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EUROPEAN EMPLOYMENT LAW CASES

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2012 I **3**



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UK: illegal alien cannot claim

Austria: part-timers get overtime

Netherlands: disability entitles to telework

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2012/30

Supreme Court interprets Dutch law on transfer of public transport concessions (NL)

CONTRIBUTOR: PETER VAS NUNES*

Summary

The Dutch legislator has attempted to combine the economic advantage of opening up the public transportation sector (mainly bus companies) to competition with statutory provisions aimed at protecting employees in that sector against the effects of that competition. The result is a law, enacted in the year 2000 ("WP 2000"), that deals, *inter alia*, with the personnel consequences where a transportation company loses a concession to a competitor. Such a change of concession holder qualifies as a transfer of undertaking, even if it is not a transfer within the meaning of Directive 2001/23. The law also addresses the thorny issue of which "indirect" employees cross over to the new concession-holder. Unfortunately, the law is so vague on this issue that the courts have had to interpret it in numerous disputes. Recently, the Supreme Court was called on to interpret one of the many unclear aspects of the law.

Facts

Veolia is a bus company. It had been awarded a concession until December 2010 to operate the bus lines in an area of The Netherlands known as Veluwe, on an exclusive basis. On 1 July 2010 it was announced that Veolia had lost its bid for a new concession and that therefore, as from December 2010, a competitor named Syntus would take over the bus lines in the Veluwe area. This meant that WP 2000 would apply.

WP 2000 was enacted for two reasons. First, the transfer of a public transport concession need not always qualify as a transfer of undertaking, as evidenced by the ECJ's rulings in *Oy Liikenne* (C-172/99). The government wished all such concession transfers to entail the transfer of the relevant employees to the new concession holder, for a number of reasons, one of which was a concern that opening up the public transport sector to competition would put pressure on wage levels. The second reason for legislating WP 2000 is that, even where a change of concession holder does qualify as a transfer of undertaking, it is not always clear which employees go across to the transferee and which do not.

WP 2000 provides that "direct" employees who are involved in the physical transportation of passengers (e.g. bus drivers, ticket collectors, ticket vendors and other workers whose work is directly related to the bus lines being transferred) go across to the transferee and that the following rules apply to "indirect" staff, such as maintenance mechanics and administrative staff. The main rule is that the number of the transferor's indirect workers who go across to the transferee should correspond to the revenue lost as a percentage of the transferee's total revenue. For example, if the transferor has 30 indirect workers who perform work for a total of 10 concession areas, each with exactly the same annual revenue, and one of those areas is transferred to a competitor, then that competitor takes over 1/10 of 30 = 3 of the indirect employees. The law distinguishes between indirect employees who are and who are not "attributable" to the transferred

concession. As far as possible, those who are attributable to the transferred concession cross over to the transferee. If, following this step, indirect employees remain to be transferred, those who are not attributable to the transferred concession, for example administrative staff at the transferor's head office, are selected using the same criteria as would be used if the transferor had applied for dismissal permits for the relevant number of employees. This is done according to the "mirror principle", which is essentially a seniority system. Using the previous example, if one of the three indirect employees is attributable to the transferred concession, then that leaves two employees to be selected for transfer. If there are 20 administrative staff, then the two with the lowest seniority go across to the transferee and the 18 others remain employees of the transferor.

WP 2000 provides that the transferor and the transferee must consult with one another and with the relevant unions regarding which employees will transfer to the transferee. Accordingly, Veolia drew up three lists of employees related to the Veluwe concession who were to transfer into the employment of Syntus:

- list A: direct employees
- list B: indirect employees attributable to the concession
- list C: non-attributable indirect employees

Veolia, Syntus and the unions were in agreement that the total number of indirect staff (B + C) going across to Syntus equaled 39.01 full time equivalents. List B had the names of 28 employees on it. On 12 November 2012, Veolia presented Syntus with list C, which had 11 names on it, including the five plaintiffs in this case, all of whom worked in Veolia's head office. They were informed that they would transfer to Syntus. This was not to their liking. They claimed that they should not have been placed on list C and demanded to remain in Veolia's employment. They applied for injunctive relief.

The court of first instance found in favour of the plaintiffs and ordered Veolia to retain the plaintiffs. On appeal, this judgment was reversed, whereupon the plaintiffs took their case to the Supreme Court.

Judgment

One of the plaintiffs' arguments was that it should not be left to the transferor's discretion to determine which indirect positions and which non-attributable indirect employees go across to the transferee. Rather, those positions most closely connected to the transferred bus lines should take precedence. For example, suppose there are four positions in the head office that could potentially be on list C, each with five employees: HR manager, account manager, canteen waiter and receptionist. If the HR managers are more closely involved in the business of transporting passengers in the Veluwe concession area than are the canteen waiters, the question is, should the transferor nevertheless have the right to nominate the position of canteen waiter as a list C position? This would potentially give employers the freedom to select staff they would like to get rid of - which the plaintiffs argued was not the legislator's intent. The Supreme Court did not accept this argument and upheld the Court of Appeal's judgment.

Commentary

The idea underlying the employment-related provisions in WP 2000 was, essentially, to protect employees in bus companies and certain other public transport companies against market forces, in particular by providing that, if their employer loses the concession to operate in a certain area, they do not lose their job but transfer along with the concession rights to the new concession holder. Initially, WP 2000 was a temporary law that would apply for a period of ten years (2000-2010)

during which the public transportation industry could adapt to the privatisation of the nineties. In 2009, however, Parliament decided to afford WP 2000 permanent status. This might seem to indicate that WP 2000 was a successful law, but in reality WP 2000 is a mixed blessing at best.

Given that the bus companies' largest single item of expense - and the one most easily manipulated - is staffing, WP 2000 seriously limits competition. Also, the notion that the cost of "indirect" staff (whatever this means) within a given concession area should be mathematically proportionate to the revenue derived from that area as a percentage of the company's total revenue, does not make economic sense. Companies do not work that way.

As if the above were not bad enough, it is debatable whether, on balance, WP 2000 really helps employees. Are they better off for being shunted to and fro every time a concession changes hands? Bus companies wishing to reduce staffing costs have many ways to achieve that aim, despite WP 2000. Worst of all, WP 2000 is so vaguely drafted that it has led to numerous disputes. The courts are having to come up with the guidance that Parliament has failed to provide.

As far as I am concerned, the jury is still out on whether WP 2000 is a success.

Subject: transfer of undertaking

Parties: *Anna in 't Groen et al. - v - Veolia Transport Brabant N.V. et al*

Court: *Hoge Raad* (Supreme Court)

Date: 8 June 2012

Case number: 11/02951

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2012/31

Transfer of undertaking despite cancellation of contract (AT)

CONTRIBUTOR HANS GEORG LAIMER AND MARTIN HUGER*

Summary

The sale of a business was annulled retroactively five years afterwards. What was the status of the employees in the meantime and following the annulment?

