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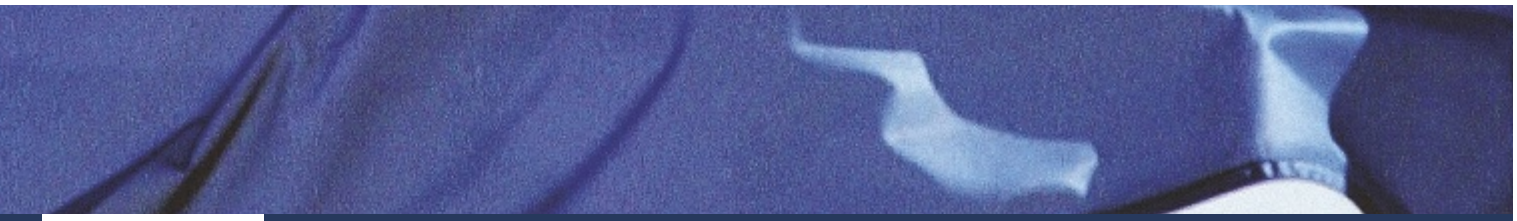

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Sdu UITGEVERS

INTRODUCTION

The financial crisis has spurred Greece, Italy, Spain and other countries to push major labour market reform legislation through their parliaments in record time. This edition features an article summarising the principal changes in Greece, Italy and Spain. The idea for this article came from a corporate lawyer who attended the EELA conference in Dublin in May. I hope the corporate lawyers who read this edition find the article useful and that they will provide feedback. The said three countries are not the only ones adapting their employment laws to the financial crisis: Portugal, Hungary and Ireland are other examples. Future editions of EELC may feature summaries of the situation in those jurisdictions.

The following firms have contributed case reports to this issue:

Austria: MOSATI Rechtanwälte, www.mosati.at (Andreas Tinhofer)

Czech Republic: Randl Partners, www.randls.com (Natasa Randlova)

Denmark: Norrbom Vinding, www.norrbomvinding.com (Mariann Norrbom)

France: 1) Flichy Grangé Avocats, www.flichy-associes.com (Claire Toumieux)
2) CMS Bureau Francis Lefebvre, www.bfl.avocats.com (Caroline Froger-Michon)

Germany: Luther Rechtanwaltgesellschaft, www.luther-lawfirm.com (Paul Schreiner, Elisabeth Höller)

Greece: Kyriakides Georgopoulos & Daniolos Issaias, www.kdgi.gr (Effie Mitsopoulou)

Italy: Bird & Bird LLP, www.twobirds.com (Caterina Rucci)

Lithuania: Sorainen, www.sorainen.com (Jurgita Venckuté)

Netherlands: BarentsKrans N.V., www.barentskrans.nl (Lotte van Heck)

Norway: Advokatfirmaet Selmer DA, www.selmer.no (Joakim Karlsen)

Poland: Kancelaria Adwokacka Marek Wandzel, www.ksiazeklegal.pl (Marek Wandzel)

Spain: Cuatrecasas, Gonçalves Pereira, www.cuatrecasas.com (Ana Campos)

UK: 1) Lewis Silkin, www.lewissilkin.com (Bethan Carney)
2) RadcliffesLeBrasseur, www.rlb.law.com (Stephen Levinson)

Attention is drawn to the ECtHR's decision in the *Eternit* case concerning the extent to which an employer is entitled to medical information on a (former) employee who was diagnosed with an occupational disease that resulted in the (former) employer having to pay increased health insurance contributions.

The ECJ has delivered two further rulings on compulsory retirement (*O'Brien* and *Tyrolean Airways*), one more on the *Schultz-Hoff* issue (*Neidel*) and another one on the right to information on other job applicants (*Meister*). This issue of EELC contains summaries of these judgments.

Peter Vas Nunes, Editor

TRANSFER OF UNDERTAKINGS

DISCRIMINATION

MISCELLANEOUS

2012/14

Airline catering company is capital-intensive (NO)

CONTRIBUTOR JOAKIM KARLSEN *

Summary

In a line of recent cases before the Norwegian courts, defendants with claims of transfer of undertakings against them have stressed the need for an economic legal entity to be identified, arguing that the transfer of an undertaking cannot take place where no such entity existed pre-transfer. In this case, which concerned the transfer of a contract for catering services to an airline, the Supreme Court, perhaps chose not to rule on whether an economic entity had been subject to transfer - but combined this question with the issue of retention of identity, and found no transfer had taken place.

Facts

An announcement for tenders to provide catering services to the airline SAS in Norway's two largest airports, Oslo and Bergen, resulted in a company called LSG losing its contract to Gate Gourmet. The SAS contract represented approximately 85% of LSG's domestic revenue and 193 of its 267 employees were made redundant following the loss of the SAS contract. Gate Gourmet hired 184 employees after being awarded the contract, of whom 74 were formerly employed by LSG.

In the process of transferring the contracts, Gate Gourmet offered the relevant trade unions an agreement under which their members would be given a preferential right to be rehired, but with no guarantee of employment. In return, the trade unions were to agree that no transfer of undertaking had taken place. Only one of the trade unions accepted the offer. A number of unsuccessful candidates affiliated with the other trade unions brought claims based both on the law relating to transfer of undertakings and on discrimination on grounds of their trade union membership. Norwegian law prohibits discrimination on the basis of (non-)union membership.

In terms of the claim in respect of the transfer, the plaintiffs, consisting of a number of former LSG employees who had not been offered employment, claimed that they should be regarded as employees of Gate Gourmet. The Supreme Court turned down this claim following an overall assessment, the conclusion of which was that the identity of the business that had been transferred had not been retained.

Judgment

The Supreme Court began by recalling the three requirements for a transaction to qualify as the transfer of an undertaking within the meaning of Directive 2001/23, namely (1) that there is an economic entity, meaning an organised grouping of resources with the objective of pursuing an economic activity; (2) that this entity is transferred; and (3) that it retains its identity.

Pointing particularly to the ECJ's ruling in *Süzen* (C-13/95), the Supreme Court re-iterated that a pre-condition for the Directive to apply is that *"the transfer must relate to a stable economic entity whose activity is not limited to performing one specific works contract [...]. The term entity thus refers to an organised grouping of persons and assets facilitating the exercise of an economic activity which pursues a specific objective"*. With reference to *Süzen* and *Jouini* (C-458/05), the Supreme Court emphasized the requirement that the part of the business that is subject to transfer must constitute a stable and operational unit, which in itself is capable of delivering services characteristic of the business' economic activity.

Applying the ECJ's case law to the facts, however, the Supreme Court stated that the process of identifying an economic entity closely resembles the assessment of the *Spijkers* criteria. Not surprisingly, therefore, the focus of the debate was on which of the *Spijkers* criteria were relevant.

In the overall assessment, the Supreme Court found no need to make a finding on whether the activity under the SAS-contract constituted an economic entity. The Court did, however, point to typically relevant factors, one of which was that no employees were fully engaged in the performance of the SAS-contract.

The Court decided as its starting point that the airline catering industry was both labour-intensive and asset-dependent. Despite this point of departure, the Supreme Court, referencing the *Liikenne* case (C-172/99) on bus transportation in Helsinki, stressed the airline catering business' dependence on designated vehicles, which were not transferred. The court also referred to the *Abler* case (C-340/01), where premises and equipment were taken over, but no employees. Applying these decisions to the facts at hand, the Supreme Court found the fact that premises and equipment were not taken over as persuasive. (This was because the premises needed to be close to the airline to enable the contractor to perform the contract.)

The overall conclusion, based on the ECJ's case law, was that no transfer of undertaking had taken place between LSG and Gate Gourmet. The Supreme Court did not find the fact that some former LSG employees had been offered employment by Gate Gourmet persuasive, as neither premises nor equipment had been transferred. One might therefore ask whether the Supreme Court remained loyal to its own starting point, namely that the business was both dependent on tangible assets and labour intensive.

Interestingly, the (unanimous) Supreme Court, in an *obiter dictum*, added that in situations such as this, the new service provider can make choices which affect the assessment of whether a transfer of undertaking has taken place. To make the point even clearer, the Supreme Court explicitly stated that whether Gate Gourmet had sought to evade the rules on transfer of undertaking by avoiding the transfer of more LSG employees, was not important to the decision.

As for the discrimination claim, the law prohibiting employers from distinguishing between members and non-members of a union does not apply to different treatment in relation to pay and working conditions provided for in collective bargaining agreements. However, as the agreement in this case governed recruitment and not pay or working conditions, it fell beyond the scope of a collective bargaining agreement under domestic law. Thus, the Supreme Court found that the prohibition applied and that the candidates had been discriminated against *"because of non-membership of a certain trade union"*. The Supreme Court further found that the discriminatory action could not be justified and declined to apply a restrictive interpretation based on the background of the agreement.

Commentary

In this case, the Supreme Court, following up on recent case law on the transfer of undertakings, discussed the interplay between (i) the precondition that the subject matter transferred constitutes an economic entity, and (ii) the requirement for its identity to be retained.

It is said that the first step in analysing whether there is a transfer of undertaking is to identify the subject matter of the transfer. Only if the business being "transferred" constitutes a stable and operational entity, may one proceed to an assessment of the *Spijkers* criteria. The Gulating Appellate Court followed this line of reasoning in an earlier case, concluding that no transfer of undertaking had taken place,

because there was no economic entity. In that case the plaintiffs alleged that a team of oil workers represented an economic entity, but they did not succeed. Decisive for rejecting the plaintiffs' claim was the fact that the functions carried out by the work team were not sufficiently separate from the company's other operations. The employees were not precluded from carrying out other additional activities under their employment agreements.
Instead of following the judgment of the Gulating Appellate Court, the Supreme Court in the Gate Gourmet case merely stated that the same factors would be relevant when assessing whether an economic entity had been transferred and its identity was retained.
A more robust stance from the Supreme Court in Gate Gourmet, particularly on the question of what constitutes an economic entity would have been welcomed. Rather than linking the conclusion to an overall assessment of the applicable facts, the Supreme Court could have seized the opportunity to clarify this. As it refrained from providing a clear statement on the connection between the conditions for the existence of an economic entity and the retention of identity, the debate on this topic will no doubt continue.

However, the Court's unanimous *obiter dictum* that whether the acquirer has sought, or made arrangements, to evade the rules on transfer of undertakings has no effect on the assessment will certainly be of interest to advisers involved in mergers and acquisitions.
In terms of the successful discrimination claim, the Supreme Court found that asking candidates which trade union they were affiliated with amounted to direct discrimination to which no exceptions apply. Nevertheless, despite the Supreme Court's robust stance on discrimination, the redress awarded to affected employees amounted to no more than approximately € 400 each.

Subject: Transfer of undertaking
Parties: Gate Gourmet Norway AS - v - Nguyen Thi Ha and others
Court: *Norges Høyesterett* (Supreme Court)
Date: 22 December 2011
Case number: HR 2011-2393-A
Hardcopy publication: Rettens Gang 2011 p. 1755
Internet publication: http:// websir.lovdata.no (subscription needed)

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2012/15

Transfer of activities that do not form a separate unit at the transferee does not constitute a TOU (GE)

CONTRIBUTORS PAUL SCHREINER AND ELISABETH HÖLLER*

Summary
Following on from the ECJ's ruling in *Klarenberg*, the Federal Labour Court (BAG) has held in two recent cases that the existence of an independent organisation at the transferor is a prerequisite for a transfer of undertaking.

1. BAG 8 AZR 455/10

Facts
The plaintiff had been employed by ET GmbH ("ET") since 1989, working in the field of industrial automation and measuring and control technology in the steel industry. He was head of department for measuring and control technology. The department was divided into three groups, one of which was also managed by the plaintiff. At the end of 2005 ET sold some of the product lines developed by the department to F GmbH ("F"), the legal predecessor of the defendant company. F also acquired the rights to software, patents, patent applications and inventions relating to the transferred product lines, along with the product name and technical knowhow. In addition, F acquired the relevant development hardware, the inventory belonging to the transferred product lines and the client and supplier lists belonging to those lines. Only the deputy head of department and three engineers were employed by F, whereas the plaintiff's department originally employed 13 people. The three engineers were from the group managed by the plaintiff. The plaintiff claimed that the circumstances constituted a transfer of undertaking and demanded continued employment with F as head of the group he managed. The claim was rejected in the court of first instance.

On appeal, the Higher Labour Court of Düsseldorf submitted to the ECJ the question of whether the transfer of part of an undertaking under Article 1 of the Directive 2001/23/EC only exists if that part continues as an autonomous part of the business of the transferee. On 12 February 2009, in *Klarenberg* (C-466/07), the ECJ ruled that Article 1 of Directive 2001/23/EU can apply in a situation where the part of the undertaking or business transferred does not retain its organisational autonomy if the functional link between the various elements of production is preserved and that link enables the transferee to use those elements to pursue the same or a similar economic activity. The Higher Labour Court of Düsseldorf accordingly approved the existence of a transfer of part of the undertaking and decided in favour of the plaintiff.

Judgment
Unlike the Higher Labour Court of Düsseldorf, the BAG decided in favour of the defendant. According to the BAG a transfer to the defendant of part of the undertaking had not taken place, as there was no single part of the business of ET that dealt exclusively with the product lines sold to F. The BAG argued that the presumption of a transfer of part of

an undertaking requires that a separate organisational and economic unit already existed at the transferor. The transferred product lines and operating facilities did not constitute a transferable part of ET, as the product lines were not allocated to any particular organisational unit of the company. Additionally, no separate group of employees in the department managed by the plaintiff was completely transferred to F. The four employees hired and the transferred rights and operating facilities were not assigned only to one of the three groups of the department in ET, but rather to different groups in that department. The BAG additionally argued that the product lines sold had not only been developed and/or manufactured by the transferred employees, but by all employees in the department.
Given that the defendant had employed only four out of 15 employees of ET, the BAG was not persuaded that a transfer had taken place by virtue of the continuation of employment of the majority or a large number of the employees. According to the BAG, the question of whether the product lines were handled in a separate part of the business of the transferee was ultimately not important.

2. BAG 8 AZR 546/10

Facts
In this case too, the parties disputed the existence of a transfer of part of an undertaking pursuant to section 613a of the German Civil Code (the "BGB"). This provision states that in the event of a transfer of a business or part of a business to another employer as a result of a legal transaction, the latter shall assume the rights and obligations arising under employment contracts existing at the time of the transfer.

The facts were as follows: two legal entities handled the interests of a number of towns in the province of Saxony. One of these entities ("A") dealt with the sewage of 42 towns. The other entity ("B") took care of the drinking water provision in 37 of those towns. In 1996, A and B decided to join forces. They incorporated a company ("W"), to which they contracted out their commercial and technical work. Accordingly, W consisted of two divisions, the Commercial division, employing about 30 staff and the Technical division, employing about 60 staff. The Commercial division was subdivided into three departments, namely finance, tax and legal. The plaintiff was head of the tax department.

In November 2006 the provincial parliament decided that A and B should terminate their outsourcing contract with W and take back all commercial and technical work with effect from 1 January 2007. Accordingly, W transferred its activities, as well as significant assets including land and buildings, to A (sewage activities and sewage assets) and to B (drinking water activities and assets). Normally, this could have constituted a transfer of an undertaking within the meaning of (the German rules transposing) Directive 2001/23 (the "Acquired Rights Directive"), with the effect that all of W's employees would transfer into the employment of either A (employees involved in sewage) or B (employees involved in drinking water provision). The problem, however, was that some employees of W, such as the plaintiff, could not be attributed to either sewage or water provision, as they performed work for both.

A and B each took over a number of W's employees but did not offer the plaintiff a job. She claimed that her employment relationship had transferred to the defendant pursuant to section 613a of the BGB and she made a claim against her notice of termination. Both the Local Labour Court and the Higher Labour Court of Saksen-Anhalt dismissed the actions.

Judgment
The BAG decided in favour of the defendant. The BAG argued that the plaintiff did not work in a separate organisational unit at W, which could have been transferred to the transferee. The BAG pointed out that a separate economic unit must already have existed at the transferor prior to the transfer, even if no equivalent organisational structure exists at the transferee. Whether the facts met this requirement needed to be assessed based on the court's interpretation the principles of established by the ECJ. In addition, the BAG determined that "part of an undertaking" is not simply defined by its activities but rather by features such as its employees, managers, work organisation, operational matters and operating facilities.
In the present case there was no separate organisational unit which exclusively dealt with commercial functions of sewage water disposal. In particular, there had been no separate classification of "drinking water supply" and "sewage water disposal" in the commercial division. Finally, the operating facilities were not divided into "sewage water" and "drinking water" sections.

Commentary
Both cases provide sound rulings. The BAG points out that a transferable separate organisational and economic unit at the transferor company is a mandatory requirement for the existence of the transfer of part of an undertaking pursuant to section 613a of the BGB. The *Klarenberg* decision does not conflict with the decisions, since in that case, the ECJ was only ruling on the criteria for the further existence of the transferred part of an undertaking at the transferee. *Klarenberg* did not consider whether a separate organisational and economic unit had already existed at the transferor. In a number of cases, the ECJ has referred to the existence of a separate organisational unit, but it has not relied on this in its decision-making.

Thus, the two decisions can be seen as a development of *Klarenberg*. In fact, in the first case, the preliminary ruling of the ECJ in *Klarenberg* turned out to be unnecessary, as the ruling did not ultimately affect the eventual outcome.

However, whether facilities constitute part of an undertaking at the transferor and whether the functional link between the elements of production is preserved to enable the transferee to pursue the same or a similar activity - remain difficult questions of fact.

Parties: unknown
Court: Federal Labour Court (*Bundesarbeitsgericht*)
Date: 1.: 13 October 2011
2.: 10 November 2011
Case number: 1.: 8 AZR 455/10 (NZA 2012, 504)
2.: 8 AZR 546/10 (NZA 2012, 509)
Internet-publication:
www.bundesarbeitsgericht → Entscheidungen → case number

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2012/16

ETO defence fails (NL)

CONTRIBUTOR LOTTE VAN HECK*

Summary
It is not up to the parties of a (collective) agreement to determine whether a situation qualifies as an ETO reason.

Facts
The plaintiff in this case was a 61 year-old chef. He was formerly employed by a catering company called Avenance. He worked in the staff restaurant of a company called PPG, which had contracted out its catering services to Avenance. In 2010 PPG terminated its contract with Avenance and entered into a similar contract with the latter's competitor Prorest. It was common ground between all parties concerned that the service provision change qualified as the transfer of an undertaking within the meaning of Directive 2001/23 and the Dutch law transposing it.

The plaintiff's employment contract, both before and after the transfer from Avenance to Prorest, was governed by a collective agreement. It provided that in the event of a transfer, the transferee had the right to reduce (in steps) any benefits in excess of the minimum provided by the collective agreement. Accordingly, Prorest informed the plaintiff that two of his above-minimum terms of employment, totalling almost € 500 gross per month, would be reduced gradually over a period of 30 months, starting on the date of the transfer.

The plaintiff complained to a joint committee established pursuant to the collective agreement, but it found in favour of Prorest, noting that the latter had applied the collective agreement correctly. The plaintiff then brought legal proceedings. He asked the court to deliver a declaratory judgment that the unilateral reduction of his terms of employment violated the law and the Directive, which clearly provides that *"the transferor's rights and obligations arising from a contract of employment [...] shall, by reason of such transfer, be transferred to the transferee"* (Article 3(1) of the Directive).

The defendant countered that the reduction in the plaintiff's benefits was not caused by the transfer itself, but (1) by the fact that Prorest had had to quote a very low price to get the contract, that (2) this necessitated a reduction in staffing costs and that (3) the collective agreement provided that a service provision change can give rise to a change in terms of employment, such circumstances qualifying as economic, technical or organisational (ETO) reasons.

Judgment
The court began by noting that the Dutch law regarding transfer of undertakings must be construed in line with the Acquired Rights Directive 2001/23 and the ECJ's case law on that directive. It went on to hold that whether or not there are ETO reasons depends on the circumstances of the case and cannot be determined by a collective agreement, as that would undermine the directive's effectiveness. In the case at hand, the reduction in the plaintiff's benefits was clearly a direct result of the transfer of the undertaking and therefore unlawful.

The court also observed that Prorest had failed to make a convincing case for the need to reduce staffing costs and to do so by reducing the plaintiff's income, over time, by almost € 500 per month, which amounted to 15% of his earnings.

Commentary
The ETO doctrine is based on Article 4(1) of the Acquired Rights Directive 2001/23, which in the first sentence provides that *"the transfer of the undertaking [...] shall not in itself constitute grounds for dismissal by the transferor or the transferee"* (emphasis added). The second sentence goes on to provide that *"this provision shall not stand in the way of dismissals that may take place for economic, technical or organisational reasons entailing changes in the workforce"*. Although the concept of ETO is limited to dismissals, Dutch courts and authors also apply it to terms of employment.

The problem is that nobody can tell whether a dismissal, or a change in terms of employment, is for an ETO reason. Lawyers tend to advise their transferee clients to wait a few months, typically six months at least, before attempting any dismissals or changes of terms.

In this case, the fact that the court found it necessary to observe that the transferee had failed to make a convincing case for the need to cut costs suggests that the court may have been uncertain whether, if that need had been demonstrated, it would have qualified as an ETO reason.

Comments from other jurisdictions
Austria (Martin Risak): The Austrian law on the transfer of undertakings does not include any explicit provision prohibiting dismissals based on the transfer. The courts see such dismissals as *contra bonos mores* but allow dismissals based on ETO reasons as provided for in Article 4 of Directive 2001/23. So far the Austrian courts have only had to deal with dismissals before the transfer but not with dismissals afterwards. For this reason, legal literature on post-transfer dismissal is diverse and no clear guidance exists for employers on how to deal with this issue. After the transfer many ETO reasons would not have arisen had there not been a transfer, e.g. the need to adapt the wages of the transferred employees to the new cost structure of the transferee or redundancy dismissals based on over-capacity because of the transfer. In any event, mainstream opinion has it that the time elapsed since the transfer is relevant and generally, after a year the special protection against dismissal as a result of a transfer ceases to apply.

United Kingdom (Hester Briant): The UK legislation implementing the Acquired Rights Directive 2001/23 ("ARD") is the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE"). TUPE provides that variations in employees' terms and conditions will be void if the reason for the variation is the transfer itself ***or*** a reason connected with the transfer which is not an ETO reason. In this, UK legislation is arguably more stringent than the ARD requires.

The ARD merely says that a transferor's rights and obligations arising from a contract of employment shall be transferred to the transferee. It does not say that in order to vary terms the employer needs an ETO reason: in fact the concept of ETO reasons is limited to dismissals. However, ECJ caselaw has suggested that the ETO concept could be relevant to changing terms. In the ECJ decision of *Foreningen af Arbejdsledere i Danmark – v - Daddy's Dance Hall A/S* the court held that a transferee had the same power to change a transferred employee's terms and conditions of employment as the transferor, provided that the reason for the change was not the transfer itself. This was supported by the case of *Martin and ors – v - South Bank University* in which the ECJ held that the transferee could vary terms provided the

transfer was not the reason for the change, as might be the case where the transferee had an ETO reason.

So, to the extent that TUPE says changes for reasons *connected* with the transfer that are not ETOs, are void, it seems to go further than the ECJ decisions in two respects. Firstly, by saying that changes in terms for "transfer-connected" reasons are void, rather than limiting this solely to where the reason for the change is the transfer itself. Secondly, by limiting reasons that are not related to the transfer solely to ETO reasons, rather than making ETO reasons an example of the type of reasons that might be unconnected to the transfer.

