal, it will make a binding decision.

What if management closes down an organisation (factory, plant, office, department, etc.) without informing the works council and without having concluded a social plan? Can the works council apply for and obtain injunctive relief, for example, in the form of a court order to stop the closure and, where appropriate, undo measures that have been taken in preparation for or execution of the closure? The majority of Labour Courts of Appeal would answer this question affirmatively, basing their position on Article 23 of the Corporate Constitution Act (*Betriebsverfassungsgesetz* or *BetrVG*), which gives works councils the right to ask the courts to order management to refrain from implementing decisions that are prohibited and hence void. However, there is a significant minority of Labour Courts of Appeal that deny works councils the right to injunctive relief. The Supreme Labour Court (*BAG*) has yet to decide on this issue.

Given that it is uncertain whether a domestic works council can obtain injunctive relief, it does not come as a surprise that the court in the case reported here denied that right to a EWC, a body that basically has no more than information rights. There is no obligation on management even to attempt to reach agreement with a EWC. All management needs to do is hear what the EWC has to say.

Comments from other jurisdictions
Austria (Martin Risak): Austrian law is not very clear on the consequences of the employer not informing or not properly informing

the works council about a transfer of an undertaking except to say that the employer is not subject to fines. There are no published lower court cases and the Supreme Court has not passed any decision on this question as yet. A recent and often discussed article (Kodek, Einstweilige Verfügungen zur Sicherung des Informationsanspruchs nach §§ 108, 109 ArbVG bei beabsichtigten Betriebsänderungen, Das Recht der Arbeit 2011, 517) argues that the works council should have the right to injunctive relief based on the obligation of Member States to enact, laws, when transposing EU Directives, that provide dissuasive, effective and proportionate sanctions for breaches. It is likely that works councils will bring claims based on this reasoning in the near future and that the question will need to be decided by the Austrian courts.

Subject: Information and consultation
Parties: unknown
Court: *Landesarbeitsgericht Köln* (Labour Court of Appeal, Cologne)
Date: 8 September 2011
Case number: 13 Ta 267/11
Hard copy publication: ZIP 2011, 2121-2123
www.justiz.nrw.de → Bibliothek → Rechtsprechung → Aktenzeichen → 13 Ta 267/11

* Paul Schreiner is a partner with Luther Rechtsanwaltgesellschaft in Essen, paul.schreiner@luther-lawfirm.com.

(Footnotes)

1. Information in the meaning of the law is defined as the transfer of information from central management or other authorised employer representative to the employees representatives for their attention and for their assessment of the measure in question. The information must be given at a time, in a way and in a form that fulfils these purposes and enables the employees representatives to assess the possible consequences and prepare for a meeting with the competent organ of the company or group.
2. For the purposes of the EBRG, consultation means an exchange of views and the establishment of dialogue between the employees representatives and central management or any other appropriate level of management, at a time, in a way and in a form that enables the employees representatives to state their opinion regarding the measures that are the subject of the consultation, so that they can be considered by the company or group. The consultation must enable the employee representatives to hold a meeting with central management to discuss their views on the management's proposals.

2012/12

Offshore workers can be required to take annual leave during onshore field breaks (UK)

CONTRIBUTOR ALISTAIR CARMICHAEL *

Summary
Offshore workers in the oil and gas industry brought an action claiming that, in not being allowed to take annual leave during periods when they were rostered for offshore work, they were being denied their entitlement to annual leave under the Working Time Regulations 1998 (the "WTR"). The WTR implement the Working Time Directive 93/104/EC (now consolidated as Directive 2003/88/EC, the "WTD"). The Supreme Court rejected the employees' argument and held that onshore field breaks could be used for statutory holiday entitlement. It also refused a request for a reference to the ECJ for a decision on the meaning of "annual leave" under the WTD.

Facts
Offshore workers in the oil and gas industry typically work a two week offshore, two week onshore shift pattern and are required to take their annual leave whilst rostered onshore. A number of employees working in the industry (for different employers) brought claims alleging that, in not being allowed to take annual leave during periods where they were rostered for offshore work, they were being denied their entitlement to annual leave under the WTR.
Of the pool of claims, seven test cases were identified on the basis that the relevant claimants were representative of the main offshore work patterns. Most of the relevant employees were engaged on a two weeks on, two weeks off shift pattern under which they worked two weeks of daily 12 hour shifts offshore, followed by two weeks of "field break" onshore. Whilst the employees were expected to attend training, appraisals and medical appointments during the field breaks, the overall time taken up with these work-related commitments was minimal.
The contracts of employment of the relevant employees specified the working arrangements or restrictions on when annual leave could be taken. The employees had each sought, and been refused, periods of annual leave which fell during periods when the employee was rostered to be offshore. Regulation 15 of the WTR provides that an employee wishing to take annual leave must give notice to his employer specifying the days on which the leave is to be taken. The employer can respond to the request with a notice of its own refusing the request. Independently, or in connection with a refusal, an employer can give notice to an employee that leave must be taken at a particular time or times. Regulation 13 of the WTR sets out the entitlement to annual leave which, at the relevant time, was four weeks per year.

Judgment
The claimants issued proceedings in the Employment Tribunal (the "ET") claiming that under the WTR their employers were obliged to give them four weeks' holiday from what would otherwise be working time and so their refusal to grant annual leave during offshore periods amounted to a breach of the WTR.
The ET determined that annual leave for the purposes of regulation 13 of the WTR "'involved a release from what would otherwise have been an obligation to work, or at least to be available for work or otherwise in some way on call". So, it held that field breaks could not be used for annual leave and leave could only be taken during periods when the employee was rostered for offshore work.
The employers appealed to the Employment Appeal Tribunal (the "EAT").
In determining whether employees had been denied their annual leave entitlements, the EAT was asked to consider:

- whether the employers had given valid regulation 15 notices which effectively countered the employees' leave requests; and
- whether annual leave could be taken during field breaks.

Noting that regulation 15 did not require notices to be given in a particular form or at a particular time, the EAT, by a majority, determined that the provisions in the relevant employees' contracts which stated when leave could and could not be taken constituted effective notices for the purposes of regulation 15. In addition to this, the employers had given valid regulation 15 notices directly refusing the employees' requests for leave. Accordingly, the employers had not wrongly refused the employees' annual leave.

On the second question, the EAT, again by majority, concluded that annual leave could be taken during field breaks. The EAT looked to the ordinary meaning of annual leave, as annual leave is not defined in the WTD or WTR, and concluded that annual leave was a period where the employee was free from work commitments. The provision of annual leave during field breaks was consistent with this definition and as such was acceptable.

The employees appealed to the Inner House of the Court of Session in Scotland.

In determining the appeal, the Court of Session was met with an additional argument that the WTD was intended to improve workers' rights and provide something over and above a worker's ordinary terms and conditions. The Court of Session rejected this argument and said that the WTD simply sought to impose minimum standards. The Court of Session said that the annual leave provisions in Article 7 were designed to place a cap on the number of weeks in which an employee was required to work. An employer will have complied with its obligations if the employee is given the opportunity to take four weeks of paid annual leave each year in which they are not required for work. Using the two weeks on, two weeks off shift pattern, the employees were not required to work more than 48 weeks per year.

The Court of Session dismissed the appeal and the employees appealed to the Supreme Court of the United Kingdom.

In the appeal to the Supreme Court the employees argued:

- annual leave required a release from an obligation to work. During field breaks the employees were not required to work, so there could be no release from that obligation;
- field breaks lacked the "qualitative dimension" required of annual leave – that a minimum period of rest is not sufficient, the rest must have a certain condition or quality that met the health and safety purpose of the legislation; and
- "annual leave" was not defined in the WTD, so its meaning was uncertain. To clear up the uncertainty, the matter should be referred to the ECJ.

The Supreme Court rejected the argument that as field breaks did not constitute working time, they could not be used for annual leave. In rejecting the argument, the Supreme Court focused on the purpose and intent of the WTD, which was to protect the health and safety of workers. Consistent with this, the WTD provided for minimum daily, weekly and annual rest periods. The Court held that a rest period (whether daily or weekly rest, or annual leave) means any period which is not working time but that it does not have to involve a release from what would otherwise be an obligation to work. As field breaks were not working time, the field break could be used for annual leave.

The Court also rejected the argument that the field breaks lacked a "qualitative dimension" required for annual leave, noting that such a dimension was not included within the terms of either the WTD or WTR. The qualitative dimension required of annual leave was simply that during the relevant period the employee was not required to work.

Whilst not relevant to the case at hand, the Court was asked to consider what is known as the "Saturday problem". This is a scenario used to support the argument that employers should not be able to direct employees to take annual leave in time when they would not otherwise be working. In this situation an employer engages an employee to work a normal five day-a-week contract, Sunday is designated the weekly rest break and the employer directs the employee to take annual leave every Saturday, resulting in the employee never having the opportunity for any meaningful annual break. The court decided that the real issue raised by the Saturday problem was not whether an employee can be required to take leave during a period when he or she would not otherwise be working but rather whether an employee can be forced to take annual leave for periods which are shorter than one week. The Court noted that the entitlement to annual leave in Article 7 of the WTD is measured in weeks and not days, and that it thought it arguable that employees can opt to take annual leave in days but employers cannot force them to do so. However, as the Saturday problem did not arise in this case, the Court did not have to reach a conclusion on it.

In a unanimous decision, the Supreme Court dismissed the appeal. The Court did not consider the meaning of annual leave to be unclear, so refused the request to refer the matter to the ECJ.

Commentary

The decision of the Supreme Court will come as a relief to employers working in sectors that require employees to take annual leave at specific times such as schools, football clubs, shipping companies and offshore oil and gas producers.

Employers can lawfully direct their employees to take annual leave during periods where the employees would not ordinarily be working. As long as the employee is accorded the required period of annual rest, the employer will have acted in accordance with the WTR.