Facts

In 2005, the owner of a toy shop (the "Transferor") sold and transferred his business to the defendant (the "Transferee"). The transaction qualified as a transfer of undertaking within the meaning of the Act on the Adjustment of Labour Law (AVRAG), the Austrian transposition of the Acquired Rights Directive (currently Directive 2001/23).

At the time of the transfer, one of the plaintiffs in this case (Plaintiff 2)

was employed in the toy shop. As a result of the transfer, he became an employee of the Transferee. In 2007 the Transferee hired another employee (Plaintiff 1). The two plaintiffs were the only employees.

Meanwhile, the Transferee brought a claim against the Transferor, seeking to annul the sale of the toy shop on account of fraud (*Arglist*). In 2010, this claim resulted in a Supreme Court judgment annulling the sale *ex tunc*, i.e. with retroactive effect.

During all the time that the litigation between the Transferor and the Transferee was ongoing, the Transferee continued to operate the toy shop. He even continued to do so for a while after the Supreme Court's judgment. However, he did inform the plaintiffs that, given the retroactive cancellation of the sale of the toy shop, he was not their employer. Strangely, the Transferee continued for about eight months to receive the proceeds of the store, pay the bills, allow the plaintiffs to continue working, pay their monthly salaries, and so forth.

After this had gone on for about eight months, the Transferee informed the plaintiffs that he could not go on paying their salaries. He repeated that he was not their employer, adding that for that reason he was incapable of dismissing them or entering into termination agreements with them. He stopped paying them their salaries.

On 1 July 2010, the plaintiffs sent a letter, addressed to both the Transferee and the Transferor. They warned them that, unless their salary payments were resumed, they would give notice of immediate termination of their contracts for cause and claim both back pay and compensation for constructive dismissal (*Kündigungsschädigung*). As this letter failed to yield any payment, the plaintiffs carried out their threat, resigned and brought a claim before the court, against the Transferee only.

The court of first instance granted the plaintiffs' claim. It argued that for a transfer of business a change to the owner of the business (*Betriebsinhaber*) was essential. Furthermore, it reasoned that the Transferee held *de facto* control of the business ("*tatsächliche Verfügungsgewalt*"). Besides, no other transfer of business to another person took place. Thus, the Transferee was the owner of the business as well as their new employer. According to the court of first instance the plaintiffs were entitled to terminate the employment relationship by way of an immediate termination without notice for cause ("*berechtigter Austritt*"). Additionally, the plaintiffs could claim their outstanding salaries plus compensation for constructive dismissal against their employer (i.e. the Transferee).

The appellate court did not grant the Transferee's appeal and confirmed that a transfer of undertaking had occurred. This court reasoned that a transfer of the business had taken place, given that the Transferee held *de facto* leadership power ("*Leitungsmacht*") of the toy shop. Therefore, the retroactive cancellation of the sales contract did not hinder the transfer of business to the Transferee. Hence, the appellate court held that he was the new employer of the plaintiffs. A *de facto* retransfer to the Transferor did not occur.

Judgment

The Supreme Court held that, even though the sale of the store was annulled *ex tunc*, and therefore deemed not to have taken place, the plaintiffs had transferred into the defendant's employment pursuant to the doctrine of transfer of undertaking.

Thus, both plaintiffs were deemed to have been in the Transferee's employment for the entire period between the sale of the toy shop in 2005 and their resignations with effect from the end of June 2010. This was upheld even though the Austrian Supreme Court decided that the sales contract between the Transferor and Transferee should be annulled *ex tunc* in October 2009. The court held that during the entire period the Transferee acted in the capacity of an employer ("*Arbeitgeberfunktion*").

The court reasoned that, in order for an annulled transaction to qualify as a transfer of undertaking, three (cumulative) conditions must be met:

1. the Transferee actually took over the business;
2. he acted in the capacity of an employer (*Arbeitgeberfunktion*); and
3. he failed to return the business to the vendor after the sale agreement was cancelled.

Had the plaintiffs not resigned, they would have continued to be employed by the Transferee.

The Supreme Court reasoned that in such circumstances a contractual commitment between the former employer and the new employer is not required for a transfer of undertaking to have occurred. Accordingly, the Transferee's appeal was dismissed and he was ordered to pay the plaintiffs their salaries for the period from 1 June 2010 to 13 July 2010, as well as statutory compensation for constructive dismissal ("*Kündigungsschädigung*").

Commentary

This is the first decision by the Austrian Supreme Court in a case where a sales contract, which had led to a transfer of business, was annulled with retrospective effect. The decision deals with the question whether the *ex tunc* annulment of the sales contract also affected the transfer of undertaking.

The decision of the Supreme Court is based on the Austrian law implementing the Acquired Rights Directive. The Austrian provisions governing a transfer of business are laid down in the AVRAG, which reflects the general case law established by the ECJ.

The case law of the ECJ and also the Austrian Supreme Court takes into account the following factors to determine whether a transfer of undertaking has occurred:

- the existence of an economic entity, i.e. an entity with a definable economic purpose;
- the transfer of tangible assets;
- the transfer of intangible assets;
- the takeover of principal staff;
- the transfer of clientele;
- a level of similarity between activities conducted prior to and after the transfer; and
- the duration of interruption, if any, of these activities.

A situation will qualify as a transfer of business even if not all these requirements are met. An overall assessment must be carried out. Based on these principles, the Supreme Court ruled that for a transfer of undertaking only the factual circumstances need be considered. Thus, the transfer should be assessed notwithstanding any contractual relations. Since in the case at hand the Transferor did not reassume the position of employer after the sales contract was annulled *ex tunc*, the Supreme Court held that the Transferee retained its capacity as

employer. According to the Supreme Court a "second" transfer of undertaking would have been required in order for the Transferee to cease to be considered as the employer. However, as the Transferee continued acting as the employer even after the *ex tunc* annulment of the contract, no such "second" transfer occurred.

The Supreme Court's arguments are in line with the principles set out by the ECJ and in compliance with Austrian law. However, from an economic perspective the ruling touches upon a delicate question. Since the Supreme Court held that, for there to be a transfer of undertaking, only the factual circumstances and not the annulment of the sales contract are decisive, the transferee would need to arrange for a "second" transfer of undertaking in order to cease being the employer. However, the Supreme Court left open the question of whether the Transferee can do this without the purchaser's cooperation, since this was not at issue.

Further, the judgment also raises the question of whether the Transferee may claim the compensation for salary and constructive dismissal that it was obliged to pay to both plaintiffs from the Transferor. This question was also not considered in the ruling. Pursuant to general Austrian civil law principles, the Transferee may have a claim for damages against the Transferor based on the *ex tunc* cancellation of the contract, but the judgment does not provide a decision about this.

The ECJ has already ruled on a similar issue in case 287/86, *Ny Mølle Kro*. In that case, the legal transfer of a tavern was based on a lease to a new employer (the "Lessee"). After the *ex nunc* cancellation of the lease, the owner (the "Lessor") of the business became the new employer again by way of a transfer of undertaking. The Lessee ceased to be the employer and the owner reacquired that status.