There is an additional reason why the position in the UK may be more restrictive than in Holland. Various UK court decisions have interpreted the meaning of an "ETO reason" very narrowly. In particular, the 1985 Court of Appeal case of *Berriman - v - Delabole* held that there can only be an ETO reason where there are changes to the numbers or functions of employees. This means that various reasons for changing terms, which would seem to be reasonable, may not be lawful. For example, it may not be possible to vary the employee's place of work, because this would not involve a change to the numbers or functions of employees.

As the transferee in the case above had no need to change numbers or functions of employees, the transferee's stated reasons for its changes to the plaintiff's terms and conditions would not have qualified as ETO reasons in the UK. There does not seem to be any suggestion in this case report that the concept of an ETO reason is interpreted as narrowly in the Netherlands as it is in the UK.

The UK position is widely viewed to be unsatisfactory. The government is currently undertaking a public consultation exercise about TUPE, in which we understand that both (a) the use of ETO reasons for changes in terms and conditions and (b) the very restrictive interpretation of an ETO reason in *Berriman* have been widely criticised by those responding to the consultation. We anticipate that following this consultation, the position in the UK will be reviewed.

Subject: transfer of undertaking - ETO reason
Parties: X - v - Prorest Catering B.V.
Court: *rechtbank, sector kanton* (Lower Court), Amsterdam
Date: 8 May 2012
Case number: 1292945 CV EXPL 11-35449
Internet publication: www.rechtspraak.nl → LJN: BW 7288

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2012/17

Lithuanian Supreme Court interprets domestic law in line with the Acquired Rights Directive (LT)

CONTRIBUTOR JURGITA VENCKUTÉ*

Summary
Lithuania transposed the Acquired Rights Directive 2001/23 in 2002 without, however, providing for the automatic transfer of employment in the event an undertaking is transferred. The Labour Code merely prohibits dismissals in such an event. In this first ever case in Lithuania on the transfer of undertakings, the Supreme Court fills in the gap left open by the legislator.

Facts
Mr X was employed by *UAB Šnipiškių ūkis*. This is a limited liability company, the shares of which are owned by the Vilnius municipality. Originally, *Šnipiškių ūkis* was responsible, *inter alia*, for the operation of the Vilnius central market. X held the position of Market Inspector.

On 6 May 2009 the municipality decided to split *Šnipiškių ūkis* into two limited liability companies, the existing *Šnipiškių ūkis* and a newly incorporated company called *UAB Kalvarijų turgus*, and to transfer to this new company the activities, assets, rights and obligations relating to the market.

Šnipiškių ūkis, which no longer operated the market and therefore had no use for a market inspector, dismissed X. The new company *Kalvarijų turgus* did not offer employment to X, who now found himself without a job. He took both *Šnipiškių ūkis* and *Kalvarijų turgus* to court, arguing that the transfer of market activities and assets from the first defendant to the second defendant constituted a transfer of undertaking and that he had therefore become an employee of *Kalvarijų turgus.* He asked the court to confirm this and to order *Snipškių ūkis* to pay him salary until the date of the judgment.

Kalvarijų turgus' defence was that the Labour Code does not provide for automatic transfer from one employer to anothyer and that therefore any claim (for unfair dismissal) could only be against *Šnipiškių ūkis.* The latter's defence is not known.

The court of first instance found in favour of X. It confirmed that X had retained his previous position at *Šnipiškių ūkis* and ordered *Kalvarijų turgus* to offer X employment. This judgment was overturned on appeal, whereupon X brought the matter to the Supreme Court.

Judgment

The Supreme Court, interpreting the Labour Code in line with the Acquired Rights Directive 2001/23, which Lithuania transposed in 2002, and with the ECJ's case law on that directive, held that where activities, assets, rights and obligations are transferred from one company to another, the employees involved in those activities transfer automatically to the transferee, even though Lithuanian law does not stipulate this expressly. If the transferee has an economic, technical or operational (ETO) reason for dismissing one or more of

the employees so transferred, and if the domestic law allows for such a dismissal (which Lithuanian law does), then the transferee may proceed to dismiss such employees, but only after having taken them on as its employees. The upshot of the case was that the claim against *Šnipiškių ūkis* was rejected and that *Kalvarijų turgus* was recognised as X's employer and was ordered to offer him employment on unchanged terms with effect from 6 May 2009.

Commentary

This is the first time the Lithuanian Supreme Court has explicitly recognised the rules on transfer of undertakings. The judgment shows that the Supreme Court is willing to fill in a gap the legislature left unfilled when it transposed – incompletely – the Acquired Rights Directive and to apply the principles formulated by the ECJ.

Unfortunately the published documents leave certain crucial questions of fact and of law unanswered. For example it is not known whether *Šnipiškių ūkis* employed other individuals for its market activities. In addition, the court did not consider whether those activities were capital-intensive or labour-intensive.

Subject: transfer of undertaking
Parties: G.J. - v - WAB *"Šnipiškių ūkis" and UAB "Kalvarijų turgus"*
Court: *Lietuvos Aukščiausiasis Teismas* (Supreme Court)
Date: 26 January 2012
Case number: 3K-3-8/2012
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2012/18

Dismissal for being HIV-positive justified (GE)

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Summary
The termination of an HIV-positive employee cannot lead to a successful claim for damages based on disability discrimination if the safety standards adopted by the employer aim to prevent the infection of patients with that disease.

Facts
The plaintiff was born in 1987 and was employed as a technical chemical assistant at a pharmaceutical company in December 2010. The defendant manufactures medication that is administered intravenously to cancer patients. The parties agreed to a probationary period of six months in the plaintiffs' employment contract. During that period, the contract was terminated with two weeks' notice in accordance with section 622 (3) of the German Civil Code (the "BGB"). The German Unfair Dismissal Protection Act and the special dismissal protection for disabled employees under German law do not apply during the first six months of employment.

According to his job description the plaintiff was to be employed in the production and quality control of pharmaceuticals. His workplace was in the so-called "cleanroom" section of the company. The company's Standard Operating Procedures are based on the European "Good Manufacturing Practice" guidelines, which are in turn based on Directive 2003/94/EC. The guidelines provide that every possible precaution must be taken to ensure that no one suffering from a contagious disease or with open cuts or injuries is employed in the production of medication. Chronic skin diseases and chronic infections such as hepatitis B or C and HIV are listed in the Standard Operating Procedures to the effect that people with those conditions must not be employed.

The plaintiff started working on 6 December 2010. During the initial medical check-up two days later, the plaintiff informed the company medical doctor that he was HIV positive. The doctor then filled out a form expressing concern regarding the employment of the technical chemical assistant in the cleanroom. Since there was no other possible employment for the plaintiff, the defendant terminated the contract with two weeks' notice.

The plaintiff sued the company for disability discrimination. The German Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz*, the "AGG"), which is the German transposition of Directive 2000/78/EC) applies irrespective of an employee's length of service. The plaintiff also said the company medical doctor did not raise concerns about his employment during the check-up and that because of the specific path of infection of HIV, transmission to a cancer patient would be practically impossible.

The defendant argued that the plaintiff did not qualify as a disabled employee.

The Labour Court in Berlin held in the first instance that the plaintiff was indeed not disabled. It noted that someone is considered disabled when the condition in question has an impact, which lasts longer than 6 months, on his or her ability to carry out normal day to day activities and has an adverse impact on his or her ability to participate in society (Section 2 SGB IX). A medically treated HIV infection without symptoms had no impact on either the plaintiff's social life or his professional career. He could not be considered disabled under the AGG, as his condition had not (yet) had any impact on his ability to participate in society. The first time it had any impact at all was when his employer prohibited him from working in the cleanroom.

The plaintiff appealed to the Regional Labour Court (the "LAG") of Berlin-Brandenburg to have his termination declared void. He claimed in damages what he would have been paid for three months of the probation period.

Judgment
The LAG held that the employment contract had been lawfully terminated by the company during the six-month trial period in accordance with section 622 of the BGB. The court considered the employer's obligations under the guidelines and its own Standard Operating Procedures and found that it was under a duty to ensure there was no contamination in the cleanroom. If it needed to remove an infected employee from the cleanroom in order to fulfill that duty, it was then obliged to take steps to redeploy the employee elsewhere. However, if that failed, the employer was entitled to dismiss the employee, as happened in this case.

It ruled that the termination did not violate section 7(1) of the AGG (which provides that employees may not be discriminated against on any of the protected grounds listed in section 1, including disability), as this section was not relevant to the termination. The court did not rule on whether an HIV infection without symptoms constitutes a disability as defined by section 1 of the AGG. However, the court did consider section 3 of the AGG, which says that direct discrimination occurs when one person is treated less favourably than another in a comparable situation (this mirrors Article 2 (2)(a) of Directive 2000/78). The court found that it was not clear that the employer would have acted differently towards another HIV-positive person (or indeed any other employee suffering from a contagious, yet not necessarily permanent disease) who had been employed for a longer period of time. There were no indications that HIV-positive employees would be more likely to be terminated or excluded from the cleanroom based on indirect discrimination resulting from their disease than other employees who were not HIV positive. The court therefore held that the plaintiff had not been subject to unequal treatment.
In any event, the court found that by section 8 of the AGG, unequal treatment would have been permitted in this case. Section 8 of the AGG stipulates that exceptions to the principle of equal treatment can be made if the treatment is justified by a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate (this mirrors Article 4(1) of Directive 2000/78). In this case, the fact that the cleanroom needed to be free from contagious diseases was an important professional requirement. An employer manufacturing medication for intravenous injections must prevent any contamination of patients using the medication and must at the same time protect the company from potential claims for damages, declining sales and harm to its reputation.

The employee has since lodged an appeal with the Federal Labour Court.

Commentary
The Berlin-Brandenburg LAG left unanswered the interesting question of whether or not HIV qualifies as a disability under section 1 of the AGG. Nor have the German courts yet determined whether AIDS constitutes a disability, but this would largely depend on the nature of the illnesses suffered as a result of the AIDS virus.

Nevertheless, under German law, being HIV positive is not usually sufficient reason for termination of employment. There are no set causes for termination under German law. The termination of an HIV-positive employee is therefore only lawful in limited situations.

This decision has been quite controversial, as some authors have argued that HIV positive employees should not be excluded from the workplace under any circumstances. However, the court ruled that the employer's interests held sway where the safety and well-being of patients was in question. Only in such circumstances - and with the proviso that the employer also cannot find other suitable work for the employee (here, outside the cleanroom) - should the employer have the right to terminate the contract. It remains to be seen whether or not the Federal Court will uphold this judgment.

Comments from other jurisdictions
The Netherlands (Peter Vas Nunes): In the Netherlands this question would be approached in the following way:
Step 1: does the plaintiff's HIV qualify as a disability (real or perceived) within the meaning of the AGG and, hence, Directive 2000/78? If not, the claim is to be rejected.
Step 2: if there is a disability, has the plaintiff been discriminated against? The answer depends on whom one takes as a comparator.
Step 3: if the plaintiff has been discriminated against on grounds of disability, is that discrimination direct or indirect?
Step 4: if there is direct discrimination, do any of the statutory exceptions apply?
Step 5: if indirect, is the discrimination objectively justified?
In terms of step 1: I agree with the authors that it is a pity that the court did not address the question of whether HIV qualifies as a disability. A disability within the meaning of Directive 2000/78, as defined by the ECJ in *Navas* (C-13/05), is *"a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life"*, provided that it is *"probable that the limitation will last for a long time"*. In other words, there are two elements: (i) long-lasting impairment and (ii) hindrance of participation in professional life (or perception of each of these elements). To my knowledge the ECJ has not yet refined its definition and has not addressed the question of whether a hindrance is absolute or whether it can depend on the person's profession. For example: if an airline pilot's eyesight deteriorates so that he needs to wear glasses (or contact lenses) and he refuses laser treatment, making him unfit to fly, is he "disabled"? Being short-sighted does not hinder his participation in most professions and so the pilot could become a bookkeeper or almost anything else - but it certainly would hinder his professional life as a pilot.
Recently the Dutch Equal Treatment Commission has held that being HIV-positive is a disability within the meaning of the Dutch law transposing Directive 2000/78.
In terms of step 2: The correct comparator, as I see it, is someone identical to the plaintiff with one exception, namely that he is not HIV-positive. Clearly, such a comparator would not have been dismissed and so I find the German judgment surprising. Bearing in mind that the court did not settle the question of whether the plaintiff was disabled – in other words, it did not rule that he was not disabled - how could one say with certainty that this employee, who was dismissed for no other reason than disability, was not treated unfavourably? The court seems to take as a comparator an HIV-positive person who has been employed for more than six months. I find this a strange comparison.

Subject: disability discrimination
Parties: unknown
Court: Berlin-Brandenburg Regional Labour Court
Date: 13 January 2012
Case number: 6 Sa 2159/11
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Internet-publication:
http://www.iww.de/index.cfm?pid=1307&opv=120497

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2012/19

Inviting for job interview by email not discriminatory (CZ)

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Summary
A job applicant was invited for an interview by email, sent less than 24 hours before the planned time of the interview. Because the applicant did not own a computer she read the invitation too late, missed the interview and did not get the job. Did the method of inviting applicants for an interview discriminate on the grounds of "property"? The Supreme Court found that this was not the case, as the employer had no intention to disadvantage applicants without a computer of their own.

Facts
The Czech Ministry of Culture announced on its website a vacancy for the position of Managing Director of the National Heritage Institute. A number of candidates filed an application for this position. One of them was the plaintiff. Although she did not own a computer of her own, she did apply by email, perhaps using a friend's computer or a computer in an Internet café.

On 13 December 2005 the Ministry invited all of the applicants, by email and/or by telephone, for job interviews the next day. In other words, the applicants were given less than 24 hours' notice. Because the plaintiff did not own a computer and did not have all-day access to her email account, she did not read the invitation that was sent to her email address on time. Therefore, she did not attend a job interview.

The Ministry decided to prolong the selection procedure and it placed a second advertisement for the vacancy. The plaintiff was not informed about this despite the Ministry knowing that she had applied in the first round. Nevertheless, she could have applied again, seeing that the advertisement was published both in a newspaper and on the Ministry's website. Be this as it may, the plaintiff did not apply a second time.

The result of the foregoing was that someone else got the job. When the plaintiff protested, she was told that she would not have been selected for the job anyway, as she was clearly a person with "inadequate organisational abilities". The plaintiff experienced this remark as being hurtful of her dignity and self-respect. Moreover, she felt that she had been discriminated on the grounds of "property", as provided in the Act on Employment, arguing that the Ministry's method of selecting applicants disfavoured people like her who are too poor to afford a computer of their own or to have all-day access to the Internet or a personal email account. This alleged discrimination caused the plaintiff to experience loss of dignity for which she demanded monetary compensation.

The plaintiff brought proceedings against the State. The court of first instance dismissed her claim. It reasoned that there had been no discrimination, given that all of the applicants for the vacancy had been treated in the same manner. They had all received less than 24 hours' notice of the job interview. The court of second instance upheld this judgment, adding that the plaintiff had only herself to blame, as she had failed to provide the Ministry with such contact details, e.g. a mobile telephone number, as would enable her to be contacted at short notice. As for the plaintiff's complaint that she had not been invited for the second round of interviews, there was no discrimination either, given that the invitation to apply for this second round had also been published in a newspaper. Thus, the plaintiff could have applied and, in any case, she had not been treated differently than others in this regard.

The plaintiff brought the case to the Supreme Court.

Judgment

The Supreme Court upheld the lower courts' judgments. Although it agreed with the plaintiff that the Ministry had behaved inappropriately by inviting applicants for an interview at less than 24 hours' notice, it held that the Ministry had treated all (potential) applicants in the same manner and that, therefore, it had not discriminated. There would have been discrimination, the Court added, if the Ministry had intentionally disfavoured individuals who do not own a computer or have all-day access to an email account. However, there was no such intent, given that the plaintiff had applied by email without informing the Ministry that she had no computer.

Commentary

Until 31 December 2011 the Czech Republic had (i) a special provision in the Act on Employment that prohibited discrimination on many grounds including "property" and (ii) since 1 September 2009, the Anti-Discrimination Act, which applies to discrimination in general, but prohibits discrimination on more limited grounds, not including "property". As of 1 January 2012 the rules on non-discrimination were removed from the Act on Employment.

As the alleged discrimination in this case occurred before 2012, the plaintiff could invoke both the anti-discrimination rules in the Act on Employment (including the prohibition to discriminate on grounds of property) and the Anti-Discrimination Act.

The Supreme Court does not make a clear distinction between direct and indirect discrimination, but it does so implicitly, where it holds that there would have been discrimination (on grounds of property) if the Ministry had intentionally made application difficult for individuals without a computer.

Although the claim in the case reported above may seem frivolous, the case does illustrates that discrimination claims are on the rise in the Czech Republic. This may be due to the coverage given to discrimination claims (not only in the area of employment) by the media and the heightened awareness of the general public of their rights.

Comments from other jurisdictions

The Netherlands (Peter Vas Nunes): The TFEU and a number of Directives prohibit discrimination in employment on the grounds of nationality (Article 18 TFEU), gender (Article 157 TFEU and Directive 2006/54), race (Directive 2000/43), religion/belief, disability, age and sexual orientation (Directive 2000/78) and certain categories of employment status, namely posted work (Directive 96/71), part-time work (Directive 97/81), fixed-term work (Directive 99/70) and temporary agency work (Directive 2008/104). I will refer to these grounds as the "express" grounds or strands of discrimination law.

Neither the TFEU nor any Directive prohibits discrimination in employment on what I will refer to as "other" grounds, such as property, size, weight or beauty/ugliness ("lookism"). However, there is softer law, both international (e.g. Article 26 of the BUPO Convention) and European (e.g. Article 14 of the ECHR and Article 21 of the Charter of Fundamental Rights of the European Union), that does outlaw discrimination on other grounds, but the recent ruling in the *Agafitei* case (reported in EELC 2011-3) indicates that the ECJ has no desire to apply that law to non-express forms of discrimination. Therefore, unless the ECJ expands the scope of its *Mangold* doctrine by qualifying other grounds as "general principles of EU law", employees who wish to challenge discriminatory practices that are not expressly prohibited will need to rely on their domestic law.

The national (case) law on discrimination on "other" grounds seems to be different in the various EU Member States. Judging by the rulings of the French Supreme Court reported in EELC 2009/50, 2010/10 and 2010/51, the French doctrine of equality, for example, extends well beyond the express strands of discrimination, *inter alia* requiring managers (*cadre*) and workers (*non-cadre*) to be remunerated equally in the absence of objective justification.

The Czech judgment reported above is an example of national law that prohibits discrimination on at least one "other" ground, namely property. My reading of the judgment is that if the plaintiff had established *prima facie* evidence of differential treatment on the ground of owning/not owning a computer, her claim might have been upheld.

The Dutch Supreme Court seems to be concerned that accepting a "general" equality doctrine, i.e. one not limited to the express strands, would open the gates to a flood of litigation. In a 1994 ruling in the *Agfa - v - Schooldermans* case the Supreme Court referred to *"the generally accepted principle that employees are entitled to fair remuneration, which entails, inter alia, that similar work under similar conditions must be rewarded similarly in the absence of objective justification"*. Ten years later, however, in its 2004 ruling in the *Parallel Entry* case, the Supreme Court was more reluctant. The case concerned airline pilots employed by KLM. Briefly and incompletely stated, pilots who had been employed by KLM for their entire career were paid more than their colleagues who had spent the first part of their career as employees of a subsidiary company of KLM called KLC. A group of former KLC pilots demanded a pay rise, basing their claim on the *Agfa - v - Schooldermans* doctrine. The Supreme Court upheld the lower courts' decisions to turn down the claim. It reasoned that, although the principle of equal payment

as formulated in the *Agfa - v - Schooldermans* case is a fundamentally important principle rooted in international law, it is no more than one of several aspects assessed to determine whether an employer has acted in accordance with the Dutch doctrine of "good employership". It follows, according to the Supreme Court, that an employee can only claim compensation for loss resulting from discrimination on "other" grounds in the event of a gross violation of the said principle (literally: in the event the inequality is "unacceptable" from the point of view of reasonableness and equity). The *Parallel Entry* ruling has dashed the hope of those who advocate a wider scope for anti-discrimination legislation.

Subject: discrimination on grounds of property
Parties: H.P. - v - Czech Republic (Ministry of Culture)
Court: *Nejvyšší soud Ceské republiky* (Supreme Court)
Date: 27 March 2012
Case number: 21 Cdo 4586/210
Internet publication:
www.nsoud.cz → Rozhonutí (etc.) → Spisová (etc.)

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2012/20

When does fertility treatment begin? (DK)

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Summary
In a recent landmark judgment, the Supreme Court found that an employee who was undergoing initial check-ups before starting fertility treatment was not protected by the prohibition against dismissal on grounds of pregnancy, because she had not begun the fertility treatment.

Facts
Section 9 of the Danish Act on Equal Treatment of Men and Women (the "Act") prohibits employers from dismissing employees for reasons relating to pregnancy, childbirth or adoption or for exercising their parental rights to leave. Under normal circumstances, the protection under the Act commences on the date the employee becomes pregnant, irrespective of whether she or the employer knows about the pregnancy.

In 2003 the Supreme Court established that section 9 of the Act also protects employees from being dismissed for trying to become pregnant through artificial insemination. In the present case, however, the question was whether or not the employee was covered by the protection under this section, since the fertility treatment had not yet begun. The employee was dismissed while undergoing initial check-ups. She had told the employer about her wish to undergo fertility treatment and she claimed that this was the reason for her dismissal.

The employee argued that fertility treatment should be viewed as a whole, to the effect that an employee is protected against dismissal, in the same way as a pregnant employee, i.e. from the moment she knows that she will be going into fertility treatment. The employee admitted that this interpretation of the rules would give women undergoing fertility treatment better protection than women who get pregnant without fertility treatment, since the former would be protected from an earlier stage. Since the purpose of the rules is to prohibit employers from using their knowledge about an employee's wish to become pregnant in a dismissal situation, the employee argued that this difference in protection was well-founded.

The employer argued that it had to dismiss six employees on grounds of shortage of work and that, in making this decision, it had attached great importance to sickness absence. In addition to absence due to the initial check-ups, the employee had had a large number of sick days.

Because of its fundamental nature, the district court referred the case to the High Court. The High Court stated that, at the time of dismissal, the employee's own doctor was doing initial check-ups in order to clarify what kind of fertility treatment the employee should begin. Thus, the actual fertility treatment had not begun at the time of the dismissal. The High Court found in favour of the employer, ruling that situations like these are not covered by the special dismissal protection under the Act, since there is no "actualised possibility" of becoming pregnant. The employee appealed to the Supreme Court.

Judgment
On the same grounds as the High Court, the Supreme Court ruled that although section 9 of the Act protects employees from being dismissed for trying to become pregnant through fertility treatment, the employee in this case was not covered by the dismissal protection under the Act. This is because when she was given notice, she was only undergoing initial check-ups and had not begun fertility treatment. The Supreme Court also emphasised that there was no "actualised possibility" of becoming pregnant.

Like the High Court, the Supreme Court believed that there was no basis for establishing that, in deciding to dismiss the employee, the employer had fallen foul of the prohibition against gender discrimination set out in section 4 of the Act. Therefore, the Supreme Court was satisfied that the dismissal was justified by operational reasons. The appeal was dismissed.