The case is of interest also for the Court's answer to the Saturday problem – that employers cannot force employees to take annual leave in units of days not weeks, although employees might choose to do so. Although the Court's view on the matter was only *obiter dicta*, it will be influential if the issue should come before a lower court for consideration.

Comments from other jurisdictions

Czech Republic (Nataša Randlová): We agree that the judgment is of interest not only for offshore workers, but for employees in many other sectors, including schools and shipping companies.

It was considered that field breaks were not working time but that annual leave does not have to involve a release from what would otherwise be an obligation to work. Therefore, field breaks (in the case at hand) could be used for annual leave. The same rule will apply to other periods where employees would not ordinarily be working, in relation, say, to employees in other sectors. Based on this, an employer may require employees to take their annual leave at a particular time, including time which is not ordinary working time.

Czech law gives employers an even stronger position. They have the right (which to my knowledge is not mitigated in any collective agreement) to determine unilaterally when staff take their annual leave. The only requirement is that the employer provides 14 days advance notice, that he respects the employee's legitimate interests (e.g. employees with children have a legitimate interest to take leave during school holidays) and that he does not require the employee to take leave during maternity/paternity leave, sickness, military exercises, etc. So, for example, an employer may in principle obligate an employee to take his 2011 paid leave in the month of November 2011 (as a rule not a time of the year during which employees like to take their leave) merely by informing the employee of this mid-October.

There is only one exception to this principle. Since 1 January 2012 the law provides that in the event an employer has not designated any leave period by 30 June of the year after the leave has accrued, the employee is free to determine that period himself. So, for example, if an employee has not been able to take his 2011 leave by 30 June 2012, the employee is free to take that leave (but only the leave accrued in 2011) at any time he wishes as from 1 July 2012, provided he gives the employer two weeks' notice.

In respect of the "Saturday problem", we can add that annual leave is measured in weeks in the Czech Republic too, but leave can be taken (or be required to be taken) in days, or even in half-days, which is the minimum unit of leave. If the annual leave is not taken all at once, at least part of it must be taken in a block of two weeks. There are no other statutory restrictions on the length of units of annual leave.

Germany (Markus Weber): According to a 2001 judgment of the *Bundesarbeitsgericht* German employers can grant holiday only for times when the employee would otherwise have to work. Due to this case law the case reported above would have been decided differently in Germany. The crucial point here is that the employees were expected to attend training, appraisals and medical appointments during the onshore shifts, but did not have to work apart from that. Hence, if there was no obligation to work, the employer could not release them from any corresponding obligation by granting holiday.

Moreover, the employer was obliged to grant the field breaks as free time compensation since the employees' daily work exceeded the time limits of the German *Arbeitszeitgesetz* (Working Hours Act) during the previous two weeks offshore, during which time they worked 12 hour shifts. Section 3 of the *Arbeitszeitgesetz* provides that an employee may only work in excess of 8 hours per day if the average of his daily working time during the following six months is 8 hours. Hence, two weeks of 12 hour shifts need to be compensated by free time pursuant to the German working hours legislation. These compensation periods cannot be treated as holiday at the same time according to the said case law.

Subject: Offshore workers can be required to take annual leave during onshore field breaks
Parties: *Russell and others – v – Transocean International Resources Limited and others*
Court: *Supreme Court*
Date: 7 December 2011
Case number: [2011] UKSC 57
Hard copy publication: not yet reported
Internet publication: www.bailii.org

* Alistair Carmichael is a solicitor with Lewis Silkin in London, alistair.carmichael@lewissilkin.com.

2012/13

Clarification of "closure of section" in relation to collective redundancy (P)

CONTRIBUTOR MARIA DA GLÓRIA LEITÃO*

Summary
An employee of a multinational group that experienced a downturn and carried out a collective redundancy, challenged the lawfulness of his redundancy. He claimed the grounds used by the employer were false because the section in which he used to work had not been closed down. The Supreme Court found the redundancy to have been lawful.

Facts
The case concerns a company, part of a multinational group, which was engaged in the business of manufacturing and marketing thread, kits, fabric, zippers and other sewing accessories for both domestic and commercial purposes and one of its employees. The decision provides no further identification of the parties.

Following a reorganisation in 2004 the company basically consisted of two departments: Industrial and Crafts. The plaintiff was employed in a sub-department of Industrial called the Warehouse and Industrial Logistics Section.
On 26 October 2005[1], the employer communicated to the employee its decision to dismiss him as part of a collective redundancy involving the closure of the Warehouse and Industrial Logistics Section with effect from 31 October 2005. The collective redundancy process had begun on 21 September 2005 and was to include 12 workers and so reducing labour costs by € 119,000[2]. Eleven of these entered into a termination agreement with the employer to revoke their labour contracts.

In May 2006 the plaintiff (the 12th of the redundant staff), who did not sign a termination agreement, brought an action to contest the collective redundancy, claiming that the grounds used by the employer were false because the section where he used to work had not in fact been closed down. He claimed reinstatement, payment of just over € 3,000 for loss of salary up until January 2005, about € 385 for every month after January 2005 and € 15,000 by way of personal damages.

In Portugal an individual dismissal is only possible for a "just cause", such as gross misconduct or a serious breach of contractual duties rendering maintenance of the employment relationship impossible. The concept of just cause is rooted in the Portuguese Constitution, which provides that employees shall enjoy job security, and which prohibits dismissals without just cause or with political or ideological motives. The courts are strict when applying the concept of just cause. In the event a court finds that an employee has been dismissed without just cause, i.e. illegally, it will order the employer, at the employee's choice, either (i) to reinstate the employee, to pay him full salary for the period between the dismissal and the final court decision and, where appropriate, to pay damages or (ii) to pay the employee a substantial indemnification. The fact that the employee has this choice gives him or her a strong negotiating position.

A collective redundancy is, as a rule, easier for the employer to carry out than an individual dismissal. A collective redundancy is where, in an organisation employing less than 50 employees, two or more employees are dismissed on objective grounds within a three-month

period. In organisations employing 50 or more employees, a collective redundancy is where five or more employees are dismissed on objective grounds within a three-month period. A collective redundancy does not need to be based on difficult economic conditions: it may be justified by any reorganisation. The procedure for a collective redundancy is as per Directive 98/59 and therefore involves three stages: (i) notification, (ii) consultation and (iii) decision and notice. The Directive was transposed into Portuguese law in 1999.

In the court case, the plaintiff argued that the ground for his dismissal was false, since the Warehouse and Industrial Logistics Section, where he had worked, had not closed but had been transferred to the Crafts Section. The employee argued that a section cannot be considered closed if the work it does, or at least some of it, continues to be done elsewhere. Moreover, he argued that the Warehouse and Industrial Logistics Section was part of the Industrial department. It existed as a unit within that department, and the employee argued that whether it was given a distinct identity was not important. What mattered was that the work was being carried out within the section as a whole. In this case, work that used to be done in the Warehouse and Industrial Logistics Section was transferred to the Crafts Section. In other words, either these two sections merged – which the employee felt unlikely - or the work of the Warehouse and Industrial Logistics Section was transferred to the Crafts Section.

Thus, the employee considered that the Warehouse and Industrial Logistics Section was never actually shut down, and that the grounds for the collective redundancy were therefore false. The Crafts Section was later closed down in 2009 (and this is when the employee claims that the Warehouse and Industrial Logistics Section was also shut down), therefore the employee considered that the decision to organise a collective redundancy back in 2005 was based on false grounds. And given that there were no grounds to sustain the collective redundancy, it must be considered unlawful.

The employer explained that, following the redundancies in 2005, orders placed in Portugal were input into a computer system and forwarded to a central warehouse in Germany, which then produced and/or supplied the products to customers via a specialist transportation company. This attempt to centralise orders in Germany was a way of rationalising costs. Work relating to the central warehouse in Germany was no longer necessary. This meant that the Craft Section was never understaffed during or following the process.
Both the Vila Nova de Gaia Court (1st instance) and the Porto Court of Appeal had ruled that the grounds used by the employer were valid and that the collective redundancy was carried out in compliance with legal requirements.

Judgment
According to the procedural rules on appeals, both the special rules of the Labour Procedural Code and the general ones of the Civil Procedural Code, the parties were entitled to have the case considered by three courts. This rule has since been amended to the effect that where the second instance court confirms the decision of the first instance court (even on different grounds) there is no further right of appeal.

Since no procedural or quantitative issues arose, the Supreme Court considered the authenticity and objectivity of the grounds given by the employer.

The Supreme Court noted that the collective redundancy regime set forth in the Labour Code describes the *"possible compromise between the constitutional provisions concerning job security (Article 53 of the Portuguese Constitution) and the management and viability of a company's crisis".* Thus, both constitutional provisions related to job security and the management and viability of company crisis (in a broad sense) were taken into account by the legislator when setting forth the collective redundancy regime and it is therefore a compromise between those two elements. In terms of company crisis, collective redundancy is often a way for companies to overcome difficulties as it can encourage them to undertake resizing and restructuring measures.

The Supreme Court confirmed that both the procedural and quantitative legal requirements for a collective redundancy had been fulfilled. As to the grounds for the employer's decision, the Supreme Court's view was that if the decision was not clearly erroneous, it should be respected. It therefore held that the evolving situation motivating the employer's decision was evidence of the decision's authenticity. There was a clear cause and effect relationship between the need to close the Warehouse and Industrial Logistics Section and the decision to reduce staff by means of a collective redundancy.

Following the collective redundancy the Warehouse and Industrial Logistics Section was indeed closed. The work that had been done there became partially unnecessary (as regards those products coming from the central warehouse in Germany), and the remaining tasks were carried out by the Crafts Section (without the need to take on more staff).