The difference between *Ny Mølle Kro* and the Austrian Supreme Court ruling is that the contract in the ECJ ruling was cancelled *ex nunc* (with future effect) whereas the contract in the Austrian judgment was annulled *ex tunc* (with retroactive effect). However, in the case at hand this is irrelevant. While in *Ny Mølle Kro* the transferor effectively reassumed the position as employer, this was not the case here. Thus, although the two cases differ in their outcome, the legal assessment is similar.

In summary, in terms of whether, in case of an annulment of the sale of a business, the employment relationships retransfer, it seems a "second" transfer of undertaking is required under the rules implementing the ARD. If the three conditions set out by the Austrian court are fulfilled, no such "second" transfer takes place. Accordingly, the transferee remains the employer even if the contract has been cancelled.

Subject: transfer of undertaking

Parties: Felix E / Pia L - v - Heinrich M.

Court: *Oberster Gerichtshof* (Austrian Supreme Court)

Date: 22 August 2012

Case number: 9ObA144/11h

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2012/32

Employee working illegally could not bring a race discrimination claim

CONTRIBUTOR: GEMMA CHUBB*

Summary

An employee who knowingly worked illegally in the UK was prevented from pursuing a race discrimination claim against her employers by the doctrine of illegality.

Facts

Ms Houna, a Nigerian national, was employed by Mr and Mrs Allen as an *au pair* and housekeeper from 28 January 2007 until her dismissal on 17 July 2008.

She had been approached by relatives of the Allens in Nigeria and was promised lodgings, payment and the opportunity of education in return for providing childcare and doing housekeeping duties. In order to obtain a passport and visa to enable her to come to the UK and take up the offer of employment, Ms Houna gave a false name and pretended to be a member of the Allen family in an affidavit to the High Court of Nigeria. She also relied on a fake invitation from an imaginary grandmother requesting she visit her in the UK, which had been created by the Allens. Both Ms Houna and her employers knew that her employment was unlawful and both played a substantial role in her illegal entry into and residence in the UK.

Mrs Allen physically abused Ms Houna and did not pay her, eventually dismissing her and throwing her out of the house. Following her dismissal, Ms Houna brought tribunal claims against the Allens for unfair dismissal, breach of contract, unlawful deductions from wages and holiday pay, compensation for dismissal on racially discriminatory grounds (the "dismissal discrimination") and for racially discriminatory treatment during her employment (the "non-dismissal discrimination"). The Employment Tribunal found that Ms Houna's contract of employment was tainted with illegality as Ms Houna was, as she knew, not allowed to work in the UK. Therefore, her claims for unfair dismissal, breach of contract, unpaid wages and holiday were dismissed on public policy grounds.

However, the Tribunal decided that this did not affect her claim for dismissal discrimination. It found that, for the purposes of the Race Relations Act 1976 (now replaced by the Equality Act 2010), her dismissal was an act of unlawful race discrimination. Therefore, she was entitled to compensation for injury to feelings amounting to just over £6,000. Her non dismissal discrimination claim was dismissed because she had not raised a grievance before filing her claim.¹

Ms Houna and the Allens both appealed to the Employment Appeal Tribunal (the "EAT") against the Tribunal's holdings. Ms Houna appealed against the finding that the non-dismissal discrimination could not proceed. The Allens appealed against the finding on dismissal discrimination. The EAT upheld the Tribunal's decisions.

The Court of Appeal was then required to consider, amongst other issues, whether Ms Houna could bring a race discrimination claim, even though she had been working illegally.

Judgment

The Court of Appeal overturned the decisions of both the Employment Tribunal and the EAT and found that Ms Houna was prevented from bringing either of her discrimination claims by the doctrine of illegality. In a discrimination claim the focus is normally on the conduct of the discriminator. However, when arguing her case, Ms Houna went so far as to positively link the discriminatory treatment by the Allens with her own illegal conduct: i.e. she argued she was being discriminated against because the Allens were taking advantage of her vulnerability as an illegal immigrant, a status which she herself had participated in bringing about.

In reaching this decision, the Court of Appeal looked at the earlier decisions of the Court of Appeal in *Hall -v- Woolston Hall Leisure Limited* and *Vakante -v- Governing Body of Addey and Stanhope School (No. 2)*.

In *Hall* an employee was employed under a legal employment contract. However, the employee later discovered that her employer was falsifying her payslips in an attempt to defraud the tax authorities. She turned a blind eye to this behaviour. Because of this, the Tribunal held that her subsequent claim of sex discrimination (for being dismissed because she was pregnant) was tainted with illegality and that she was not entitled to enforce the contract and neither was she entitled to compensation under the Sex Discrimination Act 1975 for earnings lost by her discriminatory dismissal. The decision in relation to the discriminatory dismissal was overturned in the Court of Appeal. In doing so, the court set out the difference between the defence of illegality in a breach of contract claim and a discrimination claim. A party will not be able to enforce a contract if (a) the contract is entered into with the intention of performing an illegal act; (b) the contract is prohibited by statute; or (c) the contract, although lawful when made, is illegally performed and the claimant knowingly participated in the illegal performance. So, Ms Hall could not have brought a breach of contract claim because she knowingly participated in the illegal performance of her contract. However, the Court of Appeal said that for the illegality defence to be available in a claim in tort (such as discrimination which is a statutory tort), there must be a causal link between the illegality in which the claimant is implicated and the loss the claimant suffered. The tribunal in a discrimination claim must consider "*whether an applicant's claim arises out of or is so closely connected with or inextricably bound up or linked with the illegal conduct of the applicant that the court could not permit the applicant to recover compensation without appearing to condone that conduct*". It could not be said that the discrimination complaint was inextricably linked or bound up with the unlawful failure by the employer to deduct tax.

Therefore, *Hall* showed that the fact that an employee is barred by illegality from enforcing her employment contract will not automatically lead to her being barred from claiming compensation for a discriminatory dismissal. She will only be barred from bringing a claim of discrimination if the discrimination arises out of, or is so inextricably linked with, the employee's illegal conduct that the Tribunal could not allow the employee to recover compensation without appearing to condone that conduct. In practice, this meant that there needed to be "*quite extreme circumstances before the test will exclude a Tort claim*."

Vakante provided an example of such "*extreme circumstances*". In that case, an individual obtained employment by lying about his immigration status. He falsely told the employer that he did not need a work permit, whereas the Home Office had told him that he could not work in the UK without a permit. This rendered his employment contract illegal from the outset. He began his employment, was dismissed eight months later and brought a tribunal claim for race discrimination (including dismissal on racial grounds) and victimisation. The employer argued

that the claims were so inextricably linked to the claimant's illegal conduct that his claims should not succeed.

Mr Vakante was barred from pursuing a discrimination claim against his employer as the discrimination he complained of was inextricably linked with the illegal conduct. Had he been allowed to pursue his discrimination claim then it would appear as though his illegal conduct was being condoned. The duty not to discriminate arose from an employment relationship which was unlawful "from top to bottom".