Commentary
In 2008, the European Court of Justice ruled in the *Sabine Mayr* case (C-506/06) that an Austrian employee was not protected against dismissal at a time when her eggs had been fertilised *in vitro*. The ruling was based on the fact that the eggs had not yet been implanted in her uterus.

In the Danish case, the employee argued that the EU directives are minimal directives and that the Danish legislature has introduced stronger protection than that provided in the *Sabine Mayr* case. Unfortunately, the Supreme Court did not address the issue of whether the protection against dismissal is triggered at an earlier stage in Denmark than in Austria. The answer depends on how the expression "actualised possibility" is to be interpreted. It is not clear whether it will be deemed an actualised possibility if the employee has *in vitro* fertilised eggs that are still not implanted in her uterus – as was the case for *Sabine Mayr*. It seems most likely that the Danish implementation of the EU Directive in question is a minimal implementation.

The ruling by the Supreme Court does establish, however, that there is a period of time between the initial check-ups and actual pregnancy during which it is unclear when the dismissal protection under the Danish Act on Equal Treatment of Men and Women is triggered, and it will be interesting to follow the development in Danish case law on this topic.

Comments from other jurisdictions

Austria (Andreas Tinhofer): In the *Sabine Mayr* case (C-506/06) the plaintiff relied exclusively on the statutory prohibition in Austrian law against dismissing a pregnant employee without prior approval by the court, which can only be given in limited situations (section 10, Maternity Protection Act, *Mutterschutzgesetz*). Having regard to the corresponding provision in the Pregnancy Directive (92/85/EC), the Austrian Supreme Court has asked the ECJ whether this protection has begun at the point when the woman's ova have been fertilised with the sperm of her partner, even though they have not yet been implanted within her.

In *Sabine Mayr* the issue of discrimination was not mentioned by the referring court, as the employer did not know about the treatment when he issued the termination letter. However, having held that Article 10 of the Pregnancy Directive did not apply to the situation at issue, the ECJ nevertheless went on to examine the case under Directive 76/207. It mentioned that the order for reference did not specify the reasons for which the worker was dismissed and that it was for the referring court to determine the relevant facts of the dispute before it. But knowing that Ms Mayr was dismissed while she was on sickness leave in order to undergo *in vitro* fertilisation treatment, the ECJ wanted to give the Austrian court some guidance on the issue of possible sex discrimination.

It pointed out that if a female worker is dismissed on account of absence due to illness there is normally no direct discrimination on grounds of sex. But if the treatment which is the reason for the absence affects only women it follows that the dismissal of a female worker essentially because she is undergoing "that important stage" of *in vitro* fertilisation treatment constitutes direct discrimination on grounds of sex (paragraph 50). Two paragraphs later the ECJ referred to "an advanced stage" of *in vitro* fertilisation treatment, that is, "between the follicular puncture and the immediate transfer of the *in vitro* fertilised ova into the uterus" (par 52).

However, it seems that if a dismissal is issued on the grounds that a worker is trying to get pregnant by *in vitro* fertilisation (or otherwise), it would constitute direct sex discrimination irrespective of the stage of the treatment. At least in Austria, the courts are very likely to view it that way.

Czech Republic (Nataša Randlová): There is a difference between Czech law and Danish law regarding the termination of the employment of a pregnant employee. Under Czech law, pregnancy is one of the situations designated by the Labour Code (such as temporary unfitness for work, maternity or parental leave or performance of military service) as a "period of protection". In this period the employee is protected against being given notice of termination (including immediate termination) by the employer.

The prohibition of giving notice to a pregnant employee is not limited to dismissal for reasons relating to pregnancy (as it appears to be in Danish law). The aim of the prohibition is to provide the employee with protection during the ensuing period from the implications of a major event, such as pregnancy.

The prohibition of giving notice applies provided an employee is already in a situation that is considered to be protected. In regard to pregnancy, the Supreme Court has held that notice of termination will not be legally effective even if the employer and/or the employee were not yet aware of the employee´s pregnancy (although the employee only has two months from the date when the employment would have ended to make a claim in court).

However, in the Czech Republic we have the same issue as described in this case report - i.e. when does pregnancy begin? A completely reliable method of ascertaining the exact moment of pregnancy does not exist, but we rely on the medical certificate of a gynaecologist to state the day pregnancy began.

Germany (Dagmar Hellenkemper): A Regional Labour Court addressed a similar case nearly 15 years ago (LAG Schleswig-Holstein, 11 November 1997, Case No. 5 Sa 184/97). The employee, who worked in a dental practice, informed her boss that she was to undergo four fertility treatments in the near future. After the first (unsuccessful) fertilisation trial, the employee's contract was terminated. The employer claimed that the termination was not based on the fertility treatment as such, but on the employee's expected sick days.

The first instance court held that the termination was not contrary to section 9 of the German Maternity Protection Act, which states that termination during pregnancy is void. It determined that section 9 did not apply to women who were trying to get pregnant, whether by fertility treatment or otherwise. The court determined that the termination was also not contrary to accepted principles of morality (section 138 of the German Civil Code) or to the duty of utmost good faith (section 242 of the German Civil Code), since it was explicitly not based on the pregnancy. The employer argued that the expected labour costs had been the reason for the termination. As in Dutch Law (see below), German Law prohibits dismissal during pregnancy, rather than on account of pregnancy, meaning that mothers are protected from the first day of the pregnancy but not before. The Appellate Court upheld that decision. Given that the provisions of the Maternity Protection Act have not changed since the decision, it is unlikely that any forthcoming case would be judged differently.

The Netherlands (Peter Vas Nunes): Danish law allows dismissal of a pregnant employee as long as the dismissal is not on the ground of pregnancy. I wonder whether this law is compatible with Article 10 (1) of the Pregnancy Directive 92/85, which provides that "Member States shall take the necessary steps to prohibit the dismissal of workers [...] during the period from the beginning of their pregnancy to the end of their maternity leave [...] save in exceptional cases not connected with their condition [...]". Is Danish law to be understood as meaning that any dismissal during pregnancy, not being on the ground of pregnancy, is an "exceptional case"? In the case reported above the employer dismissed six employees, who it selected on the basis of criteria such as the number of sick days. This does not strike me as an exceptional situation.

Although Dutch law differs from Danish law in that it prohibits dismissal during rather than on account of pregnancy (and maternity, etc.), the issue addressed in this Danish case, namely when pregnancy begins, is the same. In 1990 the Dutch Supreme Court ruled on a case where

an employee was dismissed on 31 March. On 22 April she informed her employer that she was pregnant. Subsequently she submitted a certificate, signed by her doctor, stating that according to the patient, her last period had occurred on 15 March and that she was expecting to deliver on 22 December. On 24 December she delivered a baby. The Supreme Court held that, in principle, an employee that alleges her dismissal was invalid on account of pregnancy bears the burden of proof that her pregnancy existed on the date of the dismissal. However, where there is a realistic possibility that the employee was pregnant on that date, as in this case (24 December minus 40 weeks = approximately 17 March), it must be assumed that she was pregnant on the date of the dismissal unless the employer proves otherwise. Whether an employer could prove such a thing is another matter.

In October 2008 the European Commission published a proposal to amend Directive 92/85 and this proposal was adopted by the European Parliament in 2010. Among other things the proposal adds a recital clause referring to the ECJ's ruling in the *Sabine Mayr* case, but this addition is not reflected in the text of the proposal. Moreover, in December 2011, following a full year of debate, the Council rejected a key element of the proposal, namely that maternity leave should be with full pay. This makes the fate of the proposal highly uncertain.

United Kingdom (Colin Leckey): I would expect an English Employment Tribunal to reach the same decision on these facts. Our Employment Appeal Tribunal (the "EAT") has already considered the implications of the ECJ decision in *Sabine Mayr* in a case called *Sahota - v - Pipkin*. The EAT held that, in the context of IVF, the "protected period" during which women may claim pregnancy discrimination is only to be extended by a limited time period in which ova have been collected and fertilised, and implantation is "immediate". Undertaking initial checks before starting fertility treatment clearly falls some way short of this. There is, in any event, no general prohibition under UK law on dismissing pregnant employees where the employer has operational reasons to do so, although they benefit from certain additional protections such as preference for any suitable alternative vacancies.

There might, however, be scope under UK law for a female employee to pursue a claim of ordinary sex discrimination (as distinct from pregnancy discrimination), if she could show that the decision to dismiss her was motivated by the fact that she had had initial check-ups for fertility treatment, as women will undergo more initial tests and check-ups than men.

Subject: Gender discrimination
Parties: Trade Union Denmark on behalf of A – v - the Confederation of Danish Industries on behalf of company B.
Court: *Højesteret* (Supreme Court)
Date: 29 March 2012
Case number: 259/2010
Hard Copy publication: Not yet available
Internet publication: Available from author

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2012/21

Sexual harassment no longer a criminal offence (FR)

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Summary
The definition of sexual harassment in French criminal law has been declared unconstitutional because it is insufficiently precise. Although this decision by the Constitutional Court regards only criminal law, not employment law, it is likely to have an impact on employment law as well.

Facts
Article L.222-33 of the French Criminal Code outlaws sexual harassment (*harcèlement sexuel*), which it defines as "harassing someone with a view to obtaining sexual favours". On 15 March, Gérard X was convicted of having sexually harassed someone. He was sentenced to three months in prison (suspended) and a fine of € 15,000. He appealed to the Supreme Court, arguing that Article L.222-33 is unconstitutional. He asked the Supreme Court to apply a recently introduced procedure, known as QPC (*question prioritaire de constitutionnalité*), by asking the Constitutional Court (*Conseil constitutionnel*) to pronounce on the constitutionality of Article L.222-33. The Supreme Court, in a judgment delivered on 29 February 2012, complied and asked the Constitutional Court for guidance.

Judgment
On 4 May 2012 the Constitutional Court declared Article L.222-33 of the Criminal Code to be unconstitutional, reasoning that its definition of sexual harassment breaches the fundamental principle that, in order to be punishable, an offence must be clearly defined (*nulla poena sine lege*). This means that as of 5 May 2012, and as long as the Criminal Code has not been amended, sexual harassment is no longer a criminal offence in France and that all prosecutions based on Article L.222-33 are invalid.

Commentary
The judgment reported above does not invalidate Article L.1153 of the French Labour Code, which deals with sexual harassment in the workplace. However, it is likely that sooner or later the Constitutional Court will be asked to rule on its constitutionality. Section 1 of this Article prohibits sexual harassment. Section 5 enjoins employers to take all necessary precautions to prevent sexual harassment.

A draft Bill of Parliament repairing the legislative gap caused by the Constitutional Court's judgment has been provided to the cabinet and will shortly be presented to Parliament. It is anticipated that this will lead to amendment of Article L.222-33 by the end of the summer. The repair job should not be excessively difficult, given that the Constitutional Court held that the new definition of sexual harassment need not be highly detailed, as long as it is more specific.

Comments from other jurisdictions
Germany (Markus Weber): A similar situation in Germany would be quite unlikely as there is a precise definition of sexual harassment in the German Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz*, the "AGG"). This has certain implications for German labour law,

which enjoins employers to take all necessary precautions to prevent discrimination among staff.

According to Article 3 of the AGG sexual harassment is a form of discrimination and is defined as unwanted, sexually-intended behaviour, including unwanted sexual acts and demands for such acts, sexually intended physical contact, remarks with sexual content, as well as unwanted visual presentation of pornographic images, which intend or cause the dignity of the person concerned to be harmed, in particular if it creates an environment of intimidation, hostility, humiliation, debasement or indignity. This definition predominantly adopts the definition of sexual harassment in Directive 2006/54 on equal treatment of men and women in matters of employment and occupation.

Since this definition is clear - particularly in comparison to the definition in Article L.222-33 of the French Criminal Code - there is no real risk that a German court - notably the German Constitutional Court - would declare the German clause unconstitutional or void. In any event, the German Criminal Code (*Strafgesetzbuch*, the "StGB") is unlikely to be the starting point for any controversy about the definition of sexual harassment as no such definition is contained in it – and therefore, there can be no penalty for it (*nulla poena sine lege*). Instead, Article 177 of the StGB outlaws "sexual assault" - but again, offers a clear definition.

The Netherlands (Peter Vas Nunes): EU law has a definition of sexual harassment. Directive 2006/54 on the equal treatment of men and women in employment provides the following definition: *"where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment"*. Is this definition sufficiently precise to be considered constitutional by the French courts? If so, perhaps Article L.1153 can be interpreted accordingly. If not, what then? An unconstitutional EU Directive?

Subject: discrimination-harassment
Parties: none
Court: *Conseil constitutionnel* (Constitutional Court)
Date: 4 May 2012
Case number: 2012-240QPC
Internet publication:
www.legifrance.fr → jurisprudence constitionelle → case number

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2012/22

Does an employer discriminate on grounds of marital status if it treats an employee unfavourably for being married to a particular person? (UK)

CONTRIBUTOR BETHAN CARNEY*

Summary
Two recent Employment Appeal Tribunal ("EAT") decisions have reached different conclusions on the tricky issue of whether it is discrimination on the grounds of marital status (a form of unlawful discrimination) if an employer treats a woman less favourably not because she is married, but because she is married to a particular man. In *Dunn –v- The Institute of Cemetery and Crematorium Management* the EAT held that any less favourable treatment because someone is married is unlawful, even if it is because they are married to a particular person rather than because of the fact of their marriage. However, in the slightly later case of *Hawkins – v - Atex Group Ltd* a different division of the EAT held that discrimination on marriage grounds only occurred if the ground for the treatment is that the couple are married rather than that they are in any type of close relationship.

Facts
Dunn – v - The Institute of Cemetery and Crematorium Management
Mrs Dunn was initially a volunteer at The Institute of Cemetery and Crematorium Management (the "Institute") and became an employee in December 2007, with the intention that she would set up an office in the north of England. Her husband was also employed by the Institute. Mrs Dunn was told in February 2008 that her sick pay entitlement was going to be changed. Whilst she was being consulted about this change, issues arose about her performance and responsibilities which upset her and she raised a grievance about the changes to her contract. During the course of the grievance procedure, the Institute's Chief Executive presented evidence to the person hearing Mrs Dunn's appeal against the outcome of her grievance. Mrs Dunn was not shown this material and it was about Mrs Dunn's husband and not actually relevant to her own grievance. Ultimately, Mrs Dunn went off sick, alleging sex discrimination and victimisation. A week later the board decided not to continue with the proposed new northern office. It started redundancy consultation with Mrs Dunn.
Mrs Dunn contended that the Institute had discriminated against her because she was married to Mr Dunn, who had also brought a grievance against the Institute. The relevant law was at that time contained in section 3 of the Sex Discrimination Act 1975, which said that a person discriminates against A if he treats A less favourably on the ground that A is married or a civil partner. The Employment Tribunal found that there was no reason to think that the Institute's Chief Executive would have intervened in Mrs Dunn's grievance procedure to present material about her husband if she had not been married to Mr Dunn. However, there was also no evidence that the employer would have acted in this way if she had been married to anyone else. Further, the employer would probably have behaved in this way if she had not been married to Mr Dunn but had been in a long-term relationship with him. In other words, the employer's actions were on the grounds that she was married to that particular person rather than her marital status in itself.

The Employment Tribunal found that there was no discrimination on grounds of marital status because the less favourable treatment was connected to Mrs Dunn's marriage to Mr Dunn, rather than the fact that she was married. Mrs Dunn appealed to the EAT.

Hawkins – v - Atex Group Ltd

Mrs Hawkins was married to the Chief Executive of Atex Group Ltd ("Atex"). Mr Hawkins had joined Atex in 2004. Mrs Hawkins started working for Atex as a consultant providing HR and marketing advice in 2006. She became an employee of Atex on 1 January 2010. Atex claimed that this was in breach of an instruction that had been given to Mr Hawkins on 30 April 2009 that members of his family should not be employed by Atex "in an executive or professional capacity" after the end of 2009 because such appointments could lead to conflicts of interest, favouritism and undue influence. Mrs Hawkins was suspended on 1 June 2010 and shortly afterwards dismissed. Mr Hawkins and the couple's daughter, who worked for Atex as Global Human Resources Manager, were dismissed at the same time.

Mrs Hawkins brought a claim alleging that Atex had discriminated against her on grounds of her marital status. The Employment Tribunal struck out the claim on the basis that it had no reasonable prospects of success, stating that Mrs Hawkins was not dismissed because of marriage alone but because she was married to the CEO. Mrs Hawkins appealed to the EAT.

The Employment Appeal Tribunals' Decisions

The two different divisions of the EAT reached different conclusions on the issue of when discrimination on the grounds of marriage occurs.

In *Dunn – v - The Institute of Cemetery and Crematorium Management* the EAT decided that discrimination on grounds of marital status should be interpreted broadly and that Mrs Dunn was protected against discrimination both because she was married and because she was married to a particular person. It also found that the European Convention on Human Rights was relevant. The Employment Tribunal is required to interpret legislation (such as the Sex Discrimination Act) in line with convention rights. The EAT held that Mrs Dunn's right to respect for private and family life (Article 8) and right to marry (Article 12) were both engaged. The case was remitted to the Employment Tribunal to decide whether or not discrimination had occurred taking into account her convention rights.

In *Hawkins – v - Atex Group Ltd* the EAT said that in order to decide if the claimant had been discriminated against on grounds of marriage, the question was whether she had been treated less favourably than a comparator who was not married but whose circumstances were otherwise the same. In other words, the relevant comparator was someone who was the "common-law spouse"[1] of the CEO. Would such a person have been treated in the same way as Mrs Hawkins? The EAT held that the treatment would have been the same and therefore that there was no "marriage-specific" reason for Mrs Hawkins's treatment and her appeal failed. The decision in *Hawkins* casts doubt on the reasoning of the alternative branch of the EAT in *Dunn*.

Commentary

We now have two conflicting EAT decisions and it would be helpful to have a Court of Appeal decision to clarify the situation. Until that time, the judgment in *Hawkins* is probably to be preferred because it considered earlier cases to which the *Dunn* EAT was not referred and because it expressly considered the *Dunn* decision and rejected its reasoning.

Since these cases were brought, the Sex Discrimination Act 1975 has been replaced by the Equality Act 2010. However, the equivalent provision in the Equality Act is substantially the same.

It is worth noting that although these cases were about marriage, the same provision protects individuals from discrimination because they are in a civil partnership.

Comments from other jurisdictions

Austria (Martin Risak): The Austrian Equal Treatment Act (*Gleichbehandlungsgesetz*) forbids discrimination based on sex, especially with reference to marital or family status. As in Directive 2002/73/EC this form of discrimination is – not very systematically – seen as a sub-group of sex discrimination. As there are no comparable published Austrian court decisions we can only guess how an Austrian court might have ruled if cases such as the ones at hand had been brought before it. In my opinion, they would not have been seen as discriminatory based on marital status but because they contravened *bones mores* (*Gute Sitten*). In other words, the decisions taken by the employers were too reliant on the personal circumstances of the employee. In the *Dunn* case the dismissal might have been regarded as an indirect reprisal against the husband, who had brought a grievance against the Institute. In the *Hawkins* case, a court might feel that a less draconian solution could have been used to handle the issues of conflict of interest, favouritism and undue influence, for example, by involving a third party in the recruitment of family members.

Subject: Sex discrimination
Parties: Dunn – v - The Institute of Cemetery and Crematorium Management and Hawkins –v- (1) Atex Group Ltd, (2) Age Korsvold, (3) Beatriz Malo de Molina and (4) Mr Alan Reardon Respondents
Court: Employment Appeal Tribunal
Dates: 2 December 2011 and 13 March 2012
Case numbers: UKEAT/0531/10 and UKEAT0302/11
Hard copy publication: IDS Brief
Internet publication: www.bailii.org

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(Footnotes)

1 A common-law spouse is a person cohabiting and in a long-term and stable relationship with his or her partner without being married.

2012/23

Stairlift costing € 6,000 was reasonable accommodation (NL)

CONTRIBUTOR LOTTE VAN HECK*

Summary

A stairlift costing € 6,000 was a reasonable and not a disproportionately expensive adjustment for a supermarket cashier who was unable to use the staircase.

Facts

The plaintiff was a part-time cashier (16 hours per week, i.e. 40% of full time) in a supermarket. She was hired in 1998. In 2008, by which time

she was 45 years old and had been employed for ten years, she called in sick on account of an ankle problem. Her ankle was operated on and she was declared fit to work again in 2010. However, she continued to experience difficulty walking. This created a challenge for her, as she worked on the ground floor but was unable to climb the staircase to the first floor, where the toilets and staff canteen were located. She suggested that her employer install a stairlift to enable her to reach the first floor. The employer refused to do this on account of the cost and, instead, it applied for a permit to dismiss the plaintiff. The permit was granted on the grounds that the plaintiff had been unfit for work for over two years and that there was no likelihood of her becoming fit in the near future. Accordingly, the supermarket dismissed the plaintiff.

Judgment

The plaintiff brought an action before the local Lower Court for unfair dismissal. In an interim judgment, the court held that the plaintiff qualified as a disabled employee within the meaning of the Dutch law on Equal Treatment in Employment on Grounds of Disability and Chronic Illness, which is (part of) the transposition of Directive 2000/78. The court also held that a stairlift was, in itself, a reasonable adjustment. The employer should therefore have investigated whether installing a stairlift would constitute a "disproportionate burden", before deciding to dismiss the plaintiff. The employer was ordered to investigate how much the installation of a stairlift would cost, taking into account any existing subsidy.

The employer informed the court that installing a second-hand stairlift would cost about € 10,000 excluding the additional costs of an "escape chair" and other adjustments necessary to comply with fire-safety regulations. The employer estimated that the total expense would amount to at least € 12,000 and that a subsidy, if available at all, would not exceed 40% of the total cost (corresponding to the plaintiff's part-time percentage).

The court considered this estimate to be exaggerated and proceeded from the assumption that the total cost would amount to € 10,000 minus 40% subsidy = € 6,000. This was roughly seven times the employee's average monthly salary of € 845 gross, which meant that if the employer had had a stairlift installed, it would have recouped its investment in a period of time that was short in comparison with the many years during which the plaintiff could have continued working as a cashier in the supermarket. Therefore the dismissal was declared to be unfair (mainly because the employer had failed to investigate the possibility of a stairlift) and the court awarded the plaintiff € 14,000 gross in compensation.

Commentary

This judgment contrasts with the English judgment reported in the previous issue of EELC. The English case concerned an adjustment costing £250,000, which amounted to five times the employee's annual salary. Although the Employment Appeal Tribunal found this to be excessive, it did consider the claim seriously. The adjustment in this Dutch case would have cost an estimated € 6,000 which was the equivalent of about seven months' salary. Although the court found it not to be excessive, it is clear that the court would not have seriously considered an adjustment costing anywhere near five years' salary. The British seem to be taking the obligation to provide disabled employees with reasonable adjustments more seriously than the Dutch.

Comments from other jurisdictions

Austria (Martin Risak): The Austrian Act on the Employment of Persons with Disabilities (*Behinderteneinstellungsgesetz*) states in §7c(4) that the removal of conditions which may disadvantage disabled staff, especially barriers, is not discriminatory if it would be unlawful or if inappropriate burdens would make it unacceptable for the employer. In establishing whether a measure constitutes an inappropriate burden, the law gives examples of what should be given particular consideration, namely the cost of the measure, the economic resources of the employer, available public funding and the time elapsed since the enactment of the employer obligation.