Thus, the Supreme Court considered that the redundancy grounds were genuine and there was a causal link between those grounds and the employment terminations. This was sufficient for the collective redundancy to be considered lawful.

Commentary
Article 1(1) of Council Directive 98/59/EC, of 20 July 1998 defines collective redundancies as *"dismissals effected by an employer for one or more reasons not related to the individual workers concerned"*. The Directive was intended to harmonise Member States' legal frameworks on the procedure and practical arrangements for collective redundancies in order to ensure greater protection for workers in the event of collective redundancy.

According to the Directive, an employer contemplating a collective redundancy must hold consultations with employee representatives with a view to reaching an agreement. These consultations must, at a minimum, cover ways and means of avoiding collective redundancies or reducing the number of workers affected, and of mitigating the consequences by the use of accompanying social measures aimed at redeploying or retraining redundant workers.

The Directive was transposed into Portuguese law by Law No. 99/2003, of 27 August, which approved the Portuguese Labour Code. The Labour Code was later amended by Law No. 7/2009, of 12 February.

The Portuguese labour regime is laid down in eight extensive articles of the Portuguese Labour Code. Article 359(1) of the Portuguese Labour Code (Article 397(1) in the previous version of the Code) defines collective redundancy as the termination of employment contracts by the employer operated simultaneously or successively within a three-month period, covering at least two or five employees (depending on

the size of the company) and based on specific grounds. The process takes about three months, and it involves three stages: (i) notification; (ii) consultation; and (iii) decision and notice.

According to Portuguese law, the grounds for collective redundancy are (i) the closure of one or more sections or equivalent structures or (ii) the reduction of the number of employees needed, as determined by market, structural and/or technological reasons.

Market reasons refer to situations where there is a reduction in the company's activity because of a foreseeable decrease in demand for its goods or services or where there is no possibility of placing such goods or services on the market. Structural reasons are related to economical and financial imbalance, changes in activity, organisational restructuring or the replacement of major products. Technological reasons refer to changes in techniques or production procedures, for example, the automation of production.
It is important to underline that the Directive only states that redundancy can be carried out *"for one or more reasons not related to individual workers"* but provides no further details about grounds. It makes no difference which grounds are used. For example, the employer may use a combination of closure of a unit and market, structural or technological reasons. Equally, one ground is sufficient for the rules for collective redundancy to be applied.
As Portuguese law further delimits the circumstances in which the collective redundancy can take place by specifying the reasons that can lead to it, including the closure of units, our view is that it is harder to carry out a collective redundancy in Portugal than it would be purely under the rules contained in the Directive.

What makes this judgment noteworthy is the clarification it gives of what constitutes the closure of a section or equivalent structure. This is especially important as, in times of economic and financial turmoil, employers might feel tempted to resort to collective redundancy without sufficient grounds to do so.

The decision clearly points to a broad view of what can constitute grounds for a collective redundancy: the term "not clearly erroneous" used by the Supreme Court remains undefined and leaves room for plenty of activity within the grey area - if not outright employer abuse. Practitioners representing employers may now be able to rely on broadly-defined grounds for collective redundancy to support restructuring decisions. And as the obstacles to collective redundancies are reduced, it will become easier to carry them out, with ever less legal risk.

Comments from other jurisdictions
Germany (Paul Schreiner): The German legal situation is quite different, although almost the same outcome would have probably been reached in this case.

In any establishment with 10 or more employees the Unfair Dismissal Protection Act applies, unless the employee whose employment is intended to be terminated was only on board for less than 6 months. The Unfair Dismissal Protection Act requires the employer to have substantive grounds for any termination, such as reasons relating to the person (e.g. illness), behaviour (misconduct) or operational reasons. If the employer claims that a certain employee cannot be employed anymore due to operational reasons, it has to show that there has been a decision by the employer to reorganise production, which led to a decrease in the required workforce. Such grounds can be found, *inter alia*, in a reduced volume of production, a productivity gain or the aggregation of the employee's work.

If the dismissal is challenged by the employee, a court can evaluate whether or not the grounds advanced by the employer actually exist. In the case at hand, therefore, a German court would have checked if, in reality, the tasks the employee performed before the decision of the employer had ceased to exist.

Assuming that the employer can show a valid reason for termination, in a next step it would need to perform the social selection among the employees. The social selection however addresses all employees employed in a certain establishment. It is not clear in the case at hand whether or not the crafts department constituted a separate establishment. Assuming that this was the case, no further social selection would have had to be made. Assuming the opposite, a social selection would have had to be made amongst those employees who worked in comparable positions. In such social selection, *inter alia*, the length of service, the age and the employee's number of dependents have to be taken into account.

Given the fact that the establishment was at least partly closed, the employer would have had to conclude a compromise of interest and social plan (which usually includes redundancy payments) with the works council. This process usually also includes the negotiations with the works council regarding the collective dismissal in question. In addition to this procedure, the employer would have had to notify the unemployment agency of the fact that a significant number of employees would lose their jobs.

Subject: Collective redundancies
Parties: not known
Court: Supreme Court of Justice
Date: 6 December 2011
Case number: 414/06.2TTVNG.P1.S1
Internet publication: www.dgsi.pt/jstj.nsf

* Maria da Glória Leitão is a partner with the Lisbon firm of Cuatrecasas, Goncalves Pereira, and Head of the Employment Law Department, glorialeitao@cuatrecasasgoncalvespereira.com.

(Footnotes)
1. The collective redundancy procedures started on 21 September 2005, but the decision to dismiss the plaintiff was communicated on 26 October 2005.
2. The labour costs' reduction also took into account the plaintiff's dismissal, i.e. - following the dismissal of the plaintiff and of the other 11 employees, there was a reduction of €119.000 related to personnel costs charged to the Industrial area.

ECJ COURT WATCH

SUMMARIES BY PETER VAS NUNES

RULINGS

ECJ 15 December 2011, case C-257/10 (*Försäkringskassan - v - Elisabeth Bergström*) ("**Bergström"**), Swedish case (SOCIAL SECURITY)

Facts

Mrs Bergström lived and worked in Switzerland for eight years. Her daughter was born there in March 2002. She then returned to Sweden with her husband and daughter in September 2002. Her husband immediately took up employment in Sweden, while Mrs Bergström remained unemployed in order to care for her daughter. In March 2003 she applied for Swedish "high-level parental benefits". The National Social Insurance Office denied her high-level parental benefits, merely awarding her basic parental benefits. The reason was that the relevant Swedish law requires applicants for the high-level benefit to have worked in Sweden for the 240 days before the birth of their child.

National proceedings

Mrs Bergström contested the denial of her application in court. The court of first instance turned down her claim but on appeal it was granted. The appellate court equated Mrs Bergström's employment in Switzerland with employment in Sweden. The National Social Insurance Office appealed to the Supreme Administrative Court, which referred two questions to the ECJ on the interpretation of Article 72 of Regulation 1408/71 (the "Regulation") and the corresponding Article 8 of the Agreement between the EC and Switzerland on the free movement of persons (the "Agreement"). Said Article 8 provides that "*The Contracting Parties shall make provision [...] for the coordination of social security systems with the aim in particular of [...] aggregating, for the purpose of acquiring and retaining the right to benefits and of calculating such benefits, all periods taken into consideration by the national legislation of the countries concerned*". Said Article 72 provides that "*Where the legislation of a Member State makes acquisition of the right to benefits conditional upon completion of periods of insurance, employment or self-employment, the competent institution of that State shall take into account [...] periods of insurance, employment of self-employment completed in any other Member State, as if they were periods completed under the legislation which it administers*".

ECJ's findings

1. Both the Agreement and the Regulation apply to a situation such as that of Mrs Bergström (§ 26-34).
2. The ECJ rejects the argument that the use of the expression "aggregation" implies that there must be at least two periods of employment, completed in more than one state and that, as Mrs Bergström was employed only in Switzerland, she did not qualify for the high level benefit (§ 35-45).
3. As for the amount of the benefit, Mrs Bergström's qualifying income must be calculated by taking into account the income of a person who is employed, in Sweden, in a situation comparable to her situation and who also has professional experience and qualifications comparable to her professional experience and qualifications (§ 46-53).

Ruling

Article 8(c) of the Agreement between the European Community and its Member States on the one part, and the Swiss Confederation on the other [...] and Article 72 of Regulation (EEC) No 1408/71 must be interpreted as meaning that, where the legislation of a Member State makes the award of a family benefit [...] conditional upon completion of periods of insurance, employment or self-employment, the institution of that Member State which is competent to make such an award must take into account for those purposes periods completed in their entirety in the Swiss Confederation.

Article 8(a) of that Agreement and Articles 3(1), 23(1) and (2) and 72 of Regulation No 1408/71 must be interpreted as meaning that, where the amount of a family benefit, such as that at issue in the case before the referring court, falls to be determined in accordance with the rules governing sickness benefit, that amount - awarded to a person who has completed in full the necessary employment periods for acquiring that right in the territory of the other Contracting Party - must be calculated by taking into account the income of a person who has comparable experience and qualifications and who is similarly employed in the Member State in which that benefit is sought.

ECJ (Grand Chamber) 24 January 2012, case C-282/10 (*Maribel Dominguez - v – Centre informatique du Centre Ouest Atlantique* and *Préfet de la région Centre*) **("Dominguez"),** French case (PAID LEAVE)

Facts

Ms Dominguez was employed by a French organisation in the field of social security ("CICOA"). In November 2005, while commuting between her home and place of work, she was involved in a traffic accident. As a result, she was unable to work until January 2007. This caused her to be absent for the whole of 2006. Upon her return to work she was informed that she had not accrued any paid leave in 2006. This was because French law, as it stood at the time, provided that only workers who had worked for the same employer for at least one month in any calendar year accrue entitlement to paid leave in that year. This provision is referred to below as the "contested provision". (However, note that the one month requirement was later changed to 10 days). In determining whether a worker has "worked", certain periods during which the worker did not actually work are equated with worked periods. One such period, pursuant to Article L 223-4 of the Civil Code, is where the worker was unable to work for a full year on account of an accident at work or an occupational disease. Given that Ms Dominguez's absence was not caused by an accident at work, she was not covered by this exception and so she did not accrue any paid leave for the year 2006.