The *Hall* case set out the relevant principles. Whilst in *Hall* the claimant had been a bystander to her employer's wrongdoing and in *Vakante* the employee had been entirely at fault and the employer innocent, in *Hounga -v- Allen*, both the employer and the employee were wrongdoers. However, the Court of Appeal decided that Hounga's claim was inextricably linked to the illegality for the following reasons:

1. Ms Hounga's contract was illegal in its inception because both parties knew she was not entitled to work in the UK;
2. The Tribunal's findings of fact showed that Ms Hounga's discrimination case was dependent on the particular vulnerability to which she was subject by reason of her illegal employment contract. Ms Hounga's own case was that the Allens treated her badly because she was an illegal immigrant and had no right to be employed here. Therefore, her case actually hinged on the fact that she was working illegally; and
3. The Tribunal had found that Ms Hounga knew what she was doing and knew it to be wrong and illegal.
Therefore, to allow Ms Hounga to rely upon her own illegal actions in support of her discrimination case would be to condone that illegality and this was something that the court could not do.

Commentary

The decision makes it clear that the cases of *Hall* and *Vakante* remain good law. The key question remains whether, and to what extent, the discrimination claim is inextricably linked to the illegality. The emphasis is on the employee's involvement in the illegality; the employer's involvement is less important.

The decision may seem unfair given the abuse that Ms Hounga was found to have suffered at the hands of the Allens. However, the public policy reason for which her claim was dismissed is not concerned with fairness between the parties; rather it is dependent on the principle that courts are not required to assist litigants to benefit from illegal conduct if it is inextricably bound up in their claim.

Comments from other jurisdictions

Austria (Martin Risak): The Austrian Act on the Employment of Foreign Nationals (*Ausländerbeschäftigungsgesetz*) deems employment contracts with foreign nationals covered by the Act who do not have the necessary permits as void. Thus, the employer may stop employing the foreign national at any time. The Act also states that during the employment, illegally employed foreign nationals have the same rights as if they had been employed under a valid employment contract. If the employer is responsible for the lack of a necessary permit the foreign national will have the same rights also in relation to the termination of the employment contract. This means that the employer can refuse further work but must pay compensation for notice periods, i.e. the amount the foreign national would have earned had the employment contract been terminated correctly, observing due notice.

Germany (Dagmar Hellenkemper): This judgment is surprising for

German readers. Under German Law, Ms Hounga's employment contract would be considered void because, as an illegal immigrant without a work permit, she would have no legal ability to work. By section 275 of the German Civil Code: "A claim for performance is excluded to the extent that performance is impossible for the obligor or for any other person". Therefore, an employee without a work permit under the German Residence Act cannot enter into a legally binding contract. Nevertheless, the courts have decided in numerous cases that employees must be paid for services performed even if both parties to the employment contract are aware of its invalidity. The principle of "*ex turpi causa non oritur actio*" ("no action arises from a dishonorable cause") therefore does not apply in this case under German Law. However, the employer retains the right to dismiss an employee on the grounds that he or she is not in possession of a valid work permit. Hence, Ms Hounga's argument that she was dismissed on racially discriminatory grounds would not have been heard.

Ireland (Georgina Kabemba): This case is very interesting. In an Equality Tribunal decision last year, *A Domestic Worker - v - An Employer* (EEC - E2011/117), the individual, who also worked as a childminder, had been employed through an agency in South Africa and was led to believe she was employed here legally. However, her employer obtained no legal work permit and her South African contract of employment was not in compliance with Irish employment law.

She argued that her employer was taking advantage of her vulnerability as a foreign national from South Africa and maintained that she was discriminatorily dismissed. The Equality Officer was satisfied in making the decision that an Irish employee would not have been placed in the vulnerable position in which the childminder found herself, in a foreign country without appropriate documentation, without any support network and dependent on her employer for both employment and accommodation. The Equality Tribunal ruled that the former employer had to pay the now former childminder € 15,000 for the effects of discriminatory treatment in relation to her conditions of employment, and € 31,486 for the effects of discriminatory dismissal, which was equivalent to one year's salary calculated on her entitlements under the Minimum Wage Act 2000.

The Irish High Court judgment in *Hussein - v - The Labour Court & Anor*, delivered in August 2012, may change outcomes like this in the future. The case was not on discriminatory grounds but pursuant to various employment law statutes. However, the judge outlined that the Employment Permits Act 2003 provides that a non-Irish national employee who works without a permit automatically commits an offence and their contract of employment is void. The judge quashed a € 92,000 award by the Labour Court on the grounds of illegal status. There is a strong probability that in future, awards such as those in the *A Domestic Worker* case may be granted for discriminatory treatment but not for discriminatory dismissal where the contract of employment is void.

The Netherlands (Peter Vas Nunes): This judgment, which is reminiscent of the Austrian judgment reported in EELC 2010/82, probably seems harsh and unfair to most Dutch readers, who are accustomed to the following case-law. An employer who applies for a dismissal permit on the ground that his employee is an illegal alien will always get the permit within the space of a few weeks. Once the employer has the permit, he can terminate the employee's contract, giving due notice (regardless of whether the latter is still in the country or has meanwhile been deported).

An illegal alien whose contract has been terminated (again, regardless of where he is), can seek compensation for unfair dismissal. There have been several cases where such compensation was awarded on

the ground that the employer knew the employee had no work and/or residence permit or that the employer did not know but could have known if he had done adequate investigation into the employee's status (including a check to see whether his passport was authentic).

As long as the employee's contract has not been validly terminated he is entitled to continued payment of his salary, regardless of whether he actually works or is in the country, unless he is to blame for unavailability to work. This is only the case if he lied about his work/residence status and the employer had no reason to doubt his version of the facts. In all other cases, the employer will need to continue paying salary, even where the illegal alien has left the country long ago.

Subject: Illegal contracts; race discrimination

Parties: Hounga - v - Adenike Allen and Kunle Allen

Court: Court of Appeal

Date: 15 May 2012

Case Number: [2012] EWCA Civ 609

Internet publication:

<http://www.bailii.org/ew/cases/EWCA/Civ/2012/609.html>

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(Footnotes)

1 This was a necessary condition of bringing this claim at the time but is no longer required.

2012/33

Not applying standard severance compensation formula to older employees discriminatory (NL)

CONTRIBUTOR LOTTE VAN HECK*

Summary

The courts in the Netherlands tend to award redundant employees severance compensation based on a formula known as the "ABC formula". This formula provides that the amount of compensation must not exceed the employee's loss of income between the termination date and his or her planned retirement date. The judgment in this case calls into question whether this provision is compatible with the prohibition against age discrimination.

Facts

The defendant in this case was a tobacco company. It initiated collective redundancy proceedings. The outcome was a "social plan" to which both management and the relevant unions put their signature. The social plan entitled redundant employees to a severance package on condition that they entered into a termination agreement. The package included outplacement assistance and the payment of a lump sum calculated according to the ABC formula. The ABC formula is the key element in guidelines (the "Recommendations") drawn up by the Association of Lower Court Judges. The Recommendations are not

officially binding but are in practice almost always applied. They aim to assist judges in determining how much severance compensation to award employees when ordering termination of their employment contracts. Note that Dutch law does not as a rule allow employers to dismiss employees who decline to enter into a termination agreement in the absence of either a dismissal permit or a court order.