Though this duty on the employer has existed since 2005 there are no published court decisions to provide any guidance - an indication that either everything is fine or that employees with disabilities are reluctant to make claims. A possible reason might also be that this duty is only mentioned in the context of indirect discrimination and not as a stand-alone employer obligation, i.e. it cannot be enforced independently but only in connection with an act of discrimination of the employer.

Germany (Markus Weber): According to Clause 81(4) Nr 5 of the German Social Security Code IX (§ 81 Abs. 4 Nr. 5 Sozialgesetzbuch IX (SGB IX)) every employer is obliged to equip the workplace of disabled employees with all necessary (technical) tools. Therefore an employer may not terminate an employment contract with a disabled employee, if her condition prevents her from accessing the workplace or other relevant rooms on the premises. However, it may do so if the adjustment would lead to "disproportionate" costs to the employer, provided that all other requirements regarding the termination of disabled employees are fulfilled. It may be, of course, that there are no costs at all to the employer, given that the Agency for Seriously Disabled Persons provides subsidies for required adjustments (§ 81 Abs. 4 S. 2 SGB IX). It is not uncommon for the Agency to bear the full cost of disabled access. If major adjustments are necessary, whether this is disproportionate should be calculated based on the excess payable by the employer over and above the aid provided by the Agency. Ultimately, it will depend on the financial strength of the employer.

If the employer terminates the employee's contract without assessing the necessary adjustments, the employee may bring a claim challenging the termination as unfair and arguing that it was unjustified and therefore void. The claim is likely to be successful if the cost of the adaptation (less the subsidy of the Agency) would not have been disproportionate for the employer. Further, he may claim that the termination happened for discriminatory reasons, in particular if the employer did not contact the Agency to ask for a subsidy. According to Article 15(1) of the German Non-Discrimination Act (*Allgemeines Gleichbehandlungsgesetz*, "AGG") a person is entitled to damages if the employer fails to prove that the termination was not discriminatory.
As these matters depend on the financial strength of the employer in each case, it is not unlikely that a German labour would rule that costs of € 6,000 for the installation of a stairlift are reasonable, given that the employer in this case was a supermarket.

United Kingdom (Rebecca Rule) In the UK, employers have a duty to make reasonable adjustments for disabled employees. Whether there is a breach of this duty will depend on whether a particular adjustment was "reasonable". This is fact-sensitive. The test of what is reasonable is objective and determined by the tribunal. The cost of the possible adjustment, taking into account the financial resources of the employer, will be relevant to whether the adjustment is reasonable.

The recent Employment Appeal Tribunal ("EAT") case of *Cordell - v - Foreign Commonwealth Office* (reported in last month's issue of EELC) provides guidance on how tribunals should approach the issue of cost when considering the employer's duty to make reasonable adjustments. The case involved the employer withdrawing a job offer from a deaf employee when it realised that the cost of providing necessary lipspeaking support would amount to approximately five times the employee's annual salary. The EAT decided that the cost of the adjustment was excessive, but still gave serious consideration as to whether it was reasonable.

The EAT said that cost is *"one of the central considerations in the assessment of reasonableness"*. However, this must be weighed up with other considerations set out in the Equality and Human Rights Commission Code of Practice, (such as the degree of benefit to the employee), as well as other factors. These might include what the employer has chosen to spend in comparable situations, the size of any budget dedicated to reasonable adjustments (though this cannot be conclusive because the size of the budget is determined by the employer) and any other indication of what level of expenditure is regarded appropriate by representative organisations, such as unions. A tribunal must ultimately make a judgment balancing on the one hand, the disadvantage to the employee if the adjustments are not made and, on the other, the cost of making them.

The case at hand is interesting in that it tells us what expenditure on a potential adjustment the Dutch court considered reasonable in this case. However, the decision does not seem to give much guidance about the type of factors the court will take into account when deciding if an adjustment is reasonable in other cases. From a UK perspective, we are left with several questions. For example, would it be the case that an adjustment costing seven times the salary would always be considered reasonable by Dutch courts? Did it make a difference that the employee had been employed for ten years before she hurt her ankle? Was the employer a very large undertaking which could afford to spend a lot on adjustments? Did the court take the employer's size into account when deciding the case?

Subject: disability discrimination
Parties: X - v - Em-Té Supermarkten B.V.
Court: *rechtbank, sector kanton* (Lower Court), 's-Hertogenbosch
Dates: 22 December 2011 and 24 May 2012
Case number: 782542a
Internet publication: www.rechtspraak.nl → LJN: BV 2279 (interim judgment) and BW 7246 (final judgment)

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2012/24

Supreme Court applies concept of indirect gender discrimination for the first time (FR)

CONTRIBUTOR CLAIRE TOUMIEUX*

Summary
The French Supreme Court has recently held that a national pension institution's decision to reject an application by social workers to be affiliated with that scheme amounted to indirect discrimination, because social workers in the sector in question were predominantly women while some affiliated workers holding positions with a similar level of responsibilities within that same sector were predominantly men. For the Supreme Court, the need to ensure consistent treatment with social workers in other sectors was not a relevant consideration.

Facts
In France all employees, besides being covered by the State retirement scheme (*retraite de base*), are members of either one of the following mandatory cross-industry retirement schemes:
- *Association pour le régime de retraite complémentaire des salariés* (ARRCO), which is for ordinary employees ("*non-cadre*") ;
- *Association générale des institutions de retraite des cadres* (AGIRC), which is for senior staff (*cadre*) and employees with a position that is acknowledged to be similar to *cadre*, the so-called *cadre-assimilés* or, simply, the *"assimilés"*;

Both schemes obtain their income from employers and employees jointly and are managed on a 50/50 basis by representatives of industry and trade unions i.e. by the social partners. AGIRC has about 4 million members, ARRCO has about 18 million members.

Whether a certain category of persons is covered by AGIRC, and in particular whether employees qualify as *"assimilés"*, is determined by a committee consisting in equal parts of representatives of employers' federations and trade unions, the *commission paritaire administrative*.

The plaintiffs in this case were 39 female social workers[1] employed by a social insurance organisation called *Mutualité Sociale Agricole (MSA)*. They were in the ARRCO scheme but wished to benefit from the AGIRC scheme, which provides for higher pension benefits. They applied to the administrative committee of AGIRC to be included in its scheme, pointing out that their profession was at least on the same professional level as, if not higher than, that of several other professions within MSA that had been admitted to AGIRC and were occupied mainly by men. Their application was turned down, whereupon they brought proceedings before the lower labour court (*prud' hommes*) in Paris. In 2003 that court found their case to be non-receivable (*non-recevable pour défaut de droit d'agir*). On appeal this judgment was overturned in 2006. The Court of Appeal ordered AGIRC and its co-defendant FNEMSA (the relevant employers' association) to include the plaintiffs in the AGIRC scheme. In 2009 the Supreme Court overturned the Court of Appeal's judgment and ordered a retrial.

AGIRC's position was that the plaintiffs should be compared to social workers in other organisations than MSA, namely in organisations

belonging to other business sectors, where the social workers did not have the status of *assimilé*. The plaintiffs, on the other hand, compared themselves to their colleagues within MSA who held positions with a similar level of responsibility and did have the status of *assimilé*. The Court of Appeal, in a judgment delivered in 2010, agreed with the plaintiffs' position on the correct comparator and (again) ordered AGIRC to admit the plaintiffs to its scheme, now on the ground that its decision to include certain predominantly male occupations and to exclude certain predominantly female occupations was indirectly discriminatory on the ground of gender, as provided in Directive 2006/54, and not objectively justified. The Court of Appeal rejected AGIRC's plea that by including occupations such as those of the plaintiffs, it would be discriminating against the social workers covered by other collective agreements.

Judgment

AGIRC appealed to the Supreme Court (*Cour de cassation*). It argued that it is not up to the courts to substitute their method of comparing professions to those of the administrative committee and that the criteria used by AGIRC were the only ones to ensure continuity and consistency and hence the sustainability of AGIRC and to avoid discrimination among participants performing the same type of work in different branches.

The Supreme Court upheld the Court of Appeal's judgment, holding that *"indirect discrimination because of sex is made in the case where a provision, criterion or practice apparently neutral would be likely to cause a particular disadvantage for persons of one sex compared to others, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary"*, and that *"such discrimination is characterized when the measure affects a significantly higher proportion of members of one sex"*;

It further recalled that the Court of Appeal had found that there was unfavourable treatment, given the refusal by the AGIRC to allow social workers, a position indisputably held predominantly by women, to be members of the AGIRC scheme, whereas controllers, inspectors, technicians and other similar employees covered by the same collective agreement, mainly occupied by men, were admitted to the scheme. According to the Supreme Court, the Court of Appeal had rightly rejected AGIRC's argument that the criterion of comparison with similar functions in all collective agreements was the only one that achieves the objective of stability, consistency and sustainability of regime. That argument did not justify the necessity and appropriateness of the refusal of membership.

Commentary

Although the prohibition against indirect discrimination has been included in the French Labour Code since 2008, to comply with EU legislation, this is the first time that the French Supreme Court applies the concept of indirect sex discrimination.

In this regard, the method used by the Court is very much in line with the ECJ's rulings holding that a practice which would likely lead to a particular disadvantage for persons of one sex compared to persons of the other sex can constitute indirect discrimination, unless it is justified by an objective reason (see the ECJ's rulings in *Netherlands - v - FNV*, C-71/85 and *Nimz*, C-184/89).

That being said, in this decision, the French Supreme Court has taken a strict view, rejecting the AGIRC's argument that the social workers within MSA were treated in a consistent way compared to those covered by other national collective bargaining agreements in similar business sectors. Indeed, coming from an institution covering all business sectors, the argument seemed relevant. Should workers holding the same position in two different sectors be treated differently, one could expect that those treated in an unfavourable way could challenge such a situation.

Here, the Supreme Court simply considered that the refusal by AGIRC to affiliate social workers was not for a *"necessary and relevant reason"*. Its ruling appears all the more severe in light of the fact that the Supreme Court did not even explain why the comparison with other workers in the same business sector was more relevant than that with workers holding the same position in other business sectors.

This is another red light for negotiators of collective bargaining agreements, who should keep in mind that when they set up sector-wide job categories, usually to define the corresponding minimum wages, employees are likely to compare their situation with other employees in the same job category, even where those other employees hold different jobs.

ECJ rulings have once again set the scene, allowing for a comparison of rates of pay of two jobs *"of equal value"* to ascertain whether there is indirect gender discrimination (see ECJ's ruling in *Enderby*, C-127/92). However, practitioners may regret that, especially in light of the serious consequences of the decision at stake, the French Supreme Court did not provide the same level of explanation as the ECJ usually does, to support its view that the AGIRC comparison criterion was not a relevant one.

Subject: sex discrimination (terms of employment)
Parties: AGIRC - v - Mme Avignon and 38 others
Court: *cour de cassation* (Supreme Court), *Chambre sociale*
Date: 6 June 2012
Case number: 10-21.489
Internet publication:
www.legifrance.gouv.fr → jurisprudence judiciaire

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(Footnotes)

1 In actual fact not all of the plaintiffs held the position of social worker (*assistant de service social*). Some were counsellors on behalf of handicapped people (*délégué a la tutelle*) or of families (*conseiller en économie sociale et familiale*). For the sake of simplicity all the plaintiffs are described in this case report as being social workers.

2012/25

Supreme Court rules on compulsory retirement at 65 (UK)

CONTRIBUTOR STEPHEN LEVINSON*

Summary
A retirement age of 65 may be lawful. Justification for direct age discrimination requires reasons of a public interest nature. The CJEU jurisprudence establishes that reasons for age discrimination must ensure either inter-generational fairness or dignity.

Facts
A solicitors' partnership deed required retirement at 65. The senior partner, who was approaching that age, attempted to negotiate an extension but was refused consent by his partners on the basis there was no business case to do so. During the course of these negotiations the Employment Equality (Age) Regulations 2006 (the "Regulations") came into force. This was the measure by which the UK gave (partial) effect to Council Directive 2000/78/EC (the "Directive"). The senior partner, who ceased to be a partner on 1 December 2006, brought proceedings under the Regulations before an Employment Tribunal.

The claim alleged direct age discrimination. The firm claimed justification. The firm succeeded in defending the claim on the basis of three of the six reasons they put forward. The successful reasons were (1) to provide non-partners an opportunity of partnership after a reasonable period of service and thereby retain their service; (2) to facilitate long-term planning within the partnership; and (3) to limit the need to expel partners by performance management. The firm made clear they had no criticism of the claimant's personal performance and were relying only on the circumstances of their firm.

The Employment Tribunal concluded that the reasons given were a proportionate means of achieving a congenial and supportive culture and encouraging professional staff to remain with the firm.

The claimant appealed to the Employment Appeal Tribunal without success. At the Employment Appeal Tribunal, however, the issue was raised that there had been no evidence as to why, to achieve the reasons for a retirement age, the age selected had to be 65. It was held that this issue must go back to the Tribunal to be considered again. A further appeal to the Court of Appeal failed, with that court upholding the decision of the Employment Appeal Tribunal.

The claimant, undaunted, proceeded to the Supreme Court where the three issues identified were (1) whether the three aims accepted by the Employment Tribunal were capable of being legitimate aims justifying direct age discrimination; (2) whether the firm had to justify the retirement clause both generally and in the individual case; and (3) whether reliance on the retirement term was a proportionate means of achieving the identified aims.

The hearing before the Supreme Court took place in January 2012. The tribunal proceedings had been brought in 2007 during which time the ECJ had heard a number of age discrimination cases, which had to be considered by the Supreme Court. Also, at the time the alleged discrimination took place in 2006 there were other regulations in force in the UK that permitted dismissal of employees (but not partners) at 65 or over. These regulations were repealed in 2011.

Judgment
The Supreme Court reviewed the decisions of the ECJ/CJEU on age discrimination decided between 2006 and 2011. The cases considered were *Félix Palacios de la Villa* (C-411/05); *Bartsch* (C-427/06); *Age Concern* (C-388/07); *Kücükdeveci* (C-555/07); *David Hütter* (C-88/08); *Wolf* (C-229/08); *Petersen* (C-341/08); *Ingeniørforeningen I Danmark* (C-499/08); *Rosenbladt* (C-45/09); *Georgiev* (C-250/09); *Prigge* (C-447/09); *Fuchs* (C-159/10) and *Hennings* (C-297/10) (together the "Luxembourg jurisprudence")

The court drew seven "messages" from these decisions:

- all had concerned national laws or terms of collective agreements and not an individual contract;
- justification of direct age discrimination under Article 6(1) of the Directive must be on the basis of social policy objectives, such as those relating to employment policy, and not purely individual reasons particular to the employer;
- flexibility for employers is not of itself a legitimate aim but some flexibility may be extended to them in pursuit of social policy;
- all of the legitimate aims that had been recognised by these decisions could be categorised as either inter-generational fairness (e.g. promoting access to employment for younger workers) or the preservation of dignity (e.g. avoiding disputes over fitness to work over a certain age);
- any measure had to be both appropriate to achieve its legitimate aim and necessary to do so;
- in assessing necessity, the gravity of the impact on the employee had to be weighed against the legitimate aim; and
- the scope of the test for justifying any indirect discrimination under Article 2(2) (b) of the Directive and the scope of the test for justifying (direct or indirect) age discrimination under Article 6(1) are not identical and it is for the Member State and not the individual employer to establish their legitimacy.

The conclusion the Supreme Court drew about the applicability of social policy aims to employers was that it was open for them to choose which to pursue provided they were capable of consisting of objectives of public interest within the Directive, that they were in line with the social policies of the state and that they were proportionate, in the sense that they were appropriate to the aim and necessary to achieve it.

The court also observed that there was no hint in the Luxembourg jurisprudence that the objective pursued must be the one that was in the mind of those who adopted the measure in the first place. Thus, if the measure is maintained for what turns out, on a subsequent rationalisation, to be a legitimate objective, that is sufficient. In addition, when determining the tests of appropriateness and necessity the court must scrutinise carefully the particular business concerned to see whether the retirement age imposed actually did achieve the aim put forward and also whether there were any less discriminatory measures that could achieve the same aim.

Finally the court considered whether the justification of the measure had to be applicable to the individual as well as in general. The Court accepted the view of the lower courts that legitimate aims can only be achieved by the application of general policies. It held that if it is justifiable to have a general rule, that will usually justify the resulting

treatment of an individual. However it considered that the context might be relevant, in this case that the rule had been recently approved unanimously by the partners in the firm. Alternatively, in the context of inter-generational fairness, partners might in the past have benefited from the rule when they themselves were promoted.

The result was that the appeal failed and the decision to remit the question of the appropriateness of the specific age of 65 to the dignity issue remained in place but the court added that this might also be applicable to all of the inter-generational issues as well.

Commentary

Initially this decision was greeted as upholding the right of a professional partnership (or employers more generally) to impose a retirement age of 65. That is, however, a simplistic conclusion to draw, as the terms of the decision leave a number of difficult issues for advisers and their clients, particularly in relation to the evidence that will have to be produced to defend claims.

One particular point is the emphasis on the test of necessity, which in many UK cases has been secondary to establishing whether a legitimate aim can be shown. For example when this case goes back to the Tribunal the Supreme Court have made it plain that the appropriateness of the age of 65 will need to be considered in relation to the aims relied on. Put another way, the employer will have to show that the potential legitimacy is established by the test of necessity in relation to their specific business. Enquiry will be made as to whether there was in fact any risk that younger lawyers were leaving the firm because they feared lack of advancement and also whether it is the case that performance management would impact on the dignity of a senior partner. If that is established there is also a requirement to apply the necessity test again in deciding if using another (possibly older) age could have averted the risk.

The court held that stereotypical assumptions linking age to competence or capability need to be ignored, which again emphasises the need for employers to be able to produce cogent evidence for their legitimate aims and the proportionality of their rules.

In addition, when it comes to upholding the proportionality of a rule, the Supreme Court have trailed a number of possible arguments that are likely to be utilised by employees in future cases. This case concerned an agreement amongst partners reached relatively recently. There are many businesses that impose rules without any form of real consultation and in the absence of equality of bargaining. These factors may well become of importance in the future.

Consistency with the aims of the state is also a moveable feast as policies can change over time. A regular review of the continuing appropriateness of retirement rules is called for.
The wide review of the Luxembourg jurisprudence in this case makes the judgment highly appropriate for consideration in other jurisdictions. There is a lot more to come in this area, as the conflict created by the levels of high employment amongst the young, and the remorseless pressure on individuals to work for longer than they anticipated 10 years ago, means that the social policies on which these laws are predicated are likely to remain in flux for many years.

Comments of other jurisdictions

Germany (Elisabeth Höller): In Germany provisions under which an employment relationship automatically terminates upon achievement of a specific age are often used and considered a limitation in time. As such, the end of employment due to the achievement of a specific age needs to be justified.

If the age limit is agreed on in the employment contract, sec. 41 SGB VI (Social Code – "Sozialgesetzbuch") applies, according to which an employment agreement can provide for the automatic termination upon reaching the statutory retirement age. An agreement providing for automatic termination at an earlier age is only valid if concluded within three years before the agreed termination date. Said provision further states explicitly that a notice of termination cannot be justified by the fact that the employee has reached retirement age.
Collective bargaining agreements however are not governed by this provision of the SGB VI, but are also only valid if there is sufficient reason for the limitation in time – usually this requirement leads to a situation in which also the statutory retirement age is referred to.

However, age limitations can still be justified if they follow the general regulations for termination conditions. A justification can for example be found in safety requirements. It has been long standing case law that age limitations for cockpit personnel can be subject to lower age limits than the statutory retirement age, since there are certain health requirements. On 15 February 2012 the Federal Court for Labour and Employment law (BAG 7 AZR 946/07) decided that provisions on age limits for pilots in a collective bargaining agreement pursuant to which the employment relationship automatically terminates upon reaching the age of 60 violates the prohibition against age discrimination according to EU law.

Therefore, in principle the justification of a limitation due to the age of the employee is still possible, but the requirements for a justification need to be considered carefully.

Subject: Age discrimination
Parties: Seldon - v - Clarkson Wright and Jakes
Court: United Kingdom Supreme Court
Date: 25 April 2012
Case Number: [2012] UKSC 16
Internet publication: www.bailli.org/uk/cases/UKSC/2012/16.html

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2012/26

Supreme Court rules on whether a requirement for academic qualifications is age discriminatory (UK)

CONTRIBUTOR STEPHEN LEVINSON*

Summary
Requiring a degree as a qualification for a senior grade may be indirect age discrimination. Justification for indirect age discrimination may be based on the individual employer's circumstances but only if the legitimate aim is both appropriate and necessary.

Facts
The employee was a retired policeman who from 1995 worked as a legal adviser for the Police National Legal Database (PNLD), which provides legal advice within the UK's criminal justice system. He did not have a law degree but was appointed on the basis of his police examinations and experience.
To aid the retention of staff and recruitment in 2005 PNLD introduced a senior grade, which required a law degree or equivalent in order to qualify. In 2006 the employee was re-graded but kept below the senior grade because, although he met all the other criteria, he did not have a law degree. The employee appealed twice against the decision but without success.

By this time the employee was 62 years old. The normal retirement age in PNLD was 65, although it could be extended on a discretionary basis until the age of 70. However both employee and employer anticipated retirement would be at 65. During the course of these appeals the Employment Equality (Age) Regulations 2006 ('the Regulations') came into force. This was the measure by which the UK gave (partial) effect to Council Directive 2000/78/EC ('the Directive'). Under the terms of the Regulations the employee brought proceedings in an employment tribunal, which held that he had been indirectly discriminated against on the grounds of age and that this was not objectively justified.

The employee did not argue that the reason for the discrimination was a general disadvantage based on the fact that those aged between 60 and 65 were less likely to have a degree but put his case on the basis that he would be unable to complete the degree course before he retired. It was accepted that this would take him four years working part-time. The tribunal found that those in his age group (60-65) had been put to a particular disadvantage and that whilst the aim of aiding recruitment and retention was a legitimate aim there was not sufficient evidence that the requirement for a degree and the failure to make an exception for the employee was proportionate.

The employers appealed to the Employment Appeal Tribunal, which held that there had been no discrimination. It held that the employee had not been treated differently than other employees but rather the same as them by requiring a degree for the highest grade. His difficulty was caused by the fact that he had less time to obtain a degree because he was closer to retirement than others, which was a consequence of age, but not age discrimination by the employer. Anyone who was contemplating leaving work within a similar period for any reason unconnected with age would be in the same position. The EAT also held, however, that if there had been discrimination it would not have been justified. A further appeal to the Court of Appeal reached the same conclusions (see EELC 2010/59).

The employee appealed to the Supreme Court against the decision that there was no discrimination and the employers cross-appealed against the justification decision.

Judgment
The Supreme Court dealt first with the issue of discrimination. Lady Hale gave the principal judgment with which, in large part, all of the other judges agreed. She rejected the analysis that the disadvantage had been caused by the closeness of the retirement age. She thought that this was to equate the disadvantage with a similar disadvantage suffered by others for a different reason unrelated to age and that such an approach was alarming for the law of discrimination. She also felt that it was wrong in principle to equate leaving work for an age related reason with other non-age related reasons. This was particularly so in this case where there was, at the time of the discrimination, the legal possibility of enforcing retirement at 65 (that provision is now repealed). Her conclusion was that it was artificial to regard the comparative disadvantage as having been caused by anything but the employee's age and his appeal succeeded in establishing indirect age discrimination. Lady Hale also thought that the problem could have been solved another way without asking for favourable treatment for people of the employee's age by 'making arrangements' for people appointed before the new criterion was introduced.