National proceedings

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

ECJ's findings

Question 1

1. The ECJ begins by reaffirming its doctrine that the right to no less than four weeks of paid leave per year, as provided in Article 7 of Directive 2003/88, is *"a particularly important principle of EU social law"*. Although Member States may lay down conditions for the **exercise** of this right, they may not make its **existence** subject to any precondition (§ 16-19).
2. Directive 2003/88 makes no distinction between workers who are absent from work on sick leave and workers who actually work during the reference period. Therefore, the Directive precludes national legislation which makes entitlement to paid annual leave conditional on a minimum of one month's (or ten days') actual work during the reference period (§ 20-21).

Question 2

3. The ECJ reaffirms its doctrine that when national courts apply domestic law they are bound to interpret it, so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive. This obligation is limited only by general principles of law and it cannot serve as the basis for an interpretation of national law *contra legem* (§ 22-25).
4. The French Surpreme Court believes that the contested provision cannot be interpreted in a manner compatible with the Directive. Although it is for that court to determine whether this truly is the case, the ECJ hints that Article L 223-4 could perhaps be interpreted as meaning that a period of absence due to a commuting traffic accident is equal, for the purpose of paid leave, to a period of absence due to an accident at work (§ 26-31).
5. If it is not possible to interpret French law in such a manner, the question is whether Article 7 of the Directive has direct effect. This is the case if it is unconditional and sufficiently precise. The ECJ finds that Article 7 of the Directive meets this requirement (§ 32-35).
6. Ms Dominguez may rely on the direct effect of Article 7 of the Directive if CICOA is *"a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals"*. It is for the French courts to determine whether this is the case (§ 36-41).
7. If CICOA is not such a body, Ms Dominguez cannot rely on the direct effect of Article 7 of the Directive and her only recourse is to claim compensation from the French State for its failure to transpose the Directive, as per *Francovich* (C-6/90) (§ 42-43).

Question 3

8. Member States are free to vary the right to paid leave in excess of four weeks per year according to the reason for the worker's absence on health grounds (§ 45-50).

Ruling

Article 7 (1) of Directive 2003/88 [...] must be interpreted as precluding national provisions or practices which make entitlement to paid annual leave conditional on a minimum period of ten days' or one month's actual work during the reference period.

It is for the national court to determine, taking the whole body of domestic law into consideration, in particular Article L. 223-4 of the Labour Code, and applying the interpretative methods recognized by domestic law, with a view to ensuring that Article 7 of Directive 2003/88 is fully effective and achieving an outcome consistent with the objective pursued by it, whether it can find an interpretation of that law that allows the absence of the worker due to an accident on the journey to or from work to be treated as being equivalent to one of the situations covered by that Article of the Labour Code.

If such an interpretation is not possible, it is for the national court to determine whether, in the light of the legal nature of the respondents in the main proceedings, the direct effect of Article 7(1) of Directive 2003/88 may be relied upon against them.

If the national court is unable to achieve the objective laid down in Article 7 of Directive 2003/88, the party injured as a result of domestic law not being in conformity with European Union law can nonetheless rely on the judgment of 19 November 1991 in Joined Cases C-6/90 and C-9/90 *Francovich and Others* in order to obtain, if appropriate, compensation for the loss sustained.

Article 7(1) of Directive 2003/88 must be interpreted as not precluding a national provision which, depending on the reason for the worker's absence on sick leave, provides for a period of paid annual leave equal to or exceeding the minimum period of four weeks laid down in that directive.

ECJ 26 January 2012, case C-586/10 (*Bianca Kücük - v - Land Nordhein-Westfalen*) ("**Kücük"**), German case (FIXED-TERM WORK)

Facts

Ms Kücük was employed as a court clerk for over eleven years pursuant to thirteen consecutive fixed-term contracts. Each contract had been offered to her because of the temporary absence of a permanent employee. Ms Kücük was hired each time to replace such a permanent colleague for the duration of that colleague's absence. When she was informed that her 13th contract would expire without a new contract being offered, she brought legal proceedings, arguing that she had become a permanent employee, because the court's need for replacement of temporarily absent staff was permanent, as evidenced by the fact that she had worked in the same position for over eleven years.

National proceedings

The courts of first and second instance dismissed Ms Kücük's claim, citing the following provision of German law: *"A fixed-term employment contract may be concluded if there are objective grounds for doing so. Objective grounds exist in particular where [...] one employee replaces another"*. Ms Kücük appealed to the highest court for matters of employment law, the BAG. It referred two questions to the ECJ. The questions related to the interpretation of Clause 5 of the Framework Agreement annexed to Directive 1999/70 ("Clause 5"), which provides:

"1. To prevent abuse arising from the use of successive fixed-term employment contracts or relationships, Member States [...] shall, where there are no equivalent legal measures to prevent abuse, introduce [...] one or more of the following measures:

a) objective reasons justifying the renewal of such contracts or relationships;

b) the maximum total duration of successive fixed-term employment contracts or relationships;

c) the number of renewals of such contracts or relationships.

2. Member States [...] shall, where appropriate, determine under what conditions fixed-term employment contracts or relationships:
a) [...]
b) shall be deemed contacts or relationships of indefinite duration."

ECJ's findings

1. The referring court's first question was whether the need for temporary replacement of staff such as in the main proceedings may constitute an objective reason under Clause 5(1)(a), even where that need is, in reality, permanent or recurring and might also be met through the hiring of a permanent employee, regardless of the cumulative duration of previous fixed-term contracts between the same parties (§ 21).
2. The German government argued that, if fixed-term contracts were not allowed where there is a regular or recurrent need for replacement of permanent staff, employers would need to establish a permanent reserve of staff, which is only feasible in very large organisations (§ 22).
3. After recalling the objective of Clause 5(1), namely to combat abuse, the ECJ notes that the concept of "objective reasons" refers to "precise and concrete circumstances characterising a given activity, which are therefore capable, in that particular context, of justifying the use of successive fixed-term contracts". A national provision which merely authorises recourse to successive fixed-term contracts, in a general and abstract manner by a rule of statute or secondary legislation, does not satisfy this requirement. Such a provision, which is of a purely formal nature, does not permit objective and transparent criteria to be identified in order to verify whether the renewal of such contracts actually responds to a genuine need and is appropriate for achieving the objective pursued and necessary for that purpose (§ 25-29).
4. A provision such as the one at issue is not *per se* contrary to the Framework Agreement. In an administration with a large work force, it is inevitable that temporary replacements will frequently be necessary due to, *inter alia*, the unavailability of employees on sick, maternity, parental or other leave. The temporary replacement of employees in those circumstances may constitute an objective reason, particularly where this also pursues objectives recognised as legitimate social policy objectives, such as protecting maternity and enabling men and women to reconcile their professional and family obligations (§ 30-33).
5. The authorities must be in a position to verify whether the renewal of fixed-term contracts actually responds to a genuine need and is appropriate and necessary. The mere fact that fixed-term contracts are concluded in order to cover an employer's permanent or recurring need for replacement staff does not in itself suffice to rule out the possibility that each of those contracts, viewed individually, was concluded in order to ensure a temporary replacement. It is for the authorities of the Member State concerned to ascertain whether this is the case, taking into account all the circumstances of the case such as the number of successive contracts concluded with the same person or for the purposes of performing the same work. Thus, the number and duration of successive contracts concluded in the past may be relevant in the context of the court's overall assessment (§ 34-45).
6. The mere fact that a need for replacement staff may be satisfied through the conclusion of contracts of indefinite duration does not mean that an employer who decides to use fixed-term contracts to address temporary staffing shortages, even where these shortages are recurring or even permanent, is acting in an abusive manner. To require automatically the conclusion of permanent contracts when the size of the organisation means that the employer is faced with a recurring or permanent need for replacement staff would go beyond the objectives pursued by the Framework Agreement (§ 46-55).

Ruling

Clause 5(1)(a) of the Framework Agreement on fixed-term work [...], must be interpreted as meaning that a temporary need for replacement staff, provided for by national legislation such as that at issue in the main proceedings, may, in principle, constitute an objective reason under that clause. The mere fact that an employer may have to employ temporary replacements on a recurring, or even permanent, basis and that those replacements may also be covered by the hiring of employees under employment contracts of indefinite duration does not mean that there is no objective reason under clause 5(1)(a) of the Framework Agreement or that there is abuse within the meaning of that clause. However, in the assessment of the issue as to whether the renewal of fixed-term employment contracts or relationships is justified by such an objective reason, the authorities of the Member States must, in matters falling within their sphere of competence, take account of all the circumstances of the case, including the number and cumulative duration of the fixed-term employment contracts or relationships concluded in the past with the same employer.

ECJ 26 January 2012, case C-218/10 (*ADV Allround Vermittlungs AG - v - Finanzamt Hamburg-Bergedorf*) (**"ADV Allround"**), German case (VALUE ADDED TAX)

Facts

ADV Allround was a German company that supplied self-employed truck drivers to haulage contractors in (mainly) Germany and Italy. It charged its customers the cost of the drivers plus a profit margin. Initially, it did not add VAT when invoicing Italian customers, taking the view that its services should classified as "supply of staff" within the meaning of the "Sixth Directive" 77/388. The German tax office (*Fianzamt*) disagreed, taking the position that ADV Allround should have charged its Italian customers German VAT.