The ABC formula provides that the severance compensation equals $A \times B \times C$, where A is the number of years of service multiplied by an age factor; B is the employee's average monthly salary; and C is a "correction factor", which in this case was 1.7. Applied to the plaintiff, the ABC formula would have yielded € 242,615 gross, were it not for paragraph 3.5 of the Recommendations. Paragraph 3.5 provides that the severance compensation must not exceed the employee's loss of income up until his or her anticipated retirement age. This is also known as the "anti-accumulation provision". Given that the plaintiff was 57 and was eligible for significant unemployment benefits, his loss of income was less than € 242,615, namely € 206,967 gross. This is the sum he was offered as consideration for signing the termination agreement. He declined to sign the agreement unless he was paid € 242,615. This compelled the defendant to file an application with the court for an order to terminate the plaintiff's employment contract.

Judgment

The plaintiff argued that the provision in the social plan "reducing" his severance compensation pursuant to paragraph 3.5 of the Recommendations ABC formula violated the Age Discrimination Act (the Dutch partial transposition of Directive 2000/78) and was therefore invalid. The defendant admitted that the social plan made a distinction based on age, but argued that this distinction was objectively justified, as its purpose was legitimate, namely to compensate redundant staff for their loss of income resulting from termination of their employment before their planned retirement. The anti-accumulation provision in the social plan, combined with the outplacement assistance, served to ensure an equitable balance between the impact of redundancy on young employees with little seniority (who are generally able to find a new job relatively easily), and the impact on senior employees who have a harder time finding alternative employment.

The judge rejected the defendant's argument and found that the requirements of a legitimate aim and a proportionate means of achieving that aim had not been satisfied. Accordingly, the judge ordered the termination of the plaintiff's employment contract and awarded him € 242,615.

Commentary

Technically, the judge merely disapplied the relevant provision of the social plan at issue in this case, but indirectly this judgment can be seen as a criticism of paragraph 3.5 of the Recommendations drawn up by the judges' own Association of Lower Court Judges. This reopens the debate on whether that paragraph and, indeed, the Recommendations as a whole, comply with the (EU and domestic) rules on age discrimination. The ABC formula discriminates on the basis of age, both directly (paragraph 3.5 and age-related factor A) and indirectly (years of service). There is no consensus on what the purpose of severance compensation is. Most authors take the view that its prime aim is to compensate employees for loss of income owing to the termination of their employment contract, i.e. for the future. However, if compensation for future loss is the aim, why relate the compensation to years of service? The fact that the compensation increases in accordance with years of service indicates that it (also)

aims to reward service, i.e. the past. I will not elaborate on this issue, about which much has been written, but will concentrate on the issue of age discrimination.

Paragraph 3.5 does not come into play very frequently. More often one comes across social plans that make a different type of age-related distinction. For example, it was and still is common for social plans to grant young employees a lump sum upon termination and to grant employees who are not far away from retirement date (usually from about age 60) a supplement to their unemployment benefits (e.g. topping up those benefits from the statutory 70% to 80, 90 or even 100%) instead of a lump sum. Such a supplement can have a higher monetary value than a lump sum would have had – but usually the opposite is true, as in the case reported above. There is debate about whether this is legitimate.

Unfortunately the judgment reported above is poorly reasoned. The judge has not made a serious attempt to explain why the anti-accumulation provision in the social plan failed to fulfil a legitimate aim and/or was not an appropriate and necessary means to achieve that aim. The reason for drawing this case to EELC readers' attention is that it goes against the grain of generally accepted doctrine. The vast majority of judgments on this issue, as well as most authors, accept that age-related distinctions such as that provided in paragraph 3.5 and in social plan arrangements of the kind referenced above, are objectively justified.

Comments from other jurisdictions

Czech Republic (Nataša Randlová): In Czech practice, the prime purpose of severance compensation is as a kind of indemnity of the employee for involuntary loss of work. The employer is obliged to pay the severance pay to the employee in cases provided by the Czech Labour Code irrespective of any other factors (e.g. whether or not the employee already has new job or is entitled to old age pension). The Labour Code also expressly states the minimum amount of severance pay to which the employee is entitled – and this amount is binding on both the employer and the employee.

Unlike in The Netherlands, Czech employers are entitled to dismiss their employees on the grounds expressly stated by the Labour Code without any further permit or court order. Redundancy is the most common and most widely used ground, enabling the employer to terminate the employment relationship with an employee upon notice. The minimum amount of the severance pay in the case of an organisational change as compensation for the dismissal of a “blameless” employee has been set firmly by legislation.

The amount of the severance pay depends on the number of years' service with the employer: an employee who has been employed by the employer for under one year will get 1x his average monthly salary, one who has worked for the employer for over a year but for less than two years will get 2x his average monthly salary and one who has worked for the employer for over two years will get 3x his average monthly salary.

However, in practice employers very often make employees an offer of compensation upon planned dismissals and the amount is usually higher than that set by the Labour Code. If the employee agrees, there might, for example, in return be no notice period but an agreed date of termination that suits both parties.

United Kingdom (Louisa Tamplin): In the UK there are statutory provisions for calculating redundancy payments as follows:

- half a week's pay for each full year of service before the employee's 22nd birthday;
- one week's pay for each full year of service from 22 to 40; and
- one and a half weeks' pay for each year aged 41 or over.

The amount for a week's pay is capped (currently at £430) and a maximum of 20 years' service is taken into account.

In addition to statutory redundancy payments, some companies have their own enhanced redundancy schemes, which provide for more generous payments. On the face of it, these schemes are often potentially age discriminatory given that they generally take into account both age and length of service. However, the Equality Act 2010 specifically provides that an enhanced redundancy payment calculated on the same basis as the statutory payment will not be age discriminatory. This means that a scheme that follows the statutory formula but makes certain specified adjustments (such as disapplying or increasing the cap on a week's pay) would not be unlawful.

However, many enhanced schemes would not fall into this exemption. In particular, the exemption would not cover a provision such as the one considered in this case. Therefore, any redundancy scheme incorporating a rule that “*the overall sum must not exceed the loss of income between an individual's termination and their planned retirement date*” would need to be objectively justified. In other words, the company would have to show that this rule could be justified as a proportionate means of achieving a legitimate aim.

The employer in this case failed to objectively justify the rule in the Dutch court. In a case based on similar facts in the UK, although the employer also failed to justify the rule at first instance, the result was overturned on appeal. In *Kraft Foods UK Ltd – v – Hastie UKEAT/0024/10*, the employer applied a ‘cap’ to payments made under a voluntary redundancy scheme to prevent employees from receiving more than they could have earned had they remained in employment until retirement age. At first instance, the Employment Tribunal found this cap on payments to be unjustifiable and therefore unlawful. However, the Employment Appeal Tribunal (“EAT”) took the opposite view. Although the scheme was based on length of service, the EAT accepted that its object was to compensate employees taking voluntary redundancy for the loss of earnings they had a legitimate expectation of receiving if their employment had continued. With this in mind, it held that unless the scheme incorporated a cap, in terms of employees close to retirement age, it would result in payments in excess of the sum necessary to achieve that objective. Therefore, the EAT concluded that the cap was both legitimate and proportionate, in order to prevent such excess compensation.