The justification issue was then considered. Lady Hale pointed out that as had been established in *Bilka-Kaufhaus GmbH - v - Weber von Hartz* (C-170/84) the range of aims that can justify indirect discrimination is not limited to the social policy or other objectives derived from Articles 6(1), 4(1) and 2(5) of the Directive, but can include a real need on the part of the employer's business. There was then the requirement of proportionality, which could be analysed as a three-part test as follows:

"First, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly, are the means chosen no more than is necessary to accomplish the objective?"

This test also required an objective analysis, it was not sufficient for a reasonable employer to believe the criterion justified because the real needs of the undertaking had to be weighed against the discriminatory effect of the treatment.

Although the parties accepted as legitimate aims the retention and recruitment of employees, both elements had, according to Lady Hale, to be considered separately when determining proportionality. A distinction had to be drawn between the justification for recruitment and the justification for retention when considering the criteria for the thresholds beyond recruitment, particularly for the highest grading. The Employment Tribunal had also made the mistake of treating the terms "appropriate", "necessary" and "proportionate" as interchangeable, which is incorrect. The three-part test established in both domestic UK case law and the decisions of the ECJ/CJEU make it plain this is wrong. The measure has to be both appropriate to achieve the legitimate aim and reasonably necessary in order to do so. Some measures are simply inappropriate, as for example, in *Hennings* (C-

297/10), which established that rewarding experience is not established by age-related pay scales and in *Kücükdeveci* (C-555/07) that the aim of making it easier to recruit the young is not achieved by applying a measure that applies long after employees cease to be young.

Then the exercise of balancing the impact on the employee against the legitimate objective of the employer had to be undertaken. The Employment Tribunal had not done that. This required consideration of possible non-discriminatory alternatives including a personal exception being made for the employee. Accordingly, the issue of proportionality was remitted to the Tribunal for a detailed consideration of the issue of justification.

Whilst all the judges agreed the outcome of the decision Lord Mance made clear his view that making a personal exception for the employee would be an inappropriate step for an employer to take because all those affected adversely have to be treated equally. Making an exception for employees of his age group and with his experience may well discriminate unjustifiably against younger employees.

Commentary

The judgment has not commanded universal respect in the UK because many consider that the analysis of the Employment Appeal Tribunal and the Court of Appeal on the issue of whether there was indirect discrimination can be defended as logical. The Supreme Court treated the approach of retirement as attributable to age, which raises the possibility of other stereotypical assumptions being similarly treated. One commentator posed the example of an advertisement requiring the applicant having an excellent ability to remember names as being similarly treated, but perhaps the best view is that this case should be restricted to a connection between retirement and age. The comments in the judgments about the "technicality" of the employer's arguments make it fairly clear that it is going to be relatively difficult to defend an argument that any criterion is not indirect discrimination on the ground of age if in practice it can be shown to impact adversely on any particular age group. It would also be a mistake to presume that this resistance to technicality will be confined to older age groups, as the remarks made by Lord Mance and the judgment of the Employment Appeal Tribunal indicate.

Another consequence of the decision is that whilst the aim of the individual employer's business can be taken into account, the decision implies that the chances of that aim being held to be indirectly discriminatory are going to be greater than many might have expected. Also this decision emphasises the necessity for employers to produce detailed evidence when trying to prove justification. Every Tribunal dealing with these cases will have to deal expressly and separately with the requirements of appropriateness and necessity on an objective basis.

Whilst in *Seldon* it was said that the reasons for the justification of direct discrimination could be determined on an *ex post facto* rationalisation this was not mentioned in *Homer* and may be more difficult to apply in circumstances where the employer relies on a reason specific to its business rather than on public policy. It is also unclear how these tests will be judged in the future. It is relatively easy to say that the requirement is to balance the aim of the employer against the detrimental impact on an employee. It is much more difficult to advise a client how this exercise should be done in practice and particularly what evidence needs to be brought to court to show balance has been achieved. There will be extreme cases, for example, where action has to be taken to preserve the continued existence of the business but most cases will not be in that category. It will be advisable for any employer introducing such a requirement to preserve records showing what other alternatives had been considered and why they were rejected. To require employers to achieve an appropriate balance of interests looks suspiciously like a way of ensuring the Court will always be able to substitute its own views.

Subject: Indirect age discrimination
Parties: Homer – v - Chief Constable of West Yorkshire Police
Court: United Kingdom Supreme Court
Date: 25 April 2012
Case Number: [2012] UKSC 15
Internet publication:
http://www.bailii.org/uk/cases/UKSC/2012/15.html

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2012/27

Protection of personal data in relation to union membership (PL)

CONTRIBUTOR MAREK WANDZEL*

Summary
The rules protecting personal data prevail over those on consultation between employer and trade union in individual dismissal cases.

Facts
Polish law allows employers to dismiss most employees quite easily, as long as (i) the correct procedure has been followed and (ii) the dismissal is for good reason. Where the employee is a trade union member (or a person who has registered with a union without being a member, also known as a "protected non-union employee"[1]), the procedure is for the employer to send the employee's union a letter with information about the reasons for the proposed dismissal before making a decision to dismiss the employee. If the union does not respond within five days, the employee can be dismissed without further ado.

In the event an employee is dismissed without his or her union having been consulted, i.e. in breach of the rules, the employee can claim reinstatement or compensation with a maximum of three months' salary.

Employers are not permitted to ask their employees whether they are a member of a union.

The plaintiff in this case, a trade union member, was employed by a bank. Several trade unions were active within the bank. The employer did not know whether the plaintiff was a trade union member and, if so, of which union she was a member. For this reason the bank sent all of the relevant trade unions a letter asking them to provide it with a list of all of their members within the bank. The trade unions complied except one, which happened to be the union of which the plaintiff was a member. This union (Solidarity, the largest union in Poland) responded that providing a list of all of its members would violate the data protection rules and would therefore be illegal. The bank did not go on to the second stage of writing a letter to the union with details of the reasons for dismissal and then waiting five days, but proceeded straight to dismissal based on the provision of law to the effect that if the employee's union does not respond (adequately) within a certain time, the employee can be dismissed without consultation. The bank reasoned that Solidarity had failed to respond adequately. The employee brought proceedings against the bank.

At Solidarity's request, the Personal Data Protection Agency, GIODO, ordered the bank to remove the lists of union members it had received. GIODO took the position that each time an employer contemplates terminating an employee's contract it should ask all of the unions active within the organisation whether that individual employee is a member of theirs and, if the response is positive, send the relevant union the required letter with information on the reason for the proposed dismissal. An employer should not be in possession of trade union membership lists for future reference or indeed for any general purpose.

The court of first instance found in favour of the employee. It held that the law was imprecise as to when and how employers wishing to dismiss staff should consult with the appropriate unions. The court applied well-established case law condemning the practice of collecting employees' personal data prematurely and without a specific purpose. Accordingly, it held that the employer in this case should not have collected such data. Further, the employer should have consulted on an individual basis with the employee's union before proceeding to dismiss. Thus, the termination of the employee's contract was unlawful and the plaintiff was awarded compensation.

The bank appealed to the Court of Appeal, which referred the matter to the Supreme Court for guidance on the data protection rules.

Judgment
The Supreme Court began by analysing its existing case law, which was far from being homogenous. Most of the relevant case law allowed employers to ask the unions active within their organisation to provide them with a list of all their members, but a minority of Supreme Court judgments held that employers may only ask for membership details of individual employees if and when there is a need for such information, such as when the employer considers dismissal. In analysing this diffuse case law, the Supreme Court noted that its case law had failed to take account of the law on personal data protection. Referring to case law developed by the administrative courts in disputes with GIODO, the Supreme Court observed that personal data may only be collected for specified, explicit and legitimate purposes and that such data must be adequate, relevant and not excessive in relation to such purposes. Based on these principles, the collection of information on union membership of all employees within an organisation would only be necessary where the employer was contemplating dismissing its entire workforce.

The Supreme Court informed the Court of Appeal accordingly. Presumably this led, or will lead, to that court upholding the court of first instance's judgment.

Commentary
This judgment may have a perverse effect on employee data protection. Until now the practice has been for employers to ask the relevant unions, initially, for a list of all their members[2]. Every time a new union member joined the employer's workforce his or her name was added to the list and every time someone left, his or her name was removed. All the employer needed to do when contemplating dismissal was to check the membership lists. If that person's name was not on one of the lists, he could be dismissed without consulting the union. This practice may have been at odds with data protection rules, but it had the virtue of being simple.

Now, following this ruling, unions are no longer willing to provide employers with membership lists. Every time an employer wishes to dismiss an employee it will need to send all the relevant unions a letter asking them whether the employee is one of their members. This involves revealing the purpose of the enquiry, namely that the employer is contemplating dismissal. Not only does this infringe the employee's privacy, it may also harm the employers' interests, as this way employees may find out at an earlier stage that their employer is considering dismissing them, in which case they may call in sick before they are given notice, thereby frustrating the dismissal[3].

The Supreme Court was aware of these drawbacks, but it was of the view that data protection legislation as applied by the administrative courts took precedence.

It is likely that employers will react to this judgment by asking the unions about the membership of more employees than actually contemplated for dismissal. For example, if an employer plans to dismiss two workers, he could pretend to be planning to dismiss five workers and, having obtained union membership information on all five workers, dismiss the two and retain the information on the other three. Admittedly, this is in breach of the data protection rules, but this is hard to prove.

In my view, the provision of law regarding the procedure for dismissing unionised employees should be amended so as to strike the right balance between data protection and employers' needs.

Academic commentary (Profesor A.M. Swiatkowski)**
On the one hand trade union membership is considered by Polish labour law to be protected information which the unions, in their capacity as administrators of that information, may not reveal save specifically for the purposes stated in national legislation. On the other hand, information on protected non-union employees is not covered by that legislation. Therefore the normal data protection rules apply to these employees. This can be to their advantage (because the exception allowing union membership to be revealed does not apply), but it can also be a disadvantage (because the fact that they are not union members does not qualify as "sensitive" information). This discrepancy has not been solved by the judgment reported above.

The Polish Supreme Court is torn between the "devil" - the obligation of trade unions to provide information in the event of an employer's request in connection with one or more contemplated dismissals - and the "deep blue sea" - the prohibition on providing personal data other than in certain specific situations (such as the identities of employees who form a new union).

Both solutions are inadequate because neither of them serves the purpose of protecting information concerning protected non-union employees, whom the employer, in the case of a future labour dispute, might consider to be trade union supporters. But this most recent Supreme Court judgment, which does its best to combine both principles, is no better. According to the judgment reported above, the employer is relieved of a legal obligation established by Polish labour law and may request trade unions for a list of protected employees only when refusal to provide such information may not be justified by reason of legal protection of sensitive information.

Discrepancies between the labour courts and the administrative courts, as well as within the Supreme Court between various adjudicating panels, ought to be regarded as an urgent call for the national legislator to amend the 1991 Trade Union Act.

Comments from other jurisdictions
Austria (Andreas Tinhofer): The practice of providing the employer with a membership list can hardly be justified by the need to consult with trade unions in individual dismissal cases. For this purpose it would be sufficient for the employer to inform all the trade unions active in the company about the planned dismissal of a specific employee without revealing the reason. The relevant trade union could then ask the employer for consultation on the reason for the dismissal. Such a procedure would reduce the impairment of the employee's privacy as other trade unions would not receive information that might be of a rather personal nature. However, it seems that such a solution would require changing the statutory rules on the involvement of trade unions in individual dismissal cases.

Czech Republic (Nataša Randlová): In the Czech Republic there is a similar obligation as in Polish law. Under Czech law the employer is obliged to consult with the trade union in advance in individual dismissal cases. However, it differs from Polish law, in that this obligation to applies to any notice or immediate termination, regardless whether the employee is a member of any trade union established at the employer.

In order to comply with the obligation to consult with the trade union in an individual dismissal case, it is necessary (unless the employee informs the employer that he or she is not willing to be represented by any trade union – very unusual but possible) to contact all trade unions active within the employer and ask them whether the individual employee is one of their members. This is the only way to find out which trade union to consult with in respect of the relevant individual dismissal. In the event the employee is not a member of any trade union established at the employer, the employee is represented by the union with the highest number of members employed by the employer, unless the employee specifies otherwise.

Since the Czech Labour Code prohibits employers from asking about membership in a trade union, requesting the trade unions active within their organisation to provide employers with a list of all their members is not allowed. This is because of the rules protecting personal data. Thus, the situation in the Czech Republic resembles that in Poland, in that the data protection rules take precedence over the rules on union consultation.

There is, however, an important difference with the Polish situation, namely that non-compliance with the obligation to consult with the relevant union in advance of an individual dismissal case does not invalidate the relevant notice or immediate termination. However, the employer could be fined up to CZK 300,000 (approximately € 12,000) for breach of the obligation relating to termination of employment.

Notwithstanding the above, there is a special regime in the event notice or immediate termination of employment is given to a trade union officer. In that case the trade union´s consent is necessary. Should the trade union not grant its consent, notice of termination is invalid, unless the employer proves before the court that all of the essentials of termination of employment have been complied with and that the employer cannot be reasonably expected to continue employing the employee. The employer may use the consent granted for up to two months, after that a new consent must be acquired.

Germany (Elisabeth Höller): The German legal situation is quite different. In terms of dismissal procedures, trade union members are treated the same way as non-union members. According to German law, employers do not need to consult the responsible trade union in order to validly dismiss a trade union member.

German law does not provide a right for employers to ask trade unions for membership lists or to enquire whether an employee is a member of a trade union, either in cases of dismissal or otherwise.

However, in Germany there is some debate about whether employers have the right to ask employees about membership of trade unions at the beginning of the employment relationship. As the Federal Labour Court has ruled that more than one trade union can be active within one company, employers have a special interest in trade union membership because employees' rate of pay is dependent on which collective agreement applies to him or her.

On the other hand, membership of a trade union is one of the inviolable rights of the person protected by the Federal Data Protection Law (BDSG). Employers must obtain the explicit consent of the employee to collect such data. The notion that employers have a legitimate interest in acquiring this data for employment purposes without the agreement of the employee has always been rejected. Given that in addition, the German Constitution provides a specific prohibition against discrimination relating to membership of a trade union, any question by an employer about an employee's membership of a trade union before recruitment would be unacceptable. As a result, employees have the right to lie about membership of a trade union if the employer asks about it in a job interview.

Whether employers can ask employees about trade union membership once the employment relationship has started is still an open question.

Subject: protection of personal data in employment
Parties: not published
Court: *Sąd Najwyższy* (Supreme Court)
Date: 24 January 2012
Case number: III PZP 7/11
Internet-publication: www.sn.pl → Orzecznictwo, studia, analizy → Izba Pracy, Ubezpieczen Społecznych i Spraw Publicznych

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(Footnotes)
1 Any employee may register with any union that is active in the employer's organisation, in which case he receives the same dismissal protection as if he were a member of that union. Where this case report refers to union members it should be deemed to refer also to these protected non-members.
2 At present no more than about 16% of Polish workers are members of a union.
3 Dismissing an employee who is sick is unlawful. Asking the national Social Security Board to investigate whether an employee really is sick usually takes several weeks. During the first 33 days of an employee's sickness the employer is liable to pay (usually 80% of) his or her salary.

2012/28

Choice of law clause in contract with temp unenforceable (AT)

CONTRIBUTOR ANDREAS TINHOFER*

Summary
An Italian temp was hired out to a company in Austria. His contract provided that Liechenstein law applied and that there was a limitation of three months for bringing claims. After this period had expired he submitted a claim for unpaid bonuses for heavy and dirty work. The Austrian Supreme Court upheld the claim on the basis that the time limit was in breach of the Posting Directive and therefore invalid.

Facts
The plaintiff was an Italian citizen and resident who worked for a temporary agency having its seat in Liechtenstein. The agency hired him out to a client in Austria, where he worked from 3 October 2007 to 15 August 2008.

The employment contract contained a choice of law clause which said that the law of Liechtenstein governed the employment contract, with the exception of its conflict law provisions. Another clause provided for the forfeiture of all claims arising from the employment relationship unless they were asserted in writing within three months after their due date.

In August 2008 the plaintiff terminated his employment with the temporary agency. More than five months later he sent that agency a letter claiming bonuses for dirty and heavy work and related payments. It was not in dispute that the plaintiff was in principle entitled to the bonuses. The exact legal basis for it is not made clear in the facts of the case, but presumably, they were agreed in the employment contract. However, the employer replied that the claims had been forfeited because the plaintiff was out of time.

The plaintiff then sued the temporary agency in the Austrian courts, arguing that pursuant to the Austrian Hiring-Out of Workers Act (*Arbeitskräfteüberlassungsgesetz – AÜG*) the forfeiture clause was void. Section 11(2)(5) of the AÜG explicitly outlaws contractual clauses that shorten any preclusion periods that would otherwise apply. He argued that this provision was a "mandatory rule", as provided in Article 6 of the Rome Convention (now Article 8 of "Rome I"), which states that a choice of law clause in individual employment contract may not have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have applied.

The defendant argued that Section 11(2)(5) of the AÜG was not a "mandatory rule" within the meaning of Article 6 of the Rome Convention. It said that Section 11(2)(5) AÜG did not form part of the "hard core" of protective rules defined by Article 3(1)(c) of the Posting Directive (96/71/EC), which reads, "*Member States shall ensure that, whatever the law applicable to the employment relationship, the undertakings referred to in Article 1(1) guarantee workers posted to their territory the terms and conditions of employment covering the following matters which, in the Member State where the work is carried out, are laid down by [...] collective agreements [...] which have been declared*

universally applicable [...] insofar as they concern [...] (c) the minimum rates [...]".

The court of first instance rejected the claim on the ground that the choice of law clause in the employment contract was valid, given that Section 11(2)(5) of the AÜG does not constitute a "mandatory rule" within the meaning of Article 6 of the Rome Convention.

The Appellate Court of Innsbruck (*Oberlandesgericht*) reversed the judgment, holding that Section 11(2)(5) of the AÜG (providing for the invalidity of preclusion clauses in an employment contract) was clearly a mandatory rule within the meaning of Article 6 of the Rome Convention. In its reasoning it referred to Article 3(1)(c) of the Posting Directive, which lists "minimum rates of pay" as part of the "hard core" of protective rules that must be observed irrespective of the applicable law. These rules were also to be considered as mandatory rules within the meaning of Article 6 of the Rome Convention. The Appellate Court went on to find that the same applied to statutory rules ensuring the enforcement of minimum rates of pay and its constituent elements (such as bonuses for dirty, heavy or dangerous work) and based this finding on the ECJ's ruling in *Commission - v - Germany*, case C-341/02.

The temporary agency appealed this decision to the Supreme Court (*Oberster Gerichtshof*).

Judgment

The Supreme Court upheld the Court of Appeal's judgment, but on the basis of different legal reasoning. Following an analysis of *Commission - v -* Germany, it rejected the view that Article 3(1)(c) of the Posting Directive also contains rules regarding the due date and enforcement of bonuses for dirty and heavy work.

In *Commission - v - Germany* the ECJ had to decide what kinds of payments must be taken into account in order to establish whether the posted worker has received the "minimum rates of pay" as laid down in a statute or a univerally applicable collective bargaining agreement. In this context the ECJ pointed out that allowances and supplements paid for additional work or for work under particular conditions cannot be taken into account for the purpose of calculating the minimum wage (par 39 et seq.). The Supreme Court also concluded that limitation periods for bonuses for dirty and hard work cannot be considered to be covered by Article 3(1)(c) of the Posting Directive.

However, the Supreme Court then referred to Article 3(1)(d) of the Posting Directive, which also forms part of the "hard core" of protective rules that apply irrespective of the governing law. This provision refers to the "conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings". The Court also cited Article 3(9) of the Directive under which the host state may provide that employers must guarantee posted workers same the terms and conditions as apply to temporary workers in that state. It concluded that Section 11(2)(5) of the AÜG was such a rule and that it must therefore be applied to the relevant employment relationship, even though the parties had chosen the law of Liechtenstein. The same applies to the other provisions of the AÜG.

The Supreme Court also noted that Article 3(1) of the Posting Directive takes precedence over the more general rules laid down by Article 6 of the Rome Convention. However, it added that the application of the latter Article would have led to the same result, since the employee had his regular place of work in Austria and the parties could therefore not contract out of the mandatory rules of Austrian law, such as Section 11(2)(5) of the AÜG (which transposes Article 6(1) of the Rome Convention).

Due to the application of Section 11(2)(5) of the AÜG the employer could not rely on the forfeiture clause in the employment contract. Therefore, the plaintiff was entitled to the outstanding bonuses for dirty and heavy work and the related payments.

Commentary

The Supreme Court rightly pointed out that the Austrian Hiring-Out of Workers Act (AÜG) applies also to hiring-out scenarios from abroad to Austria, irrespective of which law governs the employment relationship in general. Therefore, it even applies if the employee's regular place of work is not in Austria and thus the "mandatory rules" of Austrian law within the meaning of Article 6 of the Rome Convention (Article 8 of Rome I) do not "bite".

However, the Court's view that Article 3(1)(c) of the Posting Directive does not encompass bonuses for dirty and heavy work or rules regarding the due date and enforcement thereof is questionable. In *Commission - v - Germany* the ECJ had to decide what kinds of payments by the foreign employer must be taken into account in order to establish whether the posted worker has received the "minimum rates of pay" as laid down in a national rule of the host country.

That is not the same issue as whether a national rule may define such payments as components of "minimum pay" within the meaning of Article 3(1)(c) of the Posting Directive. According to Article 3(1)(last subparagraph) of the Posting Directive the concept of minimum pay is defined by the national law and/or practice of the host state. Therefore, the Supreme Court has gone too far in holding that bonuses for dirty and heavy work are not caught by Article 3(1)(c). One could even argue that national rules regulating the enforcement or due date of minimum pay must be considered as being part of the rules on minimum pay and must therefore be treated in the same way.

Subject: applicable law
Parties: R P (worker) – v – M Aktiengesellschaft (employer)
Court: *Oberster Gerichtshof* (Austrian Supreme Court)
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How are Greece, Spain and Italy responding to pressure to reform their employment legislation?

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Introduction

Anyone who follows the news will know that Greece, followed by Portugal, Ireland, Spain and Cyprus are in deep trouble and that there is pressure on them, and on other countries, notably Italy, to reform their labour markets and, in particular, their protective employment legislation. The key word is "flexibility". The authors of this article thought it might be a good idea to inform the readers of EELC about the recent - in many cases dramatic - legislative developments in this area in Greece, Italy and Spain.