National proceedings

ADV Allround challenged the Tax Office's position with the Finance Court in Hamburg, which referred three questions to the ECJ. Only the first question is related to employment law.

ECJ's findings (on question 1 only)

1. The Sixth Directive contains rules for determining the place where services are deemed to be supplied for tax purposes. The objective of those rules is to avoid conflicts of jurisdiction which may result in double taxation or non-taxation (§ 23-27).
2. An interpretation of the Sixth Directive under which the term "staff" covers not only employed persons but also self-employed persons better reflects the objective of a conflict-of-laws rule such as that at issue (§ 28).

Ruling

The sixth indent of Article 9(2)(e) of Sixth Council Directive 77/388/EEC [...] must be interpreted as meaning that the "supply of staff" referred to in that provision also includes the supply of self-employed persons not in the employ of the trader providing the service.

ECJ 1 March 2012, case C-393/10 (*Dermond Patrick O'Brien - v - Ministry of Justice*) (**"O'Brien"**), UK case (PART-TIME WORK)

Facts

Mr O'Brien was a part-time British judge with the title of "recorder". Contrary to full-time judges and to some part-time judges, he - like many other part-time recorders - was not paid a fixed salary but 1/220th of a full-time judge's salary for each day worked and he was not entitled to a retirement pension. Upon retirement at age 65 he requested his employer, the Department of Constitutional Affairs (now the Department of Justice), to pay him a retirement pension. He based his request on the Framework Agreement on part-time work annexed to Directive 97/81 (the "Directive"), which in Clause 4(1) provides that *"In respect of employment conditions, part-time workers shall not be treated in a less favourable manner than comparable full-time workers solely because they work part time unless different treatment is justified on objective grounds"*.

The Department of Justice turned down Mr O'Brien's request, whereupon he commenced proceedings before the Employment Tribunal. Although successful at first instance, he lost on appeal and again before the Court of Appeal. He took his case to the Supreme Court.

National proceedings

The Supreme Court noted that the Framework Agreement applies to "part-time workers who have an employment contract or employment relationship", but that it lacks a definition of "worker". Recital clause 16 to the Directive indicates why this is so: *"Whereas, with regard to terms used in the Framework Agreement which are not specifically defined therein, this Directive leaves Member States free to define those terms in accordance with national law and practice, as is the case for other social policy Directives using similar terms, providing that the said definitions respect the content of the Framework Agreement"*. Therefore, the Supreme Court concluded that, in principle, the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (the "Regulations"), which transposed the Directive, are compatible with the Directive where they define "worker" as *"an individual who has entered into [...] (a) a contract of employment; or (b) any other contract [...] whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer [...]"*.

The first question before the Supreme Court was whether judges qualify as "workers" within the meaning of the Regulations. The second issue related to the compatibility with the Directive of Regulation 17, which provides that the Regulations do not apply *"to any individual in his capacity as the holder of a judicial office if he is remunerated on a daily fee-paid basis"*.

The Supreme Court decided to stay the proceedings and to refer two questions to the ECJ:

(1) Is it for national law to determine whether or not judges as a whole are workers who have an employment contract or employment relationship within the meaning of Clause 2.1 of the Framework Agreement [...], or is there a Community norm by which this matter must be determined?

(2) If judges as a whole are workers [...] within the meaning of [...] the Framework Agreement [...], is it permissible for national law to discriminate (a) between full-time and part-time judges, or (b) between different kinds of part-time judges in the provision of pensions?

ECJ's findings

1. There is no single definition of "worker" in EU law; it varies according to the area in which the definition is to be applied (§ 30).
2. The Framework Agreement was not intended to harmonise all national laws on part-time work, merely aiming to establish a general framework for eliminating discrimination against part-time workers. Hence the concept of worker is to be interpreted in accordance with national law. However, Member States may not apply rules which are liable to deprive the Directive of its effectiveness. In particular, a Member State may not remove at will certain categories of persons from the protection afforded by the Directive (§ 31-37).
3. According to the UK government, judges are not employed under a contract and domestic law does not recognise any category of "employment relationship" as distinct from the relationship created by a contract. Therefore, judges do not fall within the scope of the Directive and Regulation 17 is superfluous (§ 39).
4. The exclusion of a category of persons from the protection of the Directive may be permitted, if it is not to be regarded as arbitrary, only if the nature of the employment relationship concerned is substantially different from the relationship between employers and their employees which fall within the category of "workers" under national law. This is for the national courts to determine, taking into account the following (§ 41-43).
5. Judges are expected to work during defined times and periods. Furthermore, they are entitled to sick pay, maternity or paternity pay and other similar benefits (§ 45-46).
6. The fact that judges might be regarded as workers within the meaning of the Framework Agreement in no way undermines the principle of the independence of the judiciary, nor does it have any effect on national identity or the free movement of workers (§ 47-50).
7. If a part-time judge qualifies as a "worker" within the meaning of the Framework Agreement, the question arises whether a part-time judge is treated less favourably than "a comparable full-time worker" as defined in Clause 3(2) of the Framework Agreement, namely *"a full-time worker in the same establishment having the same type of employment contract or relationship, who is engaged in the same or a similar work/occupation, due regard being given to other considerations which may include seniority and qualifications/skills"*. These criteria are based on the content of the activity of the persons concerned. Therefore, the UK government's argument that full-time judges and recorders are not in a comparable situation because they have different careers (recorders retaining the opportunity to practise as barristers), is not valid. The crucial factor is that they perform essentially the same activity. Their work is identical and they carry out their functions in the same courts and at the same hearings (§ 60-62).
8. A difference in treatment between part-time workers and full-time workers cannot be justified on the basis of a general, abstract norm. An unequal treatment must respond to a genuine need, be appropriate for achieving the objective pursued and be necessary. Budgetary considerations cannot justify discrimination (§ 63-66).

Ruling

1. European Union law must be interpreted as meaning that it is for the Member States to define the concept of "workers who have an employment contract or an employment relationship" in Clause 2.1 of the Framework Agreement on part-time work [...] and, in particular, to determine whether judges fall within that concept, subject to the condition that that does not lead to the arbitrary exclusion of that category of persons from the protection offered

by Directive 97/81 [...]. An exclusion from that protection may be allowed only if the relationship between judges and the Ministry of Justice is, by its nature, substantially different from that between employers and their employees falling, according to national law, under the category of workers.
2. The Framework Agreement [...] must be interpreted as meaning that it precludes national law from establishing a distinction between full-time judges and part-time judges remunerated on a daily fee-paid basis, for the purpose of access to the retirement pension scheme, unless such a difference in treatment is justified by objective reasons, which is a matter for the referring court to determine.

ECJ 8 March 2012, case C-251/11 *(Martial Huet - v – Université de Bretagne occidentale)* (**"Huet"**), French case (FIXED-TERM WORK)

Facts
Mr Huet was employed by a university as a researcher (*chercheur*) on the basis of a number of successive fixed term contracts spanning a period of over six years (1 March 2002 - 15 March 2008). Upon expiration of the last of these contracts and pursuant to a provision of French law ("If, at the end of the maximum period of 6 years [...] these contracts are not renewed, this may be only [...] for an indefinite duration") he was offered, and accepted, a contract of indefinite duration, but in a different position (Research Officer, *ingénieur d'études*) and at a lower salary. In practice, however, his duties remained unchanged. In May 2008 he requested the university to restore his salary to its former level. When the university rejected his request he brought proceedings, arguing that the said French law implies that, in the event a fixed-term contract converts into a contract of indefinite duration, the latter contract may not be on inferior terms.

National proceedings
The court of first instance decided to seek guidance from the ECJ on the interpretation of the Framework Agreement on Fixed-term Work annexed to Directive 1999/70 (the "Directive"), even though neither party had invoked the Directive.

ECJ's findings
1. The fact that neither party in the main proceedings had invoked EU law does not prevent the court from seeking an ECJ ruling (§ 22-26).
2. Clause 4(1) of the Framework Agreement (non-discrimination) and Clause 8(3) (non-reduction of national protection) are not relevant. The only clause potentially relevant to the dispute is Clause 5 on the prevention of abuse (§ 27-33).
3. The objective of Clause 5 is to place limits on successive recourse to fixed-term contracts, which is regarded as a potential source of abuse. The benefit of stable employment is viewed as a major element in the protection of workers, whereas it is only in certain circumstances that fixed-term contracts are liable to respond to the needs of both employers and workers. This is why Clause 5(1) requires Member States to adopt at least one of the three measures listed there, namely objective reasons justifying renewal, maximum total duration and maximum number of renewals. The French law which led the university to convert Mr Huet's last fixed-term contract into a permanent contract falls within the preventive measures listed in Clause 5(1) (§ 34-37).
4. The Framework Agreement does not lay down a general obligation on the Member States to provide for the conversion of fixed-term employment contracts into contracts of indefinite duration. Clause 5(2) leaves it to the Member States to determine the conditions under which fixed-term contracts are to be regarded as contracts of indefinite duration. It follows that the Framework Agreement does not specify the conditions under which contracts of indefinite duration may be used (§ 38-40).
5. The Framework Agreement does not aim to harmonise all national rules relating to fixed-term work, simply aiming to ensure equal treatment and to prevent abuse arising from the use of successive fixed-term contracts. The Member States are free in the manner in which they achieve this objective, although their margin of appreciation is not unlimited (§ 41-43).
6. If a Member State were to permit the conversion of a fixed-term employment contract into an employment contract of indefinite duration to be accompanied by material amendments to the principal clauses of the previous contract in a way that was unfavourable overall to the employee under contract, when the subject-matter of that employee's tasks and the nature of his functions remained unchanged, it is not inconceivable that the employee might be deterred from entering into the new contract offered to him, thereby losing the benefit of stable employment – which is viewed as a major element in the protection of workers. However, it is for the competent authorities to ascertain, in accordance, with national legislation, collective agreement and/or practice, whether the amendments made to the principal clauses of the employment contract in question in the main proceedings may be described as material amendments to those clauses (§ 44-45).