Any similar cases in the UK are likely to follow the EAT's decision in *Kraft Foods*, rather than the Dutch case considered here.

Subject: age discrimination

Parties: A – v – British American Tobacco Niemeijer B.V.

Date: 31 May 2012

Case number: 540296 EJ VERZ 12-196

Internet publication: www.rechtspraak.nl → LJN: BX4451

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2012/34

Disabled employee's right to telework (NL)

CONTRIBUTOR: PETER VAS NUNES*

Summary

An employee with muscle disease successfully claimed the right to continue working from his home for four out of five days per week.

Facts

The plaintiff in this case was Mr Van Dalen, a 55 year old employee of the Dutch postal service "Post NL". His job consisted mainly of data entry work. In May 2009, he called in sick and was later diagnosed with the chronic muscle disease mitochondrial myopathy. Initially, Post NL attempted to get him to return to work in an office building in Utrecht, which was a one-and-a-half hour commute (one way) from his home in Zaandam. However, in late 2009, when it became clear that commuting to Utrecht five days a week was too strenuous for Mr Van Dalen, he was allowed to work from his home for part of the week, on a temporary basis. During the entire year 2011, he worked from home for four days per week and in the Utrecht office for one day per week, still on a temporary basis. This went well and his performance was confirmed to be good.

In November 2011, Post NL issued a policy statement that, as of 1 January 2012, nobody would be allowed to work from home for more than two days per week. Post NL sought an opinion from an occupational expert (not a doctor), who advised that Mr Van Dalen could be required to co-operate in a phased return to a five-day-a-week work schedule in Utrecht. Accordingly, Post NL instructed Mr Van Dalen to work full-time in the Utrecht office. Mr Van Dalen objected, arguing that there was no good reason why he could not continue to work from his home for four days a week.

Post NL reacted by seeking termination of Mr Van Dalen's employment. Given that Dutch law prohibits terminating an employment contract in the absence of either a dismissal permit or a court order, Post NL applied to the court, requesting termination of Mr Van Dalen's contract.

Judgment

In the proceedings, Post NL pointed out that many of its employees in administrative positions similar to that of Mr Van Dalen would love to work from home on more than two days per week and that making an exception for him would create a dangerous precedent. The court was not persuaded that allowing Mr Van Dalen to work from home more than others would create a precedent, as Mr Van Dalen was seriously ill.

The court was similarly unimpressed by Post NL's other arguments, such as that simple data entry work was being automated, leaving only the more complex work that required physical presence in the office. The court noted that Post NL had never complained about the quality of Mr Van Dalen's work and deemed there was insufficient reason to terminate his employment. Post NL's application was therefore turned down with the result that Mr Van Dalen continues to be on its payroll.

Commentary

Although Mr Van Dalen does not seem to have explicitly invoked the Dutch law on non-discrimination on the ground of disability (transposition of Directive 2000/78), and the court did not base its decision on that law, this is in effect what happened. The court found that Mr Van Dalen should be allowed to do what others could not do, because of his disability.

It is understandable that the employer in this case was concerned about setting a precedent. There is considerable pressure to allow teleworking - not only from employees - and not all employers are keen to allow it, for a variety of reasons. A bill is pending in Parliament (Bill No 32889) that would obligate employers to go along with a request for teleworking unless they have demonstrably strong reasons for not allowing it.

The issue of whether certain types of employees have the right to work from home is likely to become more prominent in the coming years.

Comments from other jurisdictions

Austria (Martin Risak): In Austria the basis for rejecting the application of an employer for permission to dismiss an employee with a disability in a similar case would most likely be § 7c (4) of the Act on the Employment of Employees with Disabilities (*Behinderteneinstellungsgesetz*), which transposes Article 5 of Directive 2000/78. It states that indirect discrimination does not occur if the removal of the obstacles that cause the disadvantage is unreasonable, either because they are illegal or because they would impose a disproportionate burden on the employer. In other words, the employer has a legal obligation to take all reasonable measures to remove obstacles to the employment of disabled employees - and, at first glance, teleworking seems eminently reasonable in this case.

Denmark (Mariann Norrbom): From a Danish perspective, it is not surprising that the court did not find in favour of the employer in this case report. Directive 2000/78 states that an employer must take appropriate measures, where needed in a particular situation, to enable a disabled person to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer.

The employer does not seem to have convinced the court that it would have been a disproportionate burden to let the employee perform telework - especially since he had been doing this for approximately two years and the commute was 1½ hour.

The question of whether or not an employer must allow an employee with a disability to perform telework has not been tried in Denmark, but it seems likely - in light of technological developments - that a Danish court would come to the same decision. It would, however, depend on the specific circumstances of the matter and, in particular, the employee's duties and responsibilities, since it is likely that there are still many types of jobs where physical presence is required. In a case where the employee has been working from home for a long time, it is difficult for the employer to argue that, suddenly, he cannot continue.

The case report is also interesting because we hear that a bill has been presented to Parliament that will oblige employers to allow employees to work from home unless the employer has demonstrably strong reasons for not allowing this. I would not imagine the Danish Parliament needing to introduce legislation about the right to perform telework. Teleworking would not be an issue in Denmark and so it

seems to me that the Danish labour market is a bit more flexible in this regard.

Germany (Klaus Thönissen): In this particular case, Mr Van Dalen would most likely be protected under Volume 9 of the Social Insurance Code (SGB IX). Among other things this Code imposes duties on employers that employ disabled people. Under section 81(4) of the Code disabled employees are entitled to a job in which they can use and develop their skills and know-how to the best of their ability, and the employer has a duty to either create or maintain an environment that facilitates this. This might include a change of location where the work is done. Here, Mr Van Dalen was allowed to work from home for quite a long time. The employer did not make any significant changes to the day-to-day activities which might have made it necessary for the employee to come into the office every day.

In a similar case in Germany the Regional Labour Court of Niedersachsen (*Landesarbeitsgericht Niedersachsen*) ruled that an employer could not force a disabled employee to work in the office five days a week if the employee had been allowed to work from home before. Therefore, the employee was entitled to maintain the status quo under section 81(4). A claim by an employee under section 81(4) will only fail if maintaining the status quo could lead to an undue burden on the employer or if occupational health and safety regulations conflict with the arrangement.

Ireland (Georgina Kabemba): The most recent case concerning tele-working and disability in Ireland is 2008, *Mr A -v- A Government Department (DEC-E-2008-0-2003)*. In this case Mr A had a fractured spine. His tele-working arrangements had been previously approved and he was found highly suitable to tele-work, yet these were withdrawn without consultation. The Equality Tribunal found that this constituted less favourable treatment on grounds of his disability, as the employer did not seek to advance any other reasons for the withdrawal of the facility. The Equality Officer ordered the employer to pay Mr A the sum of € 25,000 in compensation for the distress and unnecessary hardship their actions caused the employee.