GREECE

1. On 11 May 2010 a law came into effect allowing what is known as "rotational employment". An employer faced with a reduction in activities now has the option to obligate (unilaterally) all or some of its employees to work part-time instead of carrying out a redundancy operation. The affected employees will then work, for example, on four, three or two whole days (no partial days) rather than on five days per week, their salary being reduced proportionately. There are two conditions that must be satisfied in order for an employer to apply rotational employment. One is that the employees' representatives (the relevant unions, the works council or, in the absence of both, the employees themselves) must be informed and consulted in due time and according to the correct procedure. The other is that the employer must notify the Labour Inspection Authority within eight days of the effective date of the new working schedule. The employees whose income has dropped are not eligible for unemployment benefits or any other benefits.
2. Ever since August 2010 pensions (both the "main" pensions, to which employers, employees and the State contribute, and the "subsidiary" pensions, to which only employers and employees contribute) have undergone successive reductions inasmuch as they exceed a certain minimum (€ 1,000 per month gross for main pensions and € 600 gross per month for subsidiary pensions). Depending on a number of variables, the reduction can reach 35% or even 40%. Not only has the level of pensions been reduced, the retirement age is being raised. Currently the retirement age is different for men and women. By 2015 they will be uniform, namely 60 for individuals who have been insured for 40 years and 65 for others, provided they have no less than 15 insured years.
3. On 14 December 2010 a law came into effect extending the maximum duration of temporary work. Under the old law, a temporary employment agency could assign "temps" to one and the same assignee (referred to in Greece as the "indirect employer") for no longer than 18 months, following which period, if the temps continued to work for that assignee, they automatically became (permanent) employees of the assignee. The 18 months have now become 36 months. This increases employers' ability to have work performed by (easily removable) temps rather than by (protected) own staff, thereby creating greater flexibility in adapting a company's workforce to fluctuating work levels.
4. In normal situations, employers may only dismiss employees if they simultaneously pay them severance compensation. Under the old law, this rule did not apply during the first two months, which were, in effect, a probationary period. The new law, which also entered into force on 14 December 2010, has extended this period to 12 months. This allows employers to hire people for a whole year and then dismiss them at no cost.
5. In February 2012 Law No. 4046/2012 was published under the title "Approval of the Draft Financing Facilitation Agreements among the European Financing Stability Fund, the Hellenic Republic and the Bank of Greece, of the Draft Memorandum of Understanding between the Hellenic Republic, the European Commission and the Bank of Greece, as well as other provisions of an urgent nature regarding the reduction of public debt and the preservation of national finance". The law came into effect on 14 February 2012. Its principal provisions, inasmuch as they relate to employment law, are summarised below (paragraphs 6-12).
6. As of 14 February 2012, and for as long as the running programme for "fiscal consolidation" is ongoing (which could be a while), the minimum wage for all employees covered by the National Collective Labour Agreement (this is the collective agreement covering all employees who are not covered by a specific CLA, providing for minimum wages) dropped by 22% or, for those aged under 25 or in a trainee position, by 32%. The employer has the right to unilaterally reduce these employees' wages regardless of what was agreed with the employee.
7. Previously, collective labour agreements (CLAs) could be concluded for an indefinite duration or for very long periods. From now on, a CLA can only be concluded for a fixed term lasting no less than one year and no longer than three years.
8. CLAs that were in force on 14 February 2012 expire on 14 February 2013 or (if they were in force for less than 24 months on that date) 13 February 2014 at the latest, regardless of their agreed duration.
9. The terms of a CLA that has expired or been terminated and has not been replaced by a new CLA before 14 May 2012, with the exception of base salary and certain allowances, ceased to be valid on that date. The reasoning behind this is that it will encourage employers and employees to agree more flexible terms of employment on an individual basis.
10. Any provision of law, CLA, arbitral award or agreement that provides for an increase in salary is without effect until such time as unemployment in Greece has dropped to below 10%.
11. Any provision allowing one party to a (collective or individual) employment contract to unilaterally submit a dispute to arbitration is invalid. Moreover, even where both parties consent to arbitration, the recourse to arbitration must be limited to the determination of base salary. The arbitration may not extend to any other issue. The idea behind this is to encourage collective bargaining at the company level and to reduce the power of arbitrators, who tended to take a pro-employee position.
12. The concept of "quasi permanence" has been abolished. This affects employees in the public sector and in companies in which the Greek State owns a large portion of the shares. In this sector, many employees with a permanent contract have a "quasi permanent" status. This means that the normal rules regarding dismissal, i.e. notice with severance compensation, do not apply and, instead, there is a CLA or a set of Internal Working Regulations providing that, in the absence of serious misconduct, the employment contract cannot be terminated prior to a certain

age, usually retirement age. All such provisions have automatically become null and void, in effect abolishing the "quasi permanent" status of these more or less "untouchable" employees.

13. Legislation is planned that will reduce the mandatory contributions to the Social Security Fund ("IKA") by 5 percentage points. Currently employers and employees contribute, respectively 28.56% and 16.5% of gross salary into this fund. Measures to finance this reduction are also planned.
14. Measures have been announced to investigate and, where necessary, to boost the effectiveness of the Labour Inspection Authority, particularly in relation to its responsibility to identify and prosecute "undeclared" employment. Undeclared employment, i.e. work that officially does not exist, is a huge problem in Greece, in part because of the high percentage of (legal and illegal) immigrants.
15. By the end of 2012, all employees will be obligated to have on them, at all times, an electronic "employment card", on which their working hours are recorded. Companies that use this time tracking system and pay the correct amount of social security contributions will be given a reduction in the rate of those contributions.

ITALY

The Italian response to the financial crisis, inasmuch as it relates to the labour market, has been mixed. It consists mainly of two pieces of legislation. The first and most effective change of law, which took effect on 1 January 2012, was a radical reform of the state pension system. All pensions are now calculated on the basis of contributions paid during the entire working life and no longer on the basis of the last years of work. The retirement age for women was raised with immediate effect from 60 to 62. The retirement age for men (previously 65) and women (previously 60) is being raised in steps between 2012 and 2018, when it will be 66 for both. Retirement with full pension will be only possible provided the person has around 41/42 years of contribution paid. In some cases this means that people who might have retired in 2012 will now need six years more before getting their pension.

A controversial issue relates to employees (the so called *"esodati"* i.e. people made redundant and encouraged to accept terminations thanks to State support with additional indemnities) who, assuming they would be eligible to retire at an age earlier than the new one applicable from January 2012, resigned or agreed to leave at that earlier age within collective dismissal procedures with, in most cases, special State interventions and decrees who had authorized a longer period of unemployment benefits than usual, in order to reach the former retirement age. The government has promised to take measures to compensate these workers for the financial gap they would otherwise face.

The second legislative development relates to employment law. Following months of negotiations, on 5 April 2012 Prime Minister Mario Monti presented Parliament with a Bill aimed at reforming the Italian labour market. In the last week of June 2012 this led to a 50-page law that disappointed both labour (which considers the reforms go too far) and industry (which disagrees with the restrictions against the abuse of fixed term contracts and fake consultancy contracts). The new law took effect on 18 July 2012. The principal and most controversial change is that dismissal will lead less frequently to a court order for reinstatement and more frequently to court-ordered financial compensation instead.

The shift from reinstatement to compensation applies mainly to collective dismissals (five or more within 120 days) in large companies (with 15 or more employees) where the procedural rules relating to collective dismissal have not been fully complied with. In the past such non-compliance resulted in reinstatement and frequently in enormous damages due to the length of the judicial proceedings. Now the sanction is an indemnity ranging from 12 to 24 months' salary. However, failure to apply the correct selection criteria (a blend of company seniority, family dependants and technical and organisational reasons) will still result in reinstatement and damages equal to all salary lost between termination and reinstatement, capped at 12 months' salary as a maximum.

The shift from reinstatement to compensation also applies to certain situations where an individual employee is dismissed for misconduct that is not substantiated and for certain cases of non-collective redundancy.

Another improvement, from an employer's point of view, is that the first fixed-term contract can now be concluded, without the need for a reason to be given, for a non-extendable maximum of 12 months. Simultaneously, however, measures have been put in place to prevent abuse of fixed-term contracts. The interval between two such contracts that is required in order for both contracts not to qualify as one longer contract has been increased to 60 and 90 days (from the former 10 or 20) for contracts of under and over 6 months, respectively. Time worked as a "temp" immediately prior to the fixed-term contract now counts towards determining the maximum duration of a fixed contract (36 months if the contract was entered into for a specific reason, otherwise 12 months for the initial contract only). Fixed-term contracts have also become more costly in terms of social security contributions. A challenge against the term of a fixed-term contract must now be made within 120 days from the end of the contract and the judicial claim must be brought within 120 days of the challenge.

Perhaps the biggest improvement will prove to be procedural. Certain provisions have been enacted that will, hopefully, speed up court procedures. Also, a settlement attempt is now required in certain situations of redundancy, before the termination can be communicated.

As a concession to the unions, measures have been introduced to combat the abuse of fake "consultancy" or "partnership" agreements that are in fact employment contracts. One such measure is that a consultant who has either worked for a company for over eight months on the basis of a contract entered into after 18 July 2012 and over 80% of whose income is derived from that company, or who has a fixed position in that company's premises (two of these conditions are required), shall be deemed to be in that company's permanent employment, unless he is a lawyer, accountant, or similar truly independent, registered professional or unless he earns in excess of about € 18,000 per year.

However, terminations have been made more difficult in one respect: resignations and terminations by mutual consent must be confirmed with the Employment Office according to a specific procedure. This is to avoid employers requiring employees to pre-sign resignation letters at the time of hiring or during employment, as a condition of their employment.

In brief, the recent reform of Italian employment law is complex (in fact, a lawyer's paradise), but nothing like as radical as the Greek and Spanish reforms. Moreover, instead of making the practical management of employment contracts easier for both parties, the new statute adds - if possible - more bureaucracy to Italian employment law.

Interestingly, the radical and effective change in pension law has been discussed and criticized less intensely than the other less draconian changes in the employment law. Whether this is due to the fact that Prime Minister Monti's popularity was as its height when the pension reform was approved, whereas he is much less supported now, or because people really understood that pension reform was necessary, is difficult to say.

SPAIN

Spain has taken and is in the process of taking strong measures to adapt its employment law to face the economic crisis, with a view both to dealing with the budget deficit and to reducing unemployment. The purpose of the labour reform is not only to solve the current crisis but also to address several of the issues that have traditionally hampered labour relations in Spain. Thus, when the economy picks up again, employment law should no longer be viewed as an obstacle to competitiveness but as a useful tool for increasing competitiveness and productivity. Below is an overview of the principal changes. Some were brought about before the present government was elected in November 2011, others were the result of a Royal Decree introducing emergency measures on 12 February 2012 and still others resulted from the law that converted that decree, with amendments, into law with effect from 8 July 2012.

1. The ordinary retirement age, from which citizens are eligible for State pension benefits, has gone up from 65 to 67, with transitional provisions in favour of citizens close to retirement age, depending on their age and number of contributory years.
2. The rules in respect of collective bargaining have been modified to the advantage of company agreements rather than traditional industry-wide agreements. The idea behind this is that single-employer bargaining is more readily adaptable to changed circumstances than industry-wide bargaining. With regard to certain matters, such as salary, working times, changes of position and work-life balance, collective agreements concluded at company level now take precedence over sectorial agreements. Further, if negotiations on a new collective agreement following the expiry of an old one take longer than one year, the old agreement automatically ceases to be valid. This should put pressure on the unions when re-negotiating collective agreements. Finally, employers now have the right not to apply a collective agreement temporarily in the event of certain circumstances of an economic, productive, technical or organisational nature. Employers wishing to make use of this facility must follow a certain procedure, which involves negotiating with the employees' representatives and, if no agreement can be reached with them, submitting to a dispute resolution system.
3. The rules in respect of collective redundancies have been relaxed and tightened up at the same time. The relaxation makes it easier for employers to reduce their workforce for "business" reasons: economic, productive, technical or organisational. The employer, when dismissing on "economic" grounds, must demonstrate "a persistent decrease of ordinary income or sales", and such a decrease is now deemed to be "persistent" if it has continued for nine months consecutively. The consent of the Labour Authority, if employers fail to reach agreement with the unions, is no longer required. Now, if the mandatory negotiation period does not yield an agreement with the unions, the employer may simply go ahead with the lay-offs as planned. On the other hand, the rules requiring employers to provide employees and their representatives with information and to offer a social plan have been reinforced.
4. Non-collective dismissals for business-related reasons have also become slightly easier. The same reasons as for collective redundancies apply. An employer dismissing staff for productive, technical or organisational reasons no longer needs to provide evidence that the dismissals are a reasonable measure to prevent the employer from making a loss or having a seriously reduced financial result.
5. Not only have (collective and individual) redundancies become easier, the cost of terminating employment contracts has also been reduced. As of 12 February 2012, terminations declared unfair will attract a severance payment of 33 days' salary per year of service with a maximum of two years' salary. Previously, unfairly dismissed employees were awarded 45 days' salary of severance per year of service up to a maximum of 42 monthly instalments.
6. The new severance amounts will apply to seniority accrued after February 12, 2012, with retention of the previous entitlements for prior service.
7. The procedural rules governing employment disputes have changed now that such disputes are heard by special employment courts rather than by the administrative courts. Employment courts are faster than administrative courts.
8. The new rules give employers greater ability to make changes in their employees' position, place of work or working conditions ("internal flexibility"). For example, the Labour Authority has lost the power to temporarily suspend the relocation of a group of employees to another place of work. In addition, a modification of employees' collective terms of employment is considered to be "individual" and not "collective" if it affects no more than a certain number of employees, making it easier to depart from collective conditions terms at short notice.
9. In certain circumstances, companies that make employees aged 50 or over redundant are now obligated to pay a contribution to the Public Treasury. Whether or not this is the case depends on the size of the (group of) companies and on whether those companies or group of companies made a profit in the two business years prior to the redundancies.
10. The government has introduced a number of measures in support of entrepreneurship. One of these is that businesses with fewer than 50 employees may now enter into permanent full-time employment contracts with a probationary period of one year. Another measure is the introduction of social security incentives for hiring young, old, unemployed or female persons.
11. Finally, there are several minor amendments in the law in respect of traineeships, part-time work, teleworking and work-life balance.

The above is an overview of existing legislation. There is more to come.

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ECJ COURT WATCH

SUMMARIES BY PETER VAS NUNES

RULINGS

ECJ 20 October 2011, case C-225/10 (*Perez Garcia - v - Familienkasse Nürnberg*) (**"Perez"**), German Case (FREE MOVEMENT, SOCIAL INSURANCE)

Facts

Juan Perez Garcia, José Arias Neira, Fernando Barrera Castro and José Bernal Fernández (the "plaintiffs") were Spanish citizens who had been employed as migrant workers in Germany and who, following their retirement, returned to live in Spain. They received both German and Spanish old-age pensions and/or invalidity pensions. Each of them had a disabled child aged over 18.

This case concerns the inter-relationship between three (potential) social benefits:

- a German child benefit (*Bundeskindergeldgesetz*) to pensioners with dependent children (the "German dependent child benefit");
- a Spanish non-contributory invalidity pension payable to disabled persons from age 18 (the "Spanish invalidity pension");
- a Spanish allowance payable to pensioners with a disabled dependent child who is not in receipt of an invalidity pension (the "Spanish dependent child benefit").

The plaintiffs' disabled children were in receipt of Spanish invalidity pensions. For this reason, the plaintiffs were not eligible for Spanish dependent child benefits. The plaintiffs applied to the German organisation responsible for paying German dependent child benefits, the *Familienkasse*, in this case the *Familienkasse* in Nüremberg. They wished to receive German dependent child benefits. The *Familienkasse* rejected their applications on the ground that the plaintiffs' disabled children were entitled to claim Spanish invalidity pensions. Had the plaintiffs claimed such pensions, which were higher than the German dependent child benefit, they would not have been entitled to German dependent child benefits, so the *Familienkasse* alleged, given Article 77(2)(b)(i) of Regulation 1408/71. This provision states that family allowances for pensioners who draw pensions under the legislation of more than one Member State shall be in accordance with the State of residence (in this case, Spain), provided that a right to those family allowances is "acquired" under the legislation of that State. Simply put, the *Familienkasse* argued: if you wanted, you could get Spanish dependent child benefits, but by intentionally not applying for them (so that you can collect Spanish invalidity pension) you are prejudicing our interests.

National proceedings

The plaintiffs appealed to the *Sozialgericht* in Nüremberg. This court referred three questions to the ECJ. The first two questions related to the word "acquired" in Article 77(2)(b)(i) of Regulation 1408/71. The third question is not relevant.

ECJ's findings

1. The ECJ begins by examining whether at least one of the social benefits at issue falls within Article 77 of the Regulation. That Article deals with "family allowances" as defined in the Regulation, being benefits "granted exclusively by reference to the number and, where appropriate, the age of members of the family". Clearly, a Spanish invalidity benefit is not such a benefit. However, when acceding to the Regulation, the Spanish government declared that Spanish invalidity benefits were covered by Article 77. Therefore, despite those benefits not being covered by the definition of "family allowances", they should be treated as if they were covered (§ 28-37).
2. Is a right to Spanish dependent child benefits "acquired" within the meaning of Article 77(2)(b)(i) of Regulation 1408/71 if that right is excluded only by reason of the potential beneficiary's own choice to be granted another benefit (in this case, a Spanish invalidity pension)? The German government argued that Article 76(2) of Regulation 1408/71, which deals with "family benefits" rather than "family allowances", should be applied by analogy. That would allow the *Familienkasse* to act as if the plaintiffs had chosen to receive Spanish dependent child benefits, and not Spanish invalidity benefits, in which case the plaintiffs would not be eligible to claim German dependent child benefits (§ 38-47).
3. The ECJ rejected the argument for analogous application of Article 76, mainly because EU legislation on the coordination of national social security legislation, taking particular account of its underlying objectives, cannot, except in the case of an express exception in conformity with those objectives, be applied in such a way as to deprive a migrant worker of benefits granted under the legislation of a single Member State (in this case, Germany) on the basis solely on the insurance periods granted under that legislation (§ 48-55).

Ruling

Articles 77(2)(b)(i) and 78(2)(b)(i) of Council Regulation (EEC) No 1408/71 [...] must be interpreted as meaning that recipients of old age and/or invalidity pensions or the orphan of a deceased worker, to whom the legislation of several Member States applied, but whose pension or orphan's rights are based on the legislation of the former Member State of employment alone, are entitled to claim from the competent authorities of that State the full amount of the family allowances provided under that legislation for disabled children. This is the case even though they have not applied for comparable, higher allowances under the legislation of the Member State of residence, because they opted to be granted another benefit for disabled persons, which is incompatible with those, since the right to family allowances in the Member State of employment was acquired by reason of the legislation of that State alone.

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 recorder. A recorder is a British judge who is remunerated, not on the basis of a fixed salary, but on a "fee-paid" basis. This means that he was paid 1/220th of the salary of a full-time circuit judge for every day on which he sat. Unlike full-time and part-time judges with a fixed salary, recorders are not entitled to a retirement pension.

Upon retirement at age 65, Mr O'Brien asked the Ministry of Justice to be paid a pro-rated pension. He based this request on Directive 97/81 implementing the Framework Agreement on part-time work. Clause 4 of the Framework Agreement 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". Mr O'Brien's request was denied on the ground that Regulation 17 of the UK law that transposed the Directive, the Part-Time Workers

(Prevention of Less Favourable Treatment) Regulations 2000, provides that those 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". Mr O'Brien argued that Regulation 17 is not compatible with the Framework Agreement. He brought proceedings before the Employment Tribunal.

National proceedings

The Employment Tribunal found in favour of Mr O'Brien, but on appeal (and following directions from the Court of Appeal) the Employment Appeals Tribunal dismissed his claim, whereupon he brought an appeal before the Supreme Court. The debate in this court centred around the definition of "worker" in Clause 2.1 of the Framework Agreement, which reads, "this Agreement applies to part-time workers who have an employment contract or employment relationship as defined by the law [...] or practice in force in each Member State".

The Supreme Court took into account the special position of the judiciary, for whose work independence of judgment is an essential feature. However, the Court was uncertain whether this fact is sufficient to exempt judges from the concept of "worker". It therefore referred two questions to the ECJ:

1. Is it for national law to determine whether or not judges as a whole are workers [...] within the meaning of [...] the Framework Agreement [...], or is there a Community norm by which this matter must be determined?
2. If so, 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. The reference for a preliminary ruling is admissible despite the fact that almost all of Mr O'Brien's pensionable years of service (1978-2005) predated the Framework Agreement (see the ECJ's ruling in *Bruno*, joined cases C-395 and 396/08) (§ 24-26).
2. There is no single definition of "worker" in EU law. The definition varies according to the area in which the definition is to be applied (§ 30).
3. The discretion granted to the Member States by Directive 97/81 in order to define the concepts used in the Framework Agreement is not unlimited. Those concepts must respect the effectiveness of the directive and the general principles of EU law. In particular, a Member State may not remove, at will, certain categories of persons from the protection afforded by the Framework Agreement (§ 34-38).
4. Given that UK law (i) does not recognise any category of "employment relationship" as distinct from the relationship created by a contract and (ii) has long-recognised that judges are not employed under a contract, the UK government argued that Regulation 17 is strictly speaking redundant (§ 3940).
5. An exclusion of a category of persons from the concept of "worker" may not be arbitrary and may only be permitted if the nature of the employment relationship is substantially different from the relationship between employers and their "workers" under national law. Although it is for the national court to determine whether this is the case, the ECJ mentions the following principles and criteria which that court must take into account in the course of its examination (§ 41-43).
6. The rules for appointing and removing judges and the way in which their work is organised is one such criterion. Judges are expected to work during defined times and periods, even though this can be managed by the judges themselves with a greater degree of flexibility than members of other professions. They are entitled to sick pay, maternity and paternity pay and other similar benefits (§ 44-46).
7. Qualifying as "workers" within the meaning of the Framework Agreement would not undermine the principle of the independence of the judiciary nor the right of the Member States to provide for a particular status governing the judiciary (§ 47).
8. At the time when the UK Part-time Workers Regulations were adopted, part-time judges were, with few exceptions, all remunerated on a daily fee-paid basis. Thus, *de facto*, only full-time judges are eligible to join the judicial pension scheme. Therefore, there is no need to examine whether Directive 97/81 authorises distinctions between different kinds of part-time judges (§ 58-59).
9. It cannot be argued 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). The crucial factor is that they perform essentially the same activity (§ 62).
10. Since no justification has been relied on in the proceedings before the ECJ, it is for the UK courts to examine whether the inequality of the treatment between full-time judges and part-time judges remunerated on a daily fee-paid basis may be justified (§ 65).
11. Budgetary considerations cannot justify discrimination: see *Schönheit* (C-4 and 5/02) and *Landeskrakenhäuser Tirols* (C-486/08) (§ 66).

Ruling

EU 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 this 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.

The Framework Agreement on part-time work [...] 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 purposes of access to the retirement pension scheme, unless such a difference in treatment is justified by objective reasons. This is a matter for the referring court to determine.

ECJ 19 April 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 German 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 this 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, if he does not obtain the post, to information from the employer as to whether it has engaged another applicant and, if so, the criteria on 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?

ECJ'S findings

1. The ECJ refers to its 2011 ruling in *Kelly* (C-104/10), which centred on Directive 97/80 on the burden of proof in sex discrimination cases. This directive was repealed in 2009 by Directive 2006/54 without its contents being altered. In *Kelly*, the ECJ held that, although Article 4(1) of Directive 97/80 does not specifically entitle job applicants to information that may help them establish "facts from which it may be presumed that there has been discrimination", it is not inconceivable that, in the context of establishing such facts, refusal by the defendant to disclose relevant information is liable to compromise the achievement of the objective pursued by Directive 97/80 and, in particular, to deprive Article 4(1) of the Directive of its effectiveness (§ 39).
2. It is for the referring court to ensure that Speech Design's refusal to disclose information is not liable to compromise the objectives pursued by Directives 2000/43 (race), 2000/78 (ethnic origin, etc.) and 2006/54 (gender), taking into account all the circumstances of the case and of the fact that Member States may provide that indirect discrimination can be established by any means including the use of statistical evidence. Among the factors which may be taken into account are: (i) that, unlike in *Kelly*, Speech Design seems to have refused Ms Meister any access to the information she seeks to have disclosed, (ii) that Ms Meister's level of expertise matches that referred to in the job advertisement and (iii) that she was twice refused an interview (§ 42-45).
3. In view of the answer given to the first question, there is no need to reply to the second question (§ 48).