Ruling
Clause 5 of the framework agreement on fixed-term work [...] must be interpreted as meaning that a Member State that provides in its national legislation for the conversion of fixed-term employment contracts into employment contracts of indefinite duration when the fixed-term employment contracts have reached a certain duration, is not obliged to require that the employment contract of indefinite duration reproduces in identical terms the principal clauses set out in the previous contract. However, in order not to undermine the practical effect of, or the objectives pursued by, Directive 1999/70, that Member State must ensure that the conversion of fixed-term employment contracts into an employment contract of indefinite duration is not accompanied by material amendments to the clauses of the previous contract in a way that is unfavourable overall to the person concerned when the subject-matter of that person's tasks and the nature of his functions remain unchanged.

ECJ 15 March 2012, case C-157/11 (*Guiseppe Sibilio - v - Comune di Afragola***)** (**"Sibilio"**), Italian case (FIXED TERM WORK)

Facts
Mr Sibilio was employed by the municipality of Afragola for over three years as a "socially useful worker" (*lavoratore socialmente utile*) before becoming a regular employee of this municipality. According to an Italian law introduced in 1997, Legislative Decree 468/97, certain categories of persons, such as individuals who were made redundant, can be placed on a "mobility list" (*liste di mobilità*), in which case they can be employed in the public sector for a certain maximum period (since 2001: 6 + 8 months) to perform certain types of socially useful work. Such socially useful workers are paid low-level social benefits by a national employment fund (*Fondo nazionale per l'occupazione*). Decree 468/97 provides that socially useful workers do not qualify as employees.
After becoming a regular employee, Mr Sibilio claimed the balance between what he would have earned in the period during which he

worked as a socially useful worker had he been a regular employee and what he actually earned during that period. He based his claim on the Framework Agreement on Fixed-Term Work annexed to Directive 1999/70 (the "Framework Agreement"), which prohibits employers from treating fixed-term workers less favourably than their employees with a permanent contract.

National proceedings

The court of first instance, *the Tribunale di Napoli*, was not sure whether Decree 468/97, in providing that socially useful workers do not qualify as employees, is compatible with the Framework Agreement. It noted that the public sector had been making use of individuals placed on a mobility list for over a decade. Those lists, although intended as a temporary measure to combat unemployment, had lost their temporary nature and the work performed by the socially useful workers was commonly used to fulfil permanent needs rather than needs of an exceptional nature. Although the Member States are free to establish the rules determining whether a relationship qualifies as one of employment, it is not evident that they may exclude a category of persons from the scope of the Framework Agreement simply by exempting persons based on the mere fact that they have been placed on a mobility list. Accordingly, the court referred two questions to the ECJ.

The first was whether the relationship between a socially useful worker and a public body making use of his services falls within the scope of the Framework Agreement. If so, the second question was: is paying a socially useful worker less than an employee with a permanent contract in a similar position and with the same seniority, with the only justification being that he was hired after being placed on a mobility list, compatible with the Framework Agreement?

ECJ's findings

1. The ECJ rejected Afragola's arguments (i) that the questions referred to the ECJ were unrelated to the actual dispute, in that the answer to those questions could not determine the outcome of the case, (ii) that the questions were of a hypothetical nature and (iii) that the ECJ had not been provided with all the relevant facts, and that therefore the referral to the ECJ was not receivable (§ 25-34).
2. Contrary to other Directives in the social field, Directive 1999/70 provides that the definitions of "employment relationship" and "worker" shall be as determined under national law. It is also noteworthy that Clause 2(2)(b) of the Framework Agreement gives the Member States the right to exclude certain relationships from the scope of that agreement, such as apprenticeships and relationships concluded within the framework of a public or publicly supported training, integration and vocational retraining programme (§ 36-37).
3. The Framework Agreement recognises permanent employment contracts as the norm and aims to limit successive fixed-term contracts to situations where they satisfy the needs of both employers and employees (§ 38-40).
4. Where EU legislation refers expressly to national laws and practice, as in the Framework Directive, the ECJ may not accord expressions used in that legislation an autonomous and uniform meaning (§ 43).
5. At first sight, given Decree 468/97, socially useful workers fall outside the scope of the Framework Agreement. However, it should be noted that Italian case law recognises that work performed in the context of socially useful work can, in reality, display the characteristics of regular paid work, in which case Italian law qualifies the workers concerned as regular employees. This accords with the Framework Agreement, which prohibits Member States from causing Directive 1999/70 to lose its effectiveness (see the ECJ's ruling in *O'Brien*) (§ 44-50).
6. Even if the Italian court were to find that the relationship between Mr Sibilio and the municipality of Afragola was, in reality, one of employment, it would still be possible for that relationship to fall within the scope of Clause 2(2) of the Framework Agreement, which confers on Member States a margin of appreciation in determining whether a relationship is concluded "*within the framework of a public or publicly supported training, integration and vocational retraining programme*" (§ 51-55).
7. The criteria applied under said margin of appreciation must be transparent and verifiable, which it is for the national courts to determine (§ 56-57).
8. Given the above, there is no need to answer the second question (§ 59).

Ruling

Clause 2 of the Framework Agreement is to be interpreted as not standing in the way of national rules which provide that the relationship between socially useful workers and public bodies is excluded from the scope of the Framework Agreement, where those workers do not qualify as employees (which is for the national courts to determine) or where the Member State has exercised its right under paragraph 2 of said clause.

OPINIONS

Opinion of Advocate-General Mengozzi of 12 January 2012, case C-415/10 (*Galina Meister - v - Speech Design Carrier Systems GmbH*) ("**Meister**"), German case (SEX, AGE AND ETHNIC ORIGIN DISCRIMINATION)

Facts

Ms Meister was a Russian systems engineer. In October 2006, when she was aged 45, she read a newspaper advertisement, placed by a company called Speech Design, for "an experienced software developer". She applied twice. Unlike the other applicants, she was not invited for an interview. Her application was simply turned down, without providing a reason. Ms Meister did two things. She asked Speech Design to provide her with information on the successful candidate and she brought legal proceedings, alleging discrimination on the grounds of sex, age and ethnic origin. Speech Design declined to give her information on the person they had hired.

National proceedings

The courts of first and second instance turned down Ms Meister's claim. She appealed to the highest labour court, the BAG (*Bundesarbeitsgericht*). It acknowledged that Ms Meister had suffered less favourable treatment than the other applicants, who had been invited for an interview, but she had not been able to establish that that treatment was on the grounds of sex, age or ethnic origin, as required by German law. A candidate who considers that he has been discriminated against does not meet his obligation to adduce the required evidence merely by submitting that he has applied for a job, that his application was unsuccessful and that he fits the advertised profile. Thus, Ms Meister should have given more details of the circumstances on the basis of which it could be possible to establish, to a high degree of probability, the reasons for the discriminatory treatment. The fact that Ms Meister was not invited for an interview could be explained by many non-discriminatory factors. However, the employer's failure to provide information when rejecting the application was precisely the reason why Ms Meister was unable to fulfil the obligation under German law to produce *prima facie* evidence of discrimination. For this reason the BAG

referred two questions to the ECJ:

(1) Are Article 19(1) of Directive 2006/54 [...], Article 8(1) of Directive 2000/43 [...] and Article 10(1) of Directive 2000/78 [...] to be interpreted as meaning that, where a worker shows that he meets the requirements for a post advertised by an employer, he has the right vis-à-vis that employer, if he does not obtain the post, to information as to whether the employer has engaged another applicant and, if so, as to the criteria on the basis of which that appointment has been made?

(2) If the answer to the first question is affirmative, where the employer does not disclose the requested information, does that fact give rise to a presumption that the discrimination alleged by the worker exists?

Opinion

1. The wording of Articles 19(1) of Directive 2006/54, 8(1) of Directive 2000/43 and 10(1) of Directive 2000/78 is identical to that of Article 4(1) of Directive 97/80 on the burden of proof in cases of discrimination based on sex *[replaced by Directive 2006/54, Editor]*. The ECJ interpreted that provision in its recent ruling in *Kelly* (C-104/10, see EELC 2011-3). In that case the ECJ held that there is no right to information as sought by Ms Meister (§ 20).
2. A proposal by the Commission to establish such a right (COM (88) 269 final) was not adopted (§ 21).
3. It is apparent from the overall scheme of the provisions at issue that the choice made by the legislature was clearly that of maintaining a balance between the victim of discrimination and the employer, when the latter is the source of the discrimination. Indeed, with regard to the burden of proof, the equal treatment directives opted for a mechanism making it possible to lighten, though not remove, that burden on the victim. In other words, as the ECJ held in *Kelly*, the mechanism consists of two stages. First of all, the victim must sufficiently establish the facts from which it may be presumed that there has been discrimination. In other words, the victim must establish a *prima facie* case of discrimination. Next, if that presumption is established the burden of proof thereafter lies with the defendant. Central to the provisions referred to in the first question is therefore the *burden* of proof, that although somewhat reduced, nevertheless falls on the victim. A measure of balance is therefore maintained, enabling the victim to claim his right to equal treatment but preventing proceedings from being brought against the defendant solely on the basis of the victim's assertions. Upsetting that balance would not be the only risk involved were a right to information for victims to be recognised. Such a case also raises the question of third party rights (§ 22-23).
4. The Advocate-General therefore proposes to answer the first question negatively, in which case the second question need not be answered. Nevertheless, it is useful to answer that question (§ 24-28).
5. In *Kelly*, the ECJ held that *"it cannot be ruled out that a refusal of disclosure by the [employer], in the context of establishing [facts from which it may be presumed that there has been discrimination], could risk compromising the achievement of the objective pursued"* by the directives on equal treatment, thus depriving the provisions concerning the burden of proof of their effectiveness. In so holding, the ECJ unequivocally stated that it is necessary to assess the attitude of the employer by considering not only his failure to respond but also by taking account of the wider factual context in which that occurred (§ 29).
6. The referring court must not overlook the fact that, given the employer refused to disclose information, it is not unlikely that that employer can, in that way, make his decisions virtually unchallengeable. In other words, the employer continues to keep in his sole possession the evidence upon which the substance of an action brought by the unsuccessful job applicant ultimately depends and, thus, its prospects of success. The job applicant is therefore entirely dependent on the good will of the employer with regard to obtaining information capable of constituting facts from which it may be presumed that there has been discrimination and may experience genuine difficulty in obtaining such information which is, nevertheless, essential in order to trigger the lightening of the burden of proof (§ 30-32).
7. Where a job applicant appears to be entirely dependent on the good will of the employer with regard to obtaining information capable of constituting presumptive discrimination, the balance between the freedom of employers to recruit the people of their choice and the rights of job applicants, to which the EU legislature has attached special significance, would therefore seem to have been upset (§ 33).
8. In the case of Ms Meister, the national court should consider three facts. First, it was undisputed that Ms Meister's qualifications matched those required by the post, but that, despite this, she was not invited for an interview, whereas other applicants were. Secondly, Ms Meister did not submit a spontaneous application but responded to the publication of a vacancy. Thirdly, Speech Design published a new advertisement with the same content and again rejected Ms Meister's application.