Unlike the Dutch case, Mr A's disability in the case in this instance was a temporary one. Therefore, the requirement for tele-working arrangements on a more permanent basis were not examined. In Ireland we have no pending legislation which would obligate employers to go along with a request for tele-working unless they had demonstrably strong reasons for not allowing it. However, the request for the right to work from home is likely to grow as an issue in coming years. This would not only be on the grounds of disability but also on the grounds of family status, particularly in commuter belts, where commuting to work can be arduous.

United Kingdom (Liz Kilcoyne): In the UK, this case would be treated as a possible case of disability discrimination. The first question would be to determine whether the plaintiff has a disability for the purposes of the Equality Act 2010, which implements the disability aspects of the Equal Treatment Framework Directive (2000/78/EC). If not, disability discrimination would not arise. A person will have a disability for the purposes of the Equality Act if they have a physical or mental impairment, and the impairment has a substantial long-term adverse effect on their ability to carry out normal day-to-day activities.

If the plaintiff has a disability, the next question is what type of disability discrimination does the conduct potentially fall within. In this scenario, where the plaintiff is dismissed by reason of his inability to comply with the employer's policy on home working, the most relevant

type of discrimination would be indirect discrimination. However, the employee might also have a claim relating to a failure to make reasonable adjustments and a claim of discrimination arising from disability.

An employer discriminates indirectly against an employee if it applies a provision, criterion or practice (PCP) that disadvantages employees with a shared disability, without objective justification.

The concept of a PCP is fairly wide. There does not need to be a formal policy in place for an employee to bring an indirect discrimination claim in respect of a management decision that affects them. In this case, the policy statement regarding home working is likely to constitute a relevant PCP. The plaintiff would then have to show that the PCP puts (or would put) persons with whom the plaintiff has a shared disability at a particular disadvantage when compared with others.

In this case, the plaintiff would be likely to be able to show that other people with similar mobility impairments would suffer the same disadvantage if required to comply with the employer's home working policy. If the plaintiff can show that those with his disability (including himself) are/or would be particularly disadvantaged by the application of the home working policy, this would constitute a *prima facie* case of indirect discrimination and then the burden would shift to the employer to show justification for the PCP. There will be no indirect discrimination if the employer's actions are objectively justified.

To establish justification, the employer would need to show that there is a legitimate aim, i.e. a real business need, and that the PCP is proportionate to that aim, i.e. it is reasonably necessary in order to achieve that aim, and there are no less discriminatory means available.

In this case, prior to the introduction of the home working policy, the plaintiff had worked from home more than the policy permitted and there had been no complaints regarding the quality of the plaintiff's work. Consequently, it is unlikely that the employer could show justification for the PCP and an Employment Tribunal is likely to find that the employer had indirectly discriminated against the plaintiff on grounds of disability.

In addition, the Equality Act 2010 imposes a duty on employers to make reasonable adjustments to premises or working practices to help disabled job applicants and employees. A failure to comply with the duty to make reasonable adjustments is a form of discrimination. The duty to make reasonable adjustments can arise where a PCP puts a disabled person at a substantial disadvantage in comparison with those who are not disabled, in which case the employer must take such steps as it is reasonable to have to take to avoid the disadvantage. In this case, an Employment Tribunal is also likely to find that the employer's failure to accommodate a continuation of the plaintiff's home working arrangements constitutes a failure to make reasonable adjustments.

The treatment concerned might also amount to discrimination arising from disability, as the reason for dismissal (i.e. the plaintiff's inability to work full time from the employer's office) is something arising in consequence of the disability. Discrimination arising from disability occurs where the employer treats an employee unfavourably because of something occurring in consequence of his or her disability (e.g. because of taking excessive sick leave or, as here, being unable to attend the office at required times) and the employer cannot objectively justify the treatment.

Subject: working time
Parties: *Post NL Shared Services B.V. – v – Martinus G. Van Dalen*
Court: Lower Court of Utrecht
Date: 12 June 2012
Case number: 815539 UE VERZ 12-552 LH 4059
Hard copy publication: JAR 2012/178
Internet publication: not published

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2012/35

Overtime premiums for part-time workers (AT)

CONTRIBUTOR MARTIN RISAK*

Summary

Different overtime premiums for part-time workers and full-time workers (25% and 50% of hourly wages) are not discriminatory if part-time workers – like full-time-workers – get paid the higher premium when their working time exceeds the normal working time of a full-time worker.

Facts

The Austrian Trade Union Federation (*Österreichischer Gewerkschaftsbund*, the “ÖGB”) asked the Supreme Court (*Oberster Gerichtshof*, the “OGH”) for a preliminary ruling on the interpretation of a provision in the collective bargaining agreement for employees in the social services industry. The provision at issue entitles full-time workers to hourly remuneration at the normal hourly rate plus 50% extra for overtime, that is to say, time worked in excess of 38 hours in any one week. By contrast, part-time employees are not entitled to any premium for the first two hours of extra work beyond the agreed normal working hours (i.e. they will only be paid the normal hourly rate). If they work beyond two extra hours per week they are entitled to a 25% premium. If the work exceeds 38 hours per week the premium rises to 50%.

The applicant, the Trade Union Federation, argued that the differentiation between full-time and part-time workers is discriminatory and contravenes Article 4 of Directive 1997/81/EC on part-time work and – because the majority of the part-time workers were women – also the anti-discrimination provisions of Directive 2006/54 and the Austrian laws implementing those Directives. It argued that there was no good reason why part-time workers should be entitled to no or lesser overtime premiums than full-time workers when they exceed their agreed working time. Extra work poses the same additional burden on part-time and full-time workers, as part-time workers are often responsible for caring for children or ailing relatives. They also frequently have to do other part-time work to earn a living. Therefore, the impact of extra work on top of the agreed hours can be significant. For that reason, they should at least be entitled to the same premium as full-time workers. The applicant interpreted the ECJ’s ruling in *Helmig* (C-399/92) as meaning that part-time workers must be paid a premium, which in this case should be a premium of 50% for every extra hour worked.

The respondent, the employers’ organisation in the social services

industry (*Berufsvereinigung von Arbeitgebern für Gesundheits- und Sozialberufe*, the “BAGS”) argued that part-time workers are entitled to a 50% premium when they work more than 38 hours in a week and are privileged enough to get a higher hourly wage than full-time workers when they work extra hours not exceeding 38 hours a week. The ECJ finds unlawful discrimination only in cases when the hourly pay of full-time workers for the same hours worked exceeds the hourly rates of part-time workers. It also argued that the stress that can result from long weekly hours justifies why high premiums are paid only after a certain number of hours have been worked.