Ruling

Articles 8(1) of Directive 2000/43, 10(1) of Directive 2000/78 and 19(1) of Directive 2006/54 must be interpreted as not entitling a worker who claims plausibly that he meets the requirements listed in a job advertisement and whose application was rejected, to have access to information indicating whether the employer engaged another applicant at the end of the recruiting process. Nevertheless, a defendant's refusal to grant any access to information may be one of the factors to take into account when establishing whether there has been direct or indirect discrimination. It is for the referring court to determine whether that is the case in the main proceedings, taking into account all the circumstances.

ECJ (Grand Chamber) 3 May 2012, case 337/10 (*Georg Neidel - v - Stadt Frankfurt am Main*) **("Neidel")**, German case (PAID LEAVE)

Facts

Mr Neidel was a public servant in Frankfurt am Main. He held the positions of fireman and, subsequently, chief fireman. As of 12 June 2007, Mr Neidel was declared unfit for service on medical grounds. In August 2009, having reached the age of 60, he retired and was granted pension benefits. It was common ground between the parties in the main proceedings that Mr Neidel retained, over the years 2007 to 2009, an entitlement to 86 days of untaken leave. However, his request for payment in lieu of leave was rejected on the grounds that German law relating to civil servants makes no provision for financial compensation for unused leave. According to the defendant (Frankfurt), Article 7(2) of Directive 2003/88 does not apply to civil and public servants. Furthermore, it maintained that retirement does not constitute a situation in which "the employment relationship is terminated" within the meaning of that provision.

National proceedings

The *Verwaltungsgericht Frankfurt am Main* (Administrative Court, Frankfurt am Main), before which Mr Neidel brought an action against the refusal to compensate him for leave not taken, decided to stay the proceedings and to refer six questions to the ECJ for a preliminary ruling.

ECJ's findings

Question 1

1. The first question was whether Article 7 of Directive 2002/88 applies to a public servant carrying out the activities of a fireman in normal circumstances (§ 19).
2. According to Article 1(3) of Directive 2003/88, read in conjunction with Article 2 of Directive 89/391, to which it refers, those directives apply to all sectors of activity, both public and private. In *Simap* the ECJ held that Directive 89/391 must necessarily be broad in scope, with the result that Mr Neidel's activities fall within the scope of Directive 2003/88 (§ 20-22).
3. Next, the concept of "worker"' within the meaning of Article 45 TFEU has, according to settled case law, a specific independent meaning and must not be interpreted narrowly. It is not relevant whether a worker is engaged as a workman *[ouvrier]*, a clerk *[employé]* or an official *[fonctionnaire]*, or even whether the terms on which he is employed come under public or private law (§ 23-25).

Question 4

4. As its fourth question, the national court asked whether Article 7(2) of Directive 2003/88 should be interpreted as meaning that a public

servant is entitled, on retirement, to an allowance in lieu of paid annual leave not taken on account of the fact that he was prevented from working by sickness (§ 27).

5. In *Schultz-Hoff* the ECJ ruled that the right to paid annual leave, which must be regarded as a particularly important principle of EU social law, is granted to every worker, whatever his state of health. The ECJ also held in that judgement that on termination of the employment relationship, it is no longer possible to take paid annual leave, and that in order to prevent this impossibility leading to a situation in which the worker loses enjoyment of that right, even in pecuniary form, Article 7(2) of Directive 2003/88 provides that the worker is entitled to an allowance in lieu (§ 28-29).
6. Consequently, Article 7(2) of Directive 2003/88 must be interpreted as precluding national legislation or practices which provide that, on termination of the employment relationship, no allowance in lieu of unused paid annual leave is to be paid to a worker who has been on sick leave for the whole or part of the leave year and/or a carry-over period, which was the reason why he could not exercise his right to paid annual leave. The retirement of Mr Neidel terminated his employment relationship and national law further provides that it terminated his status as a public servant (§ 30-31).

Questions 2, 3 and 6

7. In these questions the national court asked whether Article 7 of Directive 2003/88 should be interpreted as precluding provisions of national law giving public servants an entitlement to additional paid leave on top of the minimum of four weeks per year, which do not provide for the payment of an allowance in lieu to a public servant retiree who has been unable to use that additional leave because he was prevented from working by sickness (§ 33).
8. In *Dominguez* the ECJ held that the purpose of Directive 2003/88 is simply to lay down minimum safety and health requirements for the organisation of working time and that the Directive does not affect Member States' right to apply provisions of national law more favourable to the protection of workers. Consequently, it is for the Member States to (1) decide whether to confer on public servant retirees an entitlement to additional paid leave and either to provide or not provide an entitlement to an allowance in lieu if that person had been unable to use the additional entitlement because of sickness and (2) to lay down the conditions for the granting of that entitlement (§ 35-36).

Question 5

9. In its fifth question, the national court asked whether Article 7(2) of Directive 2003/88 precludes a provision of national law which restricts, by means of a carry-over period of nine months following which the entitlement to paid leave lapses, the right of a public servant who is retiring to cumulate the allowances in lieu of paid annual leave not taken because he was unfit for service (§ 38).
10. In *KHS* the ECJ took the view that, with regard to the duration of the carry-over period, it is necessary to assess whether that period may reasonably be described as a period beyond which paid annual leave ceases to have a positive effect on the worker as a rest period. In that judgment the ECJ also held that the carry-over period must, *inter alia*, ensure that the worker can have rest periods, if need be. These may be staggered, planned in advance and available in the longer term and must be substantially longer than the reference period in respect of which they are granted (§ 39-41).
11. In the main proceedings, the carry-over period is nine months, that is to say a period shorter than the reference period to which it relates (§ 42). It is too short a period to be compatible with Directive 2003/88.

Ruling

1. Article 7 of Directive 2003/88/EC [...] must be interpreted as applying to a public servant carrying out the activities of a fireman in normal circumstances.
2. Article 7(2) of Directive 2003/88 must be interpreted as meaning that a public servant is entitled, on retirement, to an allowance in lieu of paid annual leave not taken because he was prevented from working by sickness.
3. Article 7 of Directive 2003/88 must be interpreted as not precluding provisions of national law conferring on a public servant an entitlement to further paid leave in addition to the entitlement to a minimum paid annual leave of four weeks, which do not provide for the payment of an allowance in lieu if a public servant who is retiring has been unable to use that additional entitlement because he was prevented from working by sickness.
4. Article 7(2) of Directive 2003/88 must be interpreted as precluding a provision of national law which restricts, by means of a carry-over period of nine months following which the entitlement to paid annual leave lapses, the right of a public servant who is retiring to cumulate the allowances in lieu of paid annual leave not taken because he was unfit for service.

ECJ 7 June 2012, case C-132/11 (*Tyroler Luftfahrt Gesellschaft mbH - v - Betriebsrat Bord der Tiroler Luftfahrt Gesellschaft mbH*) ("**Tyroler Luftfahrt**"), Austrian case (AGE DISCRIMINATION)

Facts

Tyrolean Airways and Lauda Air are wholly owned subsidiaries of Austrian Airlines. Since they merged in 2003, Austrian Airlines and Lauda Air are governed by the same collective agreement and their staff have identical terms of employment. Tyrolean Airways has a separate collective agreement. It provides that flight and cabin crews are graded in categories A and B and that advancement from A to B shall occur three years after the recruitment of the employee as a member of the cabin crew (this provision to be referred to as the "clause at issue"). The collective agreement does not specify whether "recruitment" refers to recruitment by Tyrolean Airways or, more generally, by one of the three companies in that group. The clause at issue was included in the individual employment contract of most of Tyrolean Airways' cabin crew members.

In 2010 the works council (*Betriebsrat*) of Tyrolean Airways brought an action before the court in Innsbruck, requesting a declaration that the cabin crew members employed by Tyrolean Airways who had acquired a minimum of three years of experience in total as cabin crew members of Tyrolean Airways and/or Austrian Airlines or Lauda Air should be graded in employment category B.

National proceedings

The court found in favour of the works council, whereupon Tyrolean Airways appealed. The appellate court considered that the clause at issue constitutes discrimination on grounds of age, but it was unsure whether this discrimination should lead to the nullity of the clause. It therefore referred the following questions to the ECJ:

1. Does EU law, in particular Article 21 of the Charter of Fundamental Rights, the general principle relating to the prohibition against age discrimination and Directive 2000/78, preclude a collective agreement which, for the purpose of determining the level of remuneration, discriminates indirectly against older workers by taking account only of their experience with one airline but not the more or less identical experience which they acquired with another airline within the same

group of companies? If so, does this also apply to employment contracts entered into before 1 December 2009?
2. Can a national court treat as void and disapply a clause in an individual contract that indirectly infringes EU anti-discrimination law on grounds of the horizontal direct effect of the fundamental rights of the EU, in a manner analogous to the ECJ's rulings in the anti-trust cases *Rieser* (C-157/02) and *Béguelin* (C-22/71)?

ECJ's findings
1. The ECJ examines the first question solely in the light of Directive 2000/78 (§ 22-25).
2. A provision such as the clause at issue, although likely to entail a difference in treatment according to the date of recruitment, is not, directly or indirectly, based on age or even an event linked to age. It is the experience which may have been acquired by a cabin crew member with another airline in the same group of companies which is not taken into account for grading, irrespective of that person's age at the time of his or her recruitment. The provision is therefore based on a criterion which is neither inextricably (see, *a contrario*, the ECJ's ruling in *Ingeniørsforeningen Denmark*, case C-499/08) nor indirectly linked to the age of the employees, even if it is conceivable that it may, in some individual cases, lead to advancement from A to B at a later age, depending on whether one was recruited first by Tyrolean Airways or by another group company (§ 27-30).
3. There is no need to answer the second question (§ 32).

Ruling
Article 2(2)(b) of Directive 2000/78 [...] must be interpreted as not precluding a provision of a collective agreement which takes into account, for the purposes of grading in the employment categories provided for in that agreement and, therefore, determination of the level of pay, only the professional experience acquired as a cabin crew member of a specific airline, whilst excluding substantively identical experience acquired in the service of another airline belonging to the same group of companies.

ECJ 21 June 2012, case C-78/11 *(Asociación Nacional de Grandes Empresas de Distribución (ANGED) - v - Federación de Asociaciones Sindicales (FASGA) et. al.)* ("**ANGED**"), Spanish case (PAID LEAVE)

Facts
Several Spanish trade unions, including FASGA, filed a collective suit against ANGED, a Spanish employers' association, seeking a declaration that workers covered by the collective agreement for department stores are entitled to paid annual leave, even where such leave coincides with periods when they are absent from work on account of temporary incapacity to work. According to Article 38 of Royal Decree 1/1995 it is not possible to interrupt paid leave because of incapacity to work and then to continue the paid leave after recovery. The only exception to this is if the incapacity to work occurs at the beginning of the paid leave. The question was, could this legislation be regarded as compatible with Article 7(1) of Directive 2003/88?

National proceedings
In its first instance judgment dated 23 November 2009 the *Audiencia Nacional* (National High Court) upheld the asserted claim of FASGA in full. ANGED appealed against this decision to the *Tribunal Supremo* (Supreme Court). That court considered it necessary to stay proceedings to ask the ECJ whether said Article 38 of the royal decree was compatible with Article 7(1) of Directive 2003/88.

ECJ's findings
1. Even if an employee becomes unfit for work during and not at the beginning of his holidays, his holiday claim is not extinguished by his incapacity to work. Holidays for employees are an important social principle of EU law. One purpose of holidays is to rest. The second purpose is to grant the employee a period of self-determined free time. The second purpose in particular differs from sick leave. Sick leave is granted to the employee to enable him to recover from an illness that has caused him to be unable to work (§19).
2. Because of the purpose of paid leave it is not possible to restrict the employees' right to it, even if it coincides with incapacity to work. Consequently, a worker who is sick (or becomes sick) during pre-booked paid annual leave remains entitled to his paid annual leave at a date following his recovery. The point at which the employee became unfit to work is irrelevant. If the claim to paid leave were only to be granted if the employee becomes unfit for work at the beginning of his paid leave the purpose of paid leave could not be achieved (§ 20-22).

Ruling
Article 7(1) of Directive 2003/88 [...] must be interpreted as precluding national provisions by which a worker who becomes unfit for work during a period of paid annual leave is not entitled subsequently to the paid annual leave which coincided with the period of unfitness for work.

ECJ 28 June 2012, case *C-172/11* *(Georges Erny - v - Daimler AG - Werk Worth)* ("**Erny**"), German case (NATIONALITY DISCRIMINATION)

Facts
Mr Erny was a Frenchman living in France. He was employed by the German company Daimler and worked just across the border in Germany. Daimler deducted German social insurance contributions from his gross salary but no German income tax (tax on wages) because, pursuant to the relevant convention for the avoidance of double taxation, his income, minus the German social insurance deduction, was subject to French income tax. As the income tax rate in France was lower than that in Germany, his net salary was higher than that of a comparable worker living in Germany. In 2007, Mr Erny made use of an arrangement that Daimler offered to its older workers, under which a worker aged 55 or over can elect to work part-time and to receive, on top of his pro-rated salary, a top-up that brought his net salary up to 85% of his last-earned net salary. Such a top-up is subsidised by the German state and is not taxed under German tax law. The 85% net is calculated - briefly stated - by taking the employee's gross salary and deducting from it either (i) German income tax using certain assumptions or (ii), in the case of workers not subject to German income tax, by deducting notional German income tax, i.e. the tax that would have been deducted had the employee lived in Germany. Mr Erny objected to this method of calculating 85%, which disadvantaged him in two respects. Because (i) German income tax is higher than French income tax and (ii) the top-up was taxed in France, the top-up was less than it would have been had he lived in Germany.

Mr Erny brought proceedings in a German labour court, claiming a higher top-up. The court noted that cross-border workers who are liable to tax in France receive an amount that is appreciably less than 85% of the net income that they received before they began part-time work for older employees, whereas workers who are liable to tax in Germany receive an amount which corresponds, at a flat rate, to 85% of their previous net income. That situation is due mainly to the fact that the German tax rates are higher than the tax rates in France and

that persons in Mr Erny's position also have to pay tax on the top-up amount in France. The court wanted to know whether such a situation is compatible with Article 45(2) TFEU, which prohibits discrimination based on nationality, and Article 7(4) of Regulation *1612/68* (now Regulation *492/2011),* which declares void any clause of a collective or individual agreement concerning employment that authorises discrimination on the basis of nationality.

ECJ's findings

1. The ECJ begins by rejecting Daimler's argument that what the referring court is seeking is essentially an interpretation of German, not EU law (§ 28-33).
2. A top-up such as that at issue comes within the scope of Article 45 TFEU and Article 7 of Regulation 1612/68. A cross-border worker in Mr Erny's position may rely on those provisions (§ 38).
3. The ECJ has consistently held that those provisions prohibit not only overt discrimination but also covert (= indirect) discrimination (§ 39).
4. The principle of non-discrimination requires not only that comparable situations must not be treated differently but also that different situations must not be treated in the same way (see, *inter alia,* the ECJ's judgment in *Merida,* case *C-400102)* (§ 40).
5. Taking account, notionally, of the German tax on wages has a detrimental effect on the situation of cross-border workers, insofar as the deduction of that tax places persons like Mr Erny at a disadvantage as compared to workers who live in Germany. In circumstances such as those of Mr Erny there is indirect discrimination on the basis of nationality (§ 41-46).
6. Daimler justifies this indirect discrimination by highlighting the administrative difficulties which would stem from the application of different methods of calculation depending on the employer's place of residence and the financial consequences of not taking the German tax on wages into account. The ECJ rejects this attempt at justifying the discrimination (§ 47-50).
7. The same goes for Daimler's argument that the social partners should enjoy autonomy in developing working conditions (§ 49-50).
8. The ECJ also rejects Daimler's defence that Mr Erny could have elected not to make use of the part-time top-up facility by continuing to work full-time (§ 51-52).

Ruling

Article 45 TFEU and Article 7(4) of Regulation (EEC) No *1612/68* [...] preclude clauses in collective and individual agreements under which a top-up amount such as that at issue in the main proceedings, which is paid by an employer under a scheme of part-time working for older employees in preparation for retirement, must be calculated in such a way that the tax on wages payable in the Member State of employment is notionally deducted when the basis for the calculation of that top-up amount is being established, even though, under a tax convention for the avoidance of double taxation, the pay, salaries and similar remuneration paid to workers who do not reside in the Member State of employment are taxable in their Member State of residence. In accordance with Article 7(4) of Regulation No 1612/68, such clauses are void. Article 45 TFEU and the provisions of Regulation No 1612/68 leave the Member States or the social partners free to choose between the different solutions suitable for achieving the objective of those respective provisions.

OPINIONS

Opinion of Advocate-General Mengozzi of 22 March 2012, case C-583/10 (*Christine Nolan - v - The United States of America*), UK case (COLLECTIVE REDUNDANCIES, INFORMATION AND CONSULTATION)

Facts

Christine Nolan was one of about 200 civilian employees of the US government who worked on the "RSA Hythe" US Army base near Southampton, UK. On or before 13 March 2006, the Secretary of the US Army decided to close down the base at the end of September 2006. On 21 April 2006 the decision was reported in the media and three days later the commanding officer of the base called a meeting of the workforce in order to explain the decision to close the base and to apologise for the way in which the news about the closure had been made public. On 9 May 2006 the UK government was formally notified of the closure. On 5 June 2006 the US authorities gave the representatives of the civilian workforce at the military base a memorandum stating that all civilian personnel would be made redundant. On 14 Jun 2006 the US authorities met with the representatives of the civilian personnel, who were informed that the US government considered 5 June 2006 as the starting date for the consultations provided in The Trade Union and Labour Relations (Consolidation) Act 1992, which transposed the Collective Redundancies Directive 98/59. On 30 June 2006 dismissal notices were issued specifying termination of employment on 30 September 2006.

Ms Nolan, who was one of the personnel representatives, brought liability proceedings against the US government, arguing that the US government had neglected to consult the workers' representatives in good time. The Employment Tribunal upheld Ms Nolan's claim. The Employment Appeal Tribunal dismissed the appeal brought by the US government, which then appealed to the Court of Appeal.

National proceedings

The US government, although not claiming state immunity, argued that there was an implied exemption from the consultation obligation for a sovereign foreign power carrying out an act such as the closure of a military base. While the case was ongoing, the ECJ delivered its September 2009 judgment in the *Akavan - v - Fujitsu* case (case C-44/08).

The Court of Appeal rejected the US government's argument in respect of an implied exemption, but it felt that *Akavan (a judgment which it described, diplomatically, as not being "straightforward", Editor's note)* raised certain issues regarding the interpretation of Directive 98/59. It therefore referred the following question to the ECJ for a preliminary ruling: Does the employer's obligation to consult about collective redundancies, pursuant to Directive 98/59/EC, arise (i) when the employer is proposing, but has not yet made, a strategic business or operational decision that will foreseeably or inevitably lead to collective redundancies; or (ii) only when that decision has actually been made and he is then proposing consequential redundancies?

Opinion

1. At the hearing before the ECJ, the Commission expressed doubt as to the applicability of Directive 98/59, given that Article 1(2)(b) excludes from the directive's scope workers employed by public administrative bodies or by establishments governed by public law. The Advocate-General, whilst understanding the general legal interest in identifying the scope of Article 1(2)(b), argues that there is no need to engage in that debate, given that the UK made use of its right to introduce laws that are more favourable to workers than the Directive and given that the referring court did not take

the view that the circumstances of civilian employees of a foreign military base in the UK could be cast outside the ambit of the Trade Union and Labour Relations (Consolidated) Act 1992. Accordingly, the Advocate-General proposes that the ECJ replies to the question referred despite the complication in respect of state immunity or implied exemption (§ 13-30).

2. The Advocate-General rejects Ms Nolan's position that the employer's obligation to consult with staff representatives arises as soon as the employer is planning to make a strategic or operational decision which, foreseeably or inevitably, will lead to collective redundancies. Instead, the Advocate-General supports the Commission's position that this obligation does not arise until a later stage, namely when a strategic or commercial decision has been taken which compels the employer to contemplate or plan collective redundancies. He bases this position on the following arguments (§ 31).
3. The Directive provides that the consultations with the workers' representatives are to cover ways and means of (i) avoiding collective redundancies or reducing the number of workers affected and (ii) mitigating the consequences through accompanying social measures designed, *inter alia*, to facilitate the redeployment or retraining of workers who have been made redundant. The employer's obligation under the Directive must therefore arise at a time when there is still a possibility of preserving the effectiveness of the consultations. Accordingly, consultations must not be launched too late, for example after the decision to terminate the employment contracts has already been taken. As the ECJ observed in § 4 of *Akavan*, the obligation to consult arises where the employer is contemplating, or is drawing up a plan for, collective redundancies (§ 32-36).
4. However, as the ECJ also observed in *Akaran*, the obligation to consult should not be triggered prematurely. The rationale for, and the effectiveness of, the consultations presuppose that the factors to be taken into account in the course of those consultations have already been determined. That cannot be done if those factors are not yet known (§ 37-39).
5. When a decision is taken at a higher organisational level, the obligation to consult arises when a strategic or commercial decision is taken which compels the employer to contemplate or plan for collective redundancies. This raises the question of which entity in this particular case must be regarded as the "employer" on whom the obligation to consult rests: the commanding officer of the military base, the US Army's European headquarters in Germany, which sent the redundancy notices or, less likely, the Secretary of the US Army (§ 40-46).
6. It is for the referring court to determine whether the employer - whoever that was - made a strategic decision compelling it to contemplate or to plan for collective redundancies. The method to be used by the referring court should be to identify which of the events that occurred before 5 June 2006 was in the nature of a strategic decision and exerted compelling force on the employer for the purposes of giving effect to the consultation obligation, and to identify the date on which that decision was made (§ 47-50).
7. The above means that, on the facts, neither of the two alternatives contemplated in the question referred is to be preferred. The consultations would have been premature if, as suggested in alternative (i), the employer should have initiated them even though no "strategic or operational decision" had been taken. In other words, what it is important to know is whether, when such a decision is made, it compels the employer to contemplate collective redundancies or not. On the other hand, the consultations would have been initiated late if the strategic decision had been made without leaving the employer any time in which to contemplate collective redundancies, whereas - as appears from the chronology of the events giving rise to the main proceedings, as set out in the order for reference - the consultations were deferred for a number of weeks after the decision had been made.

Proposed reply

Directive 98/59/EC must be interpreted as meaning that an employer's obligation to conduct consultations with the workers' representatives arises when a strategic or commercial decision which compels him to contemplate or to plan for collective redundancies is made by a body or entity which controls the employer.

It is for the referring court to identify, in the light of the facts of the main proceedings, which of the events mentioned in the order for reference which occurred before the date when the consultations with the workers' representatives of the establishment in question actually started was in the nature of a strategic decision and exerted compelling force on the employer for the purposes of giving effect to the consultation obligation - and the date on which that decision was made.