Proposed reply

(1) Article 8(1) of Directive 2000/4, Article 10(1) of Directive 2000/78 and Article 19(1) of Directive 2006/54 are not to be interpreted as meaning that a job applicant must, if his application is unsuccessful, be able to force the employer to tell him whether, and based on what criteria, it has engaged another applicant, and, if so, for what reasons, even if it transpires that the unsuccessful applicant shows that he fits the required profile set out in the advertisement published by the employer.

(2) Under Article 8(1) of Directive 2000/43, Article 10(1) of Directive 2000/78 and Article 19(1) of Directive 2006/54, the referring court must assess the attitude of an employer in refusing to disclose information requested by the unsuccessful job applicant about the outcome of the recruitment process and the basis on which one of the applicants has been engaged, not only by considering the failure of the employer to respond but also taking account of the wider factual context in which that occurred. The referring court may also take into account the fact that the applicant's qualifications clearly match the post to be filled, the failure to invite her for a job interview and the fact that the employer refused again to invite her to an interview when conducting a second selection process for the same job vacancy.

PENDING CASES

Case 548/11 (*Edgard Mulders - v - Rijkdsdienst voor Pensioenen*), reference lodged by the Belgian *Arbeidshof te Antwerpen* on 31 October 2011 (SOCIAL INSURANCE)

Is Article 46 of Regulation 1408/71 infringed where a period of disability, during which a migrant worker was awarded Dutch disability benefits, is not regarded as being a "period of insurance"?

Case C-556/11 (*María Jesús Lorenzo Martínez - v - Dirección Provicial de Educación Valladolid*), reference lodged by the Spanish *Juzgado Contencioso-Administrativo de Valladolid* on 3 November 2011 (GENERAL DISCRIMINATION)

May career civil servants in the public teaching service be paid a certain benefit (*sexenio*) that is not paid to others?

Case C-575/11 (*Eleftherios-Themistoklis Nasiopoulos - v - Minister for Health and Social Welfare*), reference lodged by the Greek *Simvoulio tis Epikratias* on 16 November 2011 (FREE MOVEMENT)

May a Member State prohibit a physiotherapist who has acquired a certain qualification in another Member State to engage partially in the profession of physiotherapist, namely to carry out those activities which he has the right to carry out in the other Member State?

Case C-619 (*Patricia Dumont de Chassart - v - ONAFTS*), reference lodged by the Belgian *Tribunal du travail de Bruxelles* on 30 November 2011 (INTERNATIONAL SOCIAL SECURITY)

Does Article 79(1) of Regulation 1408/71 breach the principles of equality and non-discrimination enshrined in the ECHR and the EC Treaty when it is interpreted as benefiting someone who has worked exclusively in Belgium for a certain period, more than someone who has worked elsewhere within the EU?

Case C-681/11 (*Anita Chieza - v - Secretary of State for Work and Pensions)*, reference lodged by the UK *Upper Tribunal* on 22 December 2011 (SEX DISCRIMINATION)

Is the differential treatment on the basis of gender under the incapacity benefit scheme necessarily and objectively linked to the difference in pensionable age so that it falls within the scope of the derogation under Article 7(1)(a) of Directive 79/7 in circumstances where a claimant is a woman who falls ill shortly before reaching pensionable age (for a woman, 60), receives statutory sick pay (SSP) from her employer for 28 weeks and then, after reaching pensionable age, makes a claim for short-term incapacity benefit, is denied short-term incapacity benefit because as a matter of law her "period of incapacity for work" began after she reached pensionable age (because legislation provides that a period of entitlement to SSP does not count as a period of incapacity for work);
but where a male claimant who falls ill shortly before the age of 60, receives SSP from his employer for 28 weeks, and makes a claim for short-term incapacity benefit at the age of 60, will in principle qualify for short-term incapacity benefit, as his period of incapacity for work began before he attained pensionable age, albeit after reaching 60?

Case C-5/12 (*Marc Betriu Montull - v - INSS*), reference lodged by the Spanish *Juzgado de lo Social de leida* on 3 January 2012 (SEX DISCRIMINATION and PARENTAL LEAVE)

Spanish law recognises employed mothers who give birth to a child as holders of a primary right to maternity leave and employed fathers as holders of a secondary right, which can be enjoyed only where the mother is employed and transfers her right to her husband. In contrast, when a child is adopted, employed fathers have a primary right to suspend their contract of employment with pay from the social security system and to return to their job. Is this system compatible with Directives 76/207 and 96/34?

Case C-7/12 (*Nadezda Riežniece - v - Republic of Latvia*), reference lodged by the Latvian *Augstākās tiesas Senāta* on 4 January 2012 (SEX DISCRIMINATION AND PARENTAL LEAVE)

Do Directive 76/207 and the Framework Agreement on Parental Leave annexed to Directive 96/34 prohibit an employer from undertaking any action (in particular, the assessment of an employee while absent) which might result in a female employee on parental leave losing her post after returning to work? Does the answer depend on whether positions have been made redundant during the leave?
Must the assessment of an applicant's work and merits which takes into account his latest annual performance appraisal as a civil servant and his results before parental leave be regarded as indirect discrimination when compared to the fact that the work and merits of other civil servants who have continued in active employment (taking the opportunity, moreover, to achieve further merit) are assessed according to fresh criteria?

ECtHR COURT WATCH

SUMMARIES BY PAUL DIAMOND, BARRISTER (UK)

ECtHR 12 February 2008, Application No 14277/04 *(Guja – v – Moldova)* (**"Guja"**), Moldovan case (FREE SPEECH - WHISTLEBLOWING); and

ECtHR 6 October 2011, Application No 32820/09 *(Vellutine and Michel – v – France*) (**"Vellutine"**), French case (FREE SPEECH - TRADE UNION CONTEXT).

The European Court of Human Rights (ECtHR) is developing a clear jurisprudence in relation to Article 10 of the European Convention on Human Rights in the employment context. Although this right to expression by the employee - contrary to the employer's interests - must be balanced against a duty of loyalty to the employer, the ECtHR has afforded the employee ever greater freedom of expression. Both *Guja* and *Vellutine* offer wide application to Article 10 in the context of "whistleblowing" and labour disputes.

Guja was a whistleblowing case where a civil servant in a sensitive position disclosed letters to the media in order to draw attention to corruption at the governmental level. The ECtHR disagreed with the decision of the Moldova Supreme Court but the applicability of this decision may be limited to the unique circumstances existing in Moldova, namely the weakness of the rule of law in that country.

In *Vellutine,* the ECtHR consider the application of free speech in the context of a dispute between a trade union and a publically elected official. The Court had previously placed limits on the language that could be used during a labour dispute (*Sanchez v Spain).* However, in the context of a dispute involving an elected official greater latitude was permitted. The ECtHR disagreed with the *Cours de Cassation* that the use of defamatory words was not protected by Article 10.

Facts

In *Guja,* the head of the press office of the Prosecutor General's office released two letters to the press showing that there was political interference in their work. The release of the letters took place against the background of public concern with levels of corruption in Moldova, which had been identified in a recent speech by the President.

Four police officers arrested ten persons in relation to the 2001 Parliamentary elections. The suspects were later released and they complained of ill treatment and illegal detention. A complaint was made to the public prosecutor's office and an investigation was commenced against the police officers.

The police officers, in turn, commenced a public campaign arguing that they should not be investigated for unlawful conduct and letters were written to a number of senior public figures. The four police officers asserted that the complaints against them were politically motivated. The result of these letters was that the Deputy Speaker of the Moldovan Parliament (Mr Misin) wrote to the Public Prosecutor's Office in relation to the case; and this was followed by a letter from the Ministry of the Interior. The Public Prosecutor gave the impression that he had succumbed to political pressure.

Consequently, Mr Guja sent copies of these two letters to a newspaper. He was dismissed from his post on 3 March 2003 and he sought reinstatement. On 16 September 2003, the Court of Appeal rejected his appeal and the Supreme Court did the same on 26 November 2003, on the grounds that he had breached his duty of loyalty to his employer and failed to raise the issue internally. On 30 March 2004, Mr Guja lodged an application with the ECtHR.