PENDING CASES

Case C-128/12 (*Sindicato dos Bancários do Norte et al - v - Banco Português de Negócias*), reference lodged by the Portuguese *Tribunal do Trabalho do Porto* (HUMAN RIGHTS)

1. Must the principle of equal treatment, from which the prohibition of discrimination derives, be interpreted as being applicable to public sector employees?
2. Is the salary cut made by the State, by means of the Lei do Orçamento de Estado para 2011, applicable only to persons employed in the public sector or by a public undertaking, contrary to the principle of prohibition of discrimination, in that it discriminates on the basis of the public nature of the employment relationship?
3. Must the right to working conditions that respect dignity, laid down in Article 31(1) of the Charter of Fundamental Rights of the European Union, be interpreted as meaning that it is unlawful to make salary cuts without the employee's consent, if the contract of employment is not first altered to that effect?
4. Must the right to working conditions that respect dignity, laid down in Article 31(1) of the Charter of Fundamental Rights of the European Union, be interpreted as meaning that employees have the right to fair remuneration which ensures that they and their families can enjoy a satisfactory standard of living?
5. As a salary cut is not the only possible measure and is not necessary and fundamental to the efforts to consolidate public finances in a serious economic and financial crisis in the country, is it contrary to the right laid down in Article 31(1) of the Charter of Fundamental Rights of the European Union to put at risk the standard of living and the financial commitments of employees and their families by means of such a reduction?
6. Is such a salary cut by the Portuguese State contrary to the right to working conditions that respect dignity, in that it was unforeseeable and unexpected by the employees?

Case C-134/12 (*Corpul Naţional al Poliţiştilor - v - Ministerul administraţiei şi Internelor*), reference lodged by the Romanian *Curtea de Apel Constanţa* (HUMAN RIGHTS)

Must the provisions of Articles 17(1), 20 and 21(1) of the Charter of Fundamental Rights of the European Union be interpreted as

precluding reductions in remuneration such as those imposed by the Romanian State under Law No 118/2010 and Law No 285/2010?

Must the provisions of Article 15(3) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, whereby the Romanian Government was required to inform the Secretary General of the Council of Europe of its intention to adopt measures to reduce remuneration and to specify the time-limit laid down for implementing them, be interpreted as rendering invalid Law No 118/2010 and Law No 285/2010?

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

Is a national rule which provides that different treatment on the grounds of age may be lawful if, in the framework of an occupational social security scheme, the management and the works council have excluded from social plan benefits employees who are financially secure because they may be entitled to a pension after drawing unemployment benefits, contrary to the prohibition of discrimination on the grounds of age and/or disability?
Is a rule of an occupational social security scheme which provides that an alternative, less generous calculation will be made to compensate employees made redundant on operational grounds who are over 54, lawful?

Case C-176/12 (*Association de mediation sociale - v - CGT* and *Hichem Laboubi*), reference lodged by the French *Cour de cassation* on 16 April 2012 (INFORMATION AND CONSULTATION)

May the fundamental right of workers to information and consultation, recognised by Article 27 of the Charter of Fundamental Rights of the European Union, and as specified in the provisions of Directive 2002/14/EC, be invoked in a dispute between private individuals in order to assess the compliance of a national measure implementing the directive?

If so, may those same provisions be interpreted as precluding a national legislative provision which excludes from the calculation of staff numbers in the undertaking, in particular to determine the legal thresholds for putting into place bodies representing staff, workers with the following contracts: apprenticeships, *contrats initiative-emploi, contrats d'accompagnement dans l'emploi* and *contrats de professionnalisation*?

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

1. a. Is any person who, because of physical, mental or psychological injuries, cannot, or can only to a limited extent, carry out his work in a period that satisfies the requirement as to duration specified in *Navas* (ECJ, case 13/05), covered by the concept of disability within the meaning Directive 2000/78?
   b. Can a condition caused by a medically diagnosed incurable illness be covered by the concept of disability within the meaning of the directive?
   c. Can a condition caused by a medically diagnosed temporary illness be covered by the concept of disability within the meaning of the directive?
2. Should a permanent reduction in functional capacity which does not entail a need for special aids or the like but means only that the person concerned is not capable of working full-time be regarded as a disability in the sense in which that term is used in Directive 2000/78?
3. Is a reduction in working hours among the measures covered by Article 5 of Directive 2000/78?
4. Does Directive 2000/78 preclude the application of a provision of national law under which an employer is entitled to dismiss an employee with a shortened notice period if the employee has received his salary during a certain period of illness, in the case of an employee who must be regarded as disabled within the meaning of the directive, where (a) the absence was caused by the disability or (b) the absence was due to the fact that the employer did not implement the measures appropriate in the situation to enable a person with a disability to perform his work?

Case C-44/12 (*Andrius Kulikauskas - v - Macduff Shellfish Ltd*), reference lodged by the Scottish Court of Session on 30 January 2012 (SEX DISCRIMINATION)

With reference to the Recast Directive (2006/54), is it unlawful discrimination to treat a person ('A') less favourably on the grounds of a woman's ('B's') pregnancy?
With reference to the Recast Directive (2006/54/EC), is it unlawful discrimination to treat a person ('A') less favourably on the grounds of the pregnancy of a woman ('B') who is (i) his partner, or (ii) otherwise associated with him?

Case C-45/12 (*O.N.A.F.T.S. - v - Radia Hadj Ahmed*), reference lodged by the Belgian *Cour du travail de Bruxelles* on 30 January 2012 (FREE MOVEMENT, SOCIAL INSURANCE)

This reference concerns an Algerian woman, living legally in Belgium, with two young children: a child with Algerian nationality and a child with French nationality, both having fathers with whom she no longer lives. Is this Algerian mother a "family member" of the French father within the meaning of Regulation 1408/71 for the purpose of being eligible to family benefits on behalf of the Algerian child? If not, is she (or her Algerian child) entitled to the same legal treatment as Belgian nationals for the duration of her legal residence in Belgium pursuant to (i) Directive 2004/38 on the right of EU citizens and their family members to move and reside freely within the EU in conjunction with Article 12 EC (now Article 18 TFEU), which prohibits discrimination on grounds of nationality, or (ii) Articles 20 and 21 of the EU Charter of Fundamental Rights, with the result that Belgium is precluded from imposing on her a length-of-residence requirement for the grant of guaranteed family benefits when that condition is not imposed on Belgian beneficiaries?

Case C-64/12 (*Schlecker - v - Boedeker*), reference lodged by the Dutch *Hoge Raad* on 8 February 2012 (FREE MOVEMENT, SOCIAL INSURANCE)

Should Article 6(2) of the Rome Convention on the law applicable to contractual obligations be interpreted in such a way that, if an employee carries out the work in performance of the contract not only habitually but also for a lengthy period and without interruption in the same country, the law of that country should be applied in all cases, even if all other circumstances point to a close connection between the employment contract and another country?

Does an affirmative answer to Question 1 require that the employer and the employee intended or at least were aware of the fact that work would be carried out over a long period and without interruption in the same country when concluding the contract of employment, or at least at the commencement of the work?

Case C-81/12 (*Asociaţia - v - Consiliul Naţional pentru Combaterea Discriminări*), reference lodged by the Romanian *Curtea de Apel Bucureşti* on 14 February 2012 (SEXUAL PREFERENCE DISCRIMINATION)

This reference concerns a homophobic statement, widely published in the media, by the manager of a football club. The referring court wishes to know (i) to what extent such a statement may be regarded as *"facts from which it may be presumed that there has been direct or indirect discrimination"*, (ii) to what extent there would be a *probatio diabolica* if the football club were to bear the burden of proof that there has been no breach in the principle of equal treatment and (iii) whether the impossibility under Romanian law of imposing a fine in cases of discrimination after six months from the date of the relevant fact, is compatible with Directive 2000/78, given that sanctions, in the case of discrimination, must be effective, proportionate and dissuasive.

Case C-147/12 (Östergötlands *Fastigheter AB - v - Frank Koot* and *Evergreen Investments B.V.*), reference lodged by the Swedish *Hovrätten för Nedre Norrland* on 26 March 2012 (FORUM)

Are Articles 5(1) and 5(3) of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters to be interpreted in such a way that they constitute a comprehensive derogation from the main rule of Article 2 in compensation disputes?

Is the term "matters relating to tort, delict or quasi-delict" in Article 5(3) of the Regulation to be interpreted in such a way that the provision covers the action of a creditor against a director or the owner of a company if the action seeks to hold the director or owner, respectively, liable for the company's debts where the director has failed to make formal arrangement to monitor the company's financial situation and instead has continued to operate the company and has burdened it with further debts and where the owner continues to conduct business despite it being undercapitalised, so forcing the company to go out of business?

If so, is any harm arising deemed to have occurred in the Netherlands or in Sweden, if the director or owner is domiciled in the Netherlands and the breaches of the board's obligations relate to a Swedish company?

If Article 5(1) or 5(3) of the Regulation are applicable in any of the situations described, is it of any relevance to the application of those articles if a claim has been transferred from the original creditor to another person?

ECtHR COURT WATCH

SUMMARY BY PETER VAS NUNES (EDITOR) AND PAUL DIAMOND (BARRISTER, UK)

ECtHR 27 March 2012, Application 20041/10 (*Eternit - v - France*) ("**Eternit**"), French case (FAIR TRIAL VS. PRIVACY)

Facts

P was employed by the French firm Eternit from 1951 to 1990. Eternit was a manufacturer of building materials containing asbestos. In 2005 P contracted lung cancer. He died the next year. In November 2005 he applied for insurance benefits from the *caisse primaire d'assurance maladie*, a social insurance organisation with which Eternit was affiliated by law ("CPAM"). In February 2006 this organisation, having received information on the working conditions at Eternit in the relevant period, determined that P's lung cancer had been caused by his work for Eternit. This led to an increase in the level of Eternit's social insurance contributions. Eternit asked for, but was denied, medical information regarding P's disease. Eternit appealed against this decision. It won the case in first instance, but lost on appeal and again before the Supreme Court (*cour de cassation*).

Eternit lodged an application with the ECtHR, complaining that it had not had access to the medical evidence on which the diagnosis of its former employee's occupational disease had been based, and had thus - in violation of Article 6(1) of the ECHR (fair trial principle) - been deprived of any possibility of effectively challenging the decision that the disease was occupation-related.

ECtHR's decision

The ECtHR considered first of all that Article 6(1) of the Convention is applicable where an employer challenges the CPAM's decision that a disease is occupation-related, because the relationship between an employer and the CPAM is comparable in many respects to that between an insured party and its insurer (§ 32).

Regarding the right to an adversarial procedure, the Court pointed out that in previous judgments (*Augusto,* appl. 71665/01 and *Mantovanelli*, Rep 1997-II fasc. 32) it had found that an expert medical opinion, insofar as it pertains to a technical field that is outside the judges' field of knowledge, is likely to have a preponderant influence on the assessment of the facts by the courts, and is an essential part of the evidence on which the parties to the dispute should be allowed to comment (§ 33).

However, the special nature of the dispute between the employer and CPAM over the occupational character of the disease led the Court in those previous cases to express reservations regarding the principle of adversarial discussion by the parties of an employee's medical records (§ 34-35).

The ECtHR reiterated that a balance has to be struck between the employer's right to an adversarial procedure on the one hand, and the employee's right to medical confidentiality on the other. Such a balance is struck, in the Court's opinion, where the employer can ask the court to appoint an independent medical expert to review the employee's medical records and draw up a report - respecting the confidentiality of the medical records - to guide the court and the parties (§ 37).

The ECtHR emphasised that the fact that an expert report is not commissioned every time an employer requests one, but only when the court considers it has insufficient information, meets the requirements of a fair trial under Article 6(1) of the Convention. It was not the Court's role to say whether an expert opinion should have been sought in the present case, but rather to determine whether the proceedings as a whole, including the presentation of the evidence, had been fair. In that regard the Court found that the CPAM had reached its decision based solely on the opinion of its consulting doctor. That doctor, however, was not under the direct authority of the CPAM but under that of the National Health Insurance Fund for Salaried Employees. As the administrative services of the CPAM had not had access to the medical records requested by Eternit either, the Court considered that the CPAM had not been given a substantial advantage over Eternit in the proceedings. It accordingly concluded that the principle of equality of arms had been respected in this case (§ 39-41).

The Court held that the complaint lodged by Eternit, alleging a violation of Article 6(1) of the Convention, was ill-founded and should be declared inadmissible.

Commentary

An employee calls in sick. He claims and is awarded sickness benefits under a compulsory insurance scheme to which the employer contributes (with or without an employee contribution). The amount of the employer's contribution depends, wholly or partially, on the number of its employees who have in the recent past claimed under the insurance scheme. Therefore it is in the employer's interest to assure that sickness benefits are only awarded to those employees (or former employees) who are truly sick or disabled.

A system along these lines exists in many European countries. In all of those countries there is an inherent tension between, on the one hand, the right to a fair trial on the basis of equality of arms as provided in Article 6 of the ECHR (in this case, the employer's right to know all the facts of the matter, including whether the employee really was/is sick) and, on the other hand, the right to private life including, in particular, the confidentiality of one's medical records (in this case, the employee's right to keep his medical file from being reviewed by his employer).

This tension is of such a fundamental nature that one might have expected the ECtHR to deliver a judgment on the merits of the case rather than merely on its admissibility, even more so, given that this was a majority decision, not a unanimous one.

In this case, by the time the (former) employer requested the insurance organisation to see the (former) employee's medical records (to ascertain whether the latter's illness - lung cancer - was truly asbestos-related, as the insurer claimed), the employee had died. Is the right to medical confidentiality equally strong after the patient has died? The ECtHR replied in the affirmative. It went on to find that the employee's right to confidentiality is stronger than the employer's right to a fair trial, even though the medical report around which this dispute turned had not been drawn up in the context of a medical examination of the patient but in the context of liability apportionment. The ECtHR does not seem to have addressed the rationale behind the confidentiality of employees' medical records, which is not only to do with privacy but also the concern that if the employee knows that his employer may, under certain circumstances, review those records, he may not consult the doctor and be honest about his medical condition. This element of the rationale is less pronounced in a situation such as that at issue in this case.

Dutch law has attempted to solve the dilemma of "fair trial vs. medical confidentiality" by providing in social insurance law (Article 105 WIA) that the employee may give the employer permission to inspect (the relevant part of) his medical file and that, if the employee withholds such permission, the employer has the right to appoint a doctor and/or a lawyer (member of the bar) to inspect that file with a view to reporting back to the employer - not with any medical information but, with their opinion on the fairness of the decision at issue.

ECtHR 22 June 2011 appl. 577/11 (*Het Financieele Dagblad B.V. - v - The Netherlands*)

Facts

Dutch law provides that "employers" may not "employ" non-EU nationals, even if they reside legally in The Netherlands, in the absence of a work permit. The relevant statute defines "employer" as "the person who [....] has someone else perform work". This case revolves around the concept of "employer". It concerned a newspaper publisher, Het Financieele Dagblad B.V. ("HFD") which had its newspapers distributed to its customers in the following manner. HFD contracted out the distribution process to a company called Telegraaf Media Groep N.V. ("Telegraaf"). Telegraaf contracted out the physical distribution to a subsidiary company called DistriQ B.V. ("DistriQ"). DistriQ transported the newspapers every day to a number of independent depot managers. They had individuals ("deliverymen") deliver the newspaper to the customers' addresses. Thus, the distribution chain was:

HFD
I
Telegraaf
I
DistriQ
I
depot managers
I
deliverymen

In the course of April-June 2005 government inspectors discovered that 39 of the deliverymen were non-EU nationals and that none of the companies in the distribution chain had a permit allowing them to employ those 39 individuals. HFD was fined 39 x € 8,000 = € 312,000. It appealed the decision to impose this fine, arguing, *inter alia*, that it was not the "employer" of the 39 "illegal" aliens.

National proceedings

Having lost its appeal all the way to the highest administrative court, HFD lodged an appeal with the ECtHR. One of its complaints was that The Netherlands, by imposing said fine, had violated Article 7 of the Convention: "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed [...]". HFD argued, in essence, that, by interpreting "employer" so broadly as to include all links in the distribution chain, however remote from the persons actually performing the work, the Dutch courts had in effect found HFD guilty of committing an offence that was not clearly defined in law.

Another complaint by HFD was that, by imposing said fine, The Netherlands had violated Article 1 of Protocol No. 1 to the Convention, which provides that everybody is entitled to "the peaceful enjoyment of his possessions", which means that there must be a "fair balance" between the public interest (in this case, to control the access of foreign nationals to the Dutch labour market) and the protection of fundamental rights (in this case, the right not be fined out of proportion to the gravity of the relevant offence).

ECtHR's ruling

The ECtHR refers to its judgments in *Kononov* (appl. 36376/04) and *Van Anraat* (appl. 65389/09), in which it had ruled *"[...] that an offence must be clearly defined in law. This requirement is satisfied where the individual can know from the wording of the relevant provision - and, if need be, with the assistance of the courts' interpretation of it and with informed legal advice - what acts and omissions will make him criminally liable. [...] When speaking of 'law', Article 7 alludes to the same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises written and unwritten law and which implies qualitative requirements, notably those of accessibility and foreseeability. As regards foreseeability in particular, the Court recalls that however clearly drafted a legal provision may be in any system of law including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Indeed, in certain Convention States, the progressive development of the criminal law through judicial law-making is a well-entrenched and necessary part of legal tradition. Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen. [...]"*

Applying this doctrine, the ECtHR finds that the broad interpretation of "employer" by the Dutch courts was not beyond what HFD could reasonably have expected would be the case.

As for the complaint regarding Article 1 of Protocol No. 1, the ECtHR held that *"[...] there must always be a reasonable relationship of proportionality between the means employed and the aim pursued. In determining whether this requirement is met, the Court recognises that the State enjoys a wide margin of appreciation with regard both to choosing the means of enforcement and to ascertaining whether the consequences of the measures taken are justified in the general interest for the purpose of achieving the object of the interference in question. The requisite balance will not be achieved if the person concerned has had to bear an individual and excessive burden. [...] An issue under Article 1 of Protocol No. 1 may arise if an administrative fine is plainly out of all reasonable proportion in light of the competing interests [...] As it is, the Court cannot find that such is the case. In arriving at this conclusion the court takes into account the Government's stated object of countering unfair business practices and infringement of the rights of workers [...], for which purposes, among others, it is legitimate to control access of foreign nationals to the domestic labour market [...]. Furthermore, although in this instance the fines are high, it has not been stated that they pose an insuperable problem to the applicant company."*

It follows that the complaints regarding Articles 7 and 10 of the Convention are manifestly ill-founded and must be rejected as inadmissible.

Commentary

Article 7 of the Convention has been given a wide construction by the Court relating to the clarity of the law in the criminal jurisdiction. *In Kokkinakis v Greece* (1993), the European Court whilst finding that the Greek anti- proselytism law (section 4 of Law No. 1363/1938) did not

breach Article 7 went on (interestingly) to hold that Article 7 is not confined to prohibiting the retroactive application of the criminal law, but also includes the fact that an offence must be clearly defined in law according to the principle of *nullum crimen, nulla poena sine lege*.

The Court held that this condition is only satisfied: "*where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the Courts' interpretation of it, what acts and omissions will make him liable"*.

Accordingly, for a provision of the criminal law to be compatible with Article 7, it must be sufficiently precise and clear; this principle comes very close to the need for the *quality of the law* to satisfy Article 6 (*Sunday Times - v - United Kingdom (1979)*).

Under Article 6, it is recognised that any restriction on a fundamental right must be "*prescribed by law*", which has been held to mean statute, regulation and case law (including international law in monist legal systems).

The law must be of a quality that makes it accessible and foreseeable in its operation. This test is satisfied by the requirement that the law must clearly and precisely define the offence or limitation on a Convention Right. This limitation permits of incremental development of the law in common law countries (*SW – v - United Kingdom (1995)*), provided the law is not capable of arbitrariness (*Hentrich – v - France (1994)*). In short, the law must be formulated with sufficient precision to enable an individual to regulate and modify his conduct so as to avoid criminal sanction - if necessary with legal advice: *Hashman and Harrup – v - United Kingdom GC (1999)*.

The interpretation of "employ" by the Dutch administrative court to all persons working in the distribution chain raises not only an issue of foreseeability, but additionally of culpability under the criminal law. Such a wide application of Dutch law is analogous to an offence of strict liability. The *"presumption of innocence"* arguably requires that national courts and tribunals correctly identify the nature and quality of the "wrong-doing" by an individual and apportion "blame" proportionally.

In *Salabiaku – v – France (1994)*, the European Court held:

"[...] the Contracting State may, under certain conditions, penalise a simple or objective fact as such, irrespective of whether it results from criminal intent or from negligence."

This criterion of *"simple or objective fact"* does not appear to be applicable on the facts of this case.

In *Reference Re: Section 94(2) of the Motor Vehicle Act* [1986], the Canadian Supreme Court "struck down" the strict liability offence of driving whilst suspended. It was held that the courts must be able to inquire into the "proportionality" of the offence and the reason for the breach of the law. The Canadian Supreme Court held that culpabilility is a fundamental issue and that the law-maker had exceeded its powers by making the offence one of strict liability.

Finally, the definition of employment was considered by the European Court of Justice in *Case C-188/00, Bülent Kurz, né Yüce – v - Land Baden-Württemberg* at paragraph [32]:-

"The essential feature of an employment relationship is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration."

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2010/74 (AT)	employer can invoke vertical direct effect

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2009/41 (GE)	BAG follows *Klarenberg*
2009/42 (UK)	EAT clarifies "service provision change" concept
2010/1 (FR)	Supreme Court drops "autonomy" requirement
2010/4 (SP)	Supreme Court follows *Abler*, applying assets/staff mix
2010/5 (LU)	court applies *Abler* despite changes in catering system
2010/6 (IT)	Supreme Court disapplies national law
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2009/3 (NL)	move from NL to BE is transfer
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7 June 2012, C-132/11 (*Tyroler Luftfahrt*): Directive 2000/78 allows level of pay to be based on experience gained in the service of current employer to the exclusion of similar experience gained in group company.

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).

19 April 2012, C-415/10 (*Meister*): Directives 2000/43 (race), 2000/78 and 2006/54 do not entitle rejected job applicant to information on successful applicant.

28 June 2012, C-172/11 (*Erny*) re differential tax treatment of pre-retirement benefits.

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.

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.

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

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?

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.

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.

3 May 2012, C-337/10 (*Neidel*): national law may not restrict a carry-over period to 9 months. Directive 2003/88 does not apply to above-statutory entitlements.

21 June 2012, C-78/11 (*ANGED*): worker who becomes unfit for work during leave entitled to leave in lieu.

9. Health and safety, working time

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

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

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

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

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

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

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

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

10. Free movement, social insurance

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

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

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

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

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

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

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

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

14 October 2010, C-345/09 (*Van Delft*) 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.

20 October 2011, C-225/10 (*Perez*) re Articles 77 and 78 of Regulation 1408/71 (pension and family allowances for disabled children)

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

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

11. Parental leave

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

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

12. Collective redundancies, insolvency

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

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

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

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

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

13. Appliable law, forum

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

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

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

LEGAL WOMEN 2012

2 oktober 2012 | Hotel Houten, Houten

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- Anja van Bergen-van Kruijsbergen *(GC Nutreco)*
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