In *Vellutine,* an employee had a dispute with the Mayor of the municipality of Vendays- Montalivet. The Mayor took action against the employee and went further: in two issues of the municipal newsletter he criticised the employee directly. As a consequence, the employee commenced an action against the Mayor.

Mr Vellutine was the President and Mr Michel the General Secretary, of the Municipal Police Officers Union (USPPM). The USPPM supported Mr Vellutine and released a political leaflet directly criticising the Mayor, describing him as a 'dictator', 'cultivating a cult of personality' and acting dishonestly.

The Mayor sued the trade union officials successful for defamation under the Act of 29 July 1881 on freedom of the press. The decision was confirmed by the Bordeaux Court of Appeal on 1 February 2008. On 9 December 2008, the matter was appealed but the *Cour de Cassation* held the appeal non-admissible. On 5 June 2009, the Applicants lodged a complaint with the ECtHR.

ECtHR' s judgments in Guja and Velluntine:

In *Guja*, the ECtHR considered the political situation in Moldova and referred to the 2004 Report of the International Commission of Jurists which found that:

"the rule of law suffers serious shortcomings that must be addressed. The ICJ/CIJL found that the breakdown in the separation of powers has again resulted in a judiciary that is largely submissive to the dictates of the Government. The practice of 'telephone justice' has returned. The executive is able to substantially influence judicial appointments through the Supreme Council of Magistracy that lacks independence. Beyond allegations of corruption, the Moldovan judiciary has substantially regressed in the last three years, resulting in court decisions that can pervert the course of justice when the interests of the Government are at stake."

In addition, the ECHR referred to reports from Freedom House and the Open Society Justice Initiative, as well as the United Nations Convention Against Corruption (in force 14 December 2005).

The ECtHR held that there was a violation of Article 10 notwithstanding the fact that Mr Guja was not the author of the letters. Article 10 was held to apply to the workplace in general and public servants in particular. Article 10 applied to the imparting of information even where an individual was not the author. Whilst, it was recognised that a public servant owed a strong duty of confidentiality to his or her employer, the situation in Moldova was such that the alternative - of reporting this political interference to his superiors - would have not been effective. In short, the only mechanism for drawing public attention to this political interference was to release the letters to the press.

The ECtHR noted that Mr Guja had acted in good faith and had released the documents to fight corruption. He did not receive any monies, nor was he acting as a result of a grievance against his employer. His dismissal was a disproportionate sanction that would discourage others from reporting or acting on misconduct.

In *Vellutine*, the ECtHR considered the fact that the applicants were trade union officials acting in connection with a labour dispute. Further, the Major had exposed himself to criticism by drawing attention to the case in the two municipal newsletters in which the individual employee had no opportunity to reply. However, whilst the ECtHR recognised the applicability of laws of defamation within Article 10 for the "protection of the reputation and rights of others", its view was that those who had entered public life must accept that the limits of acceptable criticism were wider than those of a private individual.

Commentary

The ECtHR has applied Article 10 to whistleblowing and labour disputes in an expansive manner, to the effect that it is now clear that in such cases employees will be given considerable latitude.

In *Guja* the situation in Moldova was clearly worrying and the ECtHR has strengthened the right of civil servants and employees to report illegal conduct and wrongdoing at their place of work. A State entity or employer can avoid this outcome if it provides sufficient procedural safeguards to enable the employee to raise concerns and if it ensures that the procedures for handling such concerns are effective. However, once it has been established by the employee that there has been wrongdoing and that the employer is not inclined to remedy the position, any subsequent dismissal of the employee could only be regarded as punitive and, thus, disproportionate.

What makes this case unusual is that the breach of Article 10 was not in the context of a labour dispute, nor in the expression of a private opinion outside the employment context, but was based on the substantive employment of a civil servant - and a breach of Article 10 was found by adopting a political analysis of the country.

The case of *Vellutine* raises more complex problems. The Major had used the municipal newsletter to put his case and took advantage of his public position to disseminate his version of events. It would seem reasonable in this context that the trade union and the employee should be able to use the means available to them to counter his case.

It is well established in European jurisprudence that considerable latitude is given to the press in relation to an elected official. In this sense, the press has been held to be the "watchdog" of democracy. The ECtHR has accepted a degree of exaggeration and even provocation by the press, for example, in *Prager and Oberschlick v Austria (1995)*. Elected officials have both greater rights of freedom of speech (see *Castell v Spain (1992)* and *Jerusalem v Austria (2001))* and a susceptibility to personal attack (see *Lingers v Austria (1986)).*

However, this case must be near the limit by virtue of the extreme use of language of the trade union and the clear attempt to damage the re-election prospects of a politician. There would appear to be little merit in disagreeing with the French Courts, who are in a better position than the Strasbourg Court to balance the issues.

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12 October 2010, C-45/09 (*Rosenbladt*): German collective agreement terminating employment automatically at age 65 justified; automatic termination is basically a form of voluntary termination (EELC 2010-4).

18 November 2010, C-250 and 268/09 (*Georgiev*): compulsory retirement of university lecturer at age 65 followed by a maximum of three one-year contracts may be justified (EELC 2010-5).

21 July 2011, C-159 and 160/10 (*Fuchs and Köhler*): compulsory retirement at age 65 may be justified (EELC 2011-3).

8 September 2011, C-297 and 298/10 (*Hennings*): age-dependent salary incompatible with principle of non-discrimination, but maintaining discriminatory rules during transitional period in order to prevent loss of income for existing staff is allowed (EELC 2011-3).

13 September 2011, C-447/09 (*Prigge*): automatic termination of pilots' employment at age 60 cannot be justified on grounds of safety (EELC 2011-3).

4. Other forms of discrimination

10 May 2011, C-147/08 (*Römer*): German income tax law may be in breach of sexual orientation non-discrimination rules (EELC 2011-2).

7 July 2011, C-310/10 (*Agafitei*) ECJ declines to answer questions re Romanian law providing higher salaries for public prosecutors than for judges (EELC 2011-3).

5. Fixed-term work

22 April 2010, C-486/08 (*Landeskrankenhäuser Tirols*): Austrian law disadvantaging temporary and casual workers incompatible with Directive 1999/70 (EELC 2010-3).

24 June 2010, C-98/09 (*Sorge*): Directive 1999/70 applies to initial fixed-term also, but lacks direct effect. Relaxation of Italian law in 2001 probably not a reduction of the general level of protection (EELC 2010-4).

1 October 2010, C-3/10 (*Affatato*): Framework Agreement allows prohibition to convert fixed-term into permanent contracts as long as abuse of successive fixed-term contracts is effectively penalised (EELC 2011-1).

11 November 2010, C-20/10 (*Vino*): Framework Agreement does not preclude new law allowing fixed-term hiring without providing a reason; no breach of non-regression clause (EELC 2011-1).

22 December 2010, C-444/09 and 459/09 (*Gavieiro*): interim civil servants fall within scope of Directive 1999/70 (EELC 2011-1).

18 January 2011, C-272/10 (*Berziki*): Greek time-limit for applying for conversion of fixed-term into permanent contract compatible with Directive (EELC 2011-1).

10 March 2011, C-109/09 (*Lufthansa*): German law exempting workers aged 52 and over from the requirement to justify fixed-term hiring not compatible with Framework Agreement (EELC 2011-1).

18 March 2011, C-273/10 (*Medina*): Spanish law reserving right to *trienios* to professors with permanent contract incompatible with Framework Agreement (EELC 2011-2).

8 September 2011, C-177/10 (*Rosado Santana*) re difference of treatment between career civil servants and interim civil servants and re time limit for challenging decision (EELC 2011-3).

26 January 2012, C-586/10 (*Kücük*): permanent replacement of absent staff does not preclude existence of an objective reason as provided in Clause 5(1)(a) of the Framework Agreement (EELC 2012-1).

8 March 2012, C-251/11 (*Huet*): when a fixed-term contract converts into a permanent contract, the terms thereof need not always be identical to those of the previous fixed-term contracts (EELC 2012-1).

15 March 2012, C-157/11 (*Sibilio*): "socially useful workers" may be excluded from the definition of "employee" (EELC 2012-1).

6. Part-time work

22 April 2010, C-486/08 (*Landeskrankenhäuser Tirols*): Austrian law re effect of changed working hours on paid leave incompatible with Working Time Directive (EELC 2010-3).

10 June 2010, C-395/08 (*INPS – v – Bruno*): Italian retirement benefit rules discriminate against vertical cyclical part-time workers (EELC 2010-3).

7 April 2011, C-151/10 (*Dai Cugini*): Belgian rule obligating employers to maintain documentation re part-time workers may be justified (EELC 2011-2).

1 March 2012, C-393/10 (*O'Brien*): may UK law provide that judges are not "employees" within the meaning of the Directive? (EELC 2012-1)

7. Information and consultation

10 September 2009, C-44/08 (*Akavan – v – Fujitsu*): when must employer start consultation procedure when a decision affecting its business is taken at a higher corporate level? (EELC 2009-2)

11 February 2010, C-405/08 (*Holst*): Danish practice regarding dismissal protection of employee representatives not compatible with Directive 2002/14 (EELC 2010-2 and 3).

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 (EELC 2012-1).

24 January 2012, C-282/10 (*Dominguez*): French law may not make entitlement to paid leave conditional on a minimum number of days worked in a year (EELC 2012-1).

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 (EELC 2011-4).

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*) re 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 (EELC 2011-4).

15 November 2011, C-256/11 (*Dereci*) re the right of third country nationals married to an EU citizen to reside in the EU (EELC 2012-1).

15 December 2011, C-257/10 (*Bergström*): re Swiss family benefits (EELC 2012-1).

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 (EELC 2011-4).

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 (EELC 2011-4)?

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Postbus 1030
1000 BA Amsterdam

E-mail: jarverklaard27@gmail.com
Telefoon: 020 - 525 34 00

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