Judgment

The Supreme Court accepted the arguments made by the applicants but ruled in favour of the respondent. The Court found that the applicant had misunderstood the ruling in the *Helmig* case, as well as the later *Voss* case (C-300/06). According to these rulings part-time workers are only regarded as being treated unequally if the overall pay of full-time employees is higher than that of part-time employees for the same number of hours worked. Part-time employees therefore may not be paid less than full-timers for the same number of hours worked.

The collective agreement fulfils these requirements because for every hour part-time workers work exceeding the agreed working time, they are paid at least the equivalent of full-time workers for the same working time. Like full time workers, part-time workers are paid a 50% premium when they work more than 38 hours a week. They are even treated better, in that unlike full-time employees, they are entitled to a 25% premium when they work more than two hours over their agreed weekly working time. They therefore get paid more for the same number of working hours than full-timers, who are not entitled to a premium for the work they do within their 38-hour working week.

Commentary

This ruling is important beyond the disputed collective agreement, as a similar statutory provision exists covering all workers. In 2008 a 25% extra-work premium was introduced for all part-time workers by an amendment to the Working Time Act (the “*Arbeitszeitgesetz*”). Until that time, as in most other countries, part-time workers were not entitled in law to extra pay for hours worked in excess of the contractual working time but within the normal working time of full-time workers. The new statutory premium was introduced to compensate part-time workers for their flexibility and was seen as a big step towards greater fairness for this often precarious segment of the workforce. But some argued that the different amounts of extra pay discriminated against part-time workers. The Supreme Court has now resolved this issue – in my view correctly – in line with an article I published in 2009.¹

In my view the fact that part-time workers are often paid higher rates than full time workers for extra work done within the normal working hours of a full time worker, is justified by the flexibility required by workers when they put in extra-time. Although part-time workers are not obliged to work extra time, if the employer asks them to do so, they may well feel they have to. By employing workers on a part-time basis, the employer is able to manage the risk of unproductive times. Since 2008, the benefit of this arrangement must be shared between both parties to the employment contract. Overtime premiums for hours exceeding the normal 38 hour week (as in the collective agreement) or 40 hour week (as in the Working Time Act) partly serve a different function: they not only compensate the worker for being flexible but also for the negative physical and social effects involved in working long hours.

The provisions of the Working Time Act do not provide for any “premium-

free” time and are therefore more favourable than the collective agreement in the case at hand - which allows for two extra hours with no premium. However, deviations from the Working Time Act by way of a collective bargaining agreement such as this are possible and therefore the provisions in the case at hand do not contravene it.

Comments from other jurisdictions

Denmark (Mariann Norrbom): Under most collective agreements in Denmark, part-time workers will only receive overtime premiums when their hourly working time exceeds the hourly working time of a full-time worker.

The difference in hours between a part-time worker’s agreed working time and a full-time worker’s working time is often defined as “additional work”, and for this time the part-time worker will receive a premium that is lower than the overtime premium.

This has been common practice in Denmark for many years, and whether it discriminates because part-time workers are paid more than the normal salary per hour at an earlier stage than full-time workers has never been questioned. But although the issue has not given rise to problems in Denmark, I still find it an interesting case report.

The Framework Agreement on part-time work provides that part-time workers must not be treated in a less favourable manner than comparable full-time workers. I can see how it could be argued that the issue of overtime should not be defined solely on the basis of a full-time workers’ working hours, but that the employee’s own working conditions should be taken into account. Since part-time workers often arrange their family life based on their part-time work schedule, it can be as invasive for the part-time worker to be ordered to work extra hours as it is for a full-time worker.

However, when comparing part-time and full-time workers, I agree that part-time workers are not treated less favourably than full-time workers, because the same total amount of work gives the same overtime premium. It is also not difficult to imagine how full-time workers would consider themselves to be treated in a less favourable manner if part-time workers received overtime premiums for working hours not exceeding the normal working hours of full-time workers.

The Netherlands (Peter Vas Nunes): this case report raises a number of issues, two of which are addressed here. Let us suppose that on average part-time workers earn not less but more per hour than full-timers. Is that allowed? One purpose of the Framework Agreement annexed to Directive 97/81 is “to provide for the removal of discrimination against part-time workers”. Accordingly, Clause 4 provides that “part-time workers shall not be treated in a less favourable manner than comparable full-time workers [...]”. The Framework Agreement does not prohibit discrimination against full-time workers. However, if in an organisation a disproportionate number of the full-time workers are male the part-time workers are female (as would be fairly common in The Netherlands), a higher average hourly salary for part-time workers would be indirectly sex-discriminatory. Moreover, the provision of Dutch law transposing Directive 97/81 prohibits unequal treatment (in both directions) between full and part-time employees.

The second issue I would like to raise relates to the method of determining how to compare a part-time worker’s average hourly earnings with those of a full-time colleague. Dutch law has developed the following doctrine, which I will explain using the hypothetical example of a full-timer with a 38 hour working week and a part-time worker with a 20 hour working week. Let us also suppose that in a

given week the part-time worker works 42 hours, that his or her base salary is € 10 per hour, that extra work is paid at the normal rate and overtime at 200%. In said week the work consists of:

- (i) “regular” work (hours 1-20)
- (ii) “extra” work (hours 21-38)
- (iii) overtime (hours 39-42)

and the employee is paid:

38 x € 10 =	€ 380
4 x € 20 =	€ 80
	€ 460 : 42 = approx. € 10.95 per hour on average.

This is the same average hourly base salary as a full-timer would get for working 42 hours in any week. Thus, at first sight, the situation would seem to comply with the ECJ’s rulings in *Helmig, Elsner* (C-285/02) and *Voss* and there would appear to be no discrimination. However, most employees are eligible for benefits over and above their base salary, such as pension, paid leave, continued payment in the event of sickness and, sometimes, bonuses. In The Netherlands there is also a statutory 8% holiday bonus and many employees also receive a “13th month” payment. It can safely be estimated that the monetary value of the benefits Dutch employees receive on top of their base salary equals at least on average 30%, probably significantly more. If employees are only eligible for the benefits calculated on their base salary, as is customary, part-time workers such as the one in the example above receive on average less per hour worked than full-time employees.

Clearly, calculating pension benefits, bonuses, etc. every time a part-time worker performs “extra” work would be an administrative nightmare. It is easier to calculate how much more a part-time worker should be paid extra per hour to compensate for the non-payment of benefits and to pay the resulting hourly premium for each “extra” hour. Seen in this light, the 25% premium paid to the Austrian part-time workers in the case reported above is reasonable.

Subject: discrimination

Parties: Österreichischer Gewerkschaftsbund – v – BAGS Berufsvereinigung von Arbeitgebern für Gesundheits- und Sozialberufe

Court: Austrian Supreme Court (*Oberster Gerichtshof*)

Date: 28 June 2012

Case number: 8 Ob A 89/11p

Internet publication: <http://www.ris.bka.gv.at/Jus/>

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(Footnotes)

- 1 *Risak*, Aktuelle Probleme des Mehrarbeitszuschlages, ZAS 2009/49.

2012/36

Automatic termination of pilot's employment at age 60 was already unlawful before Germany transposed Directive 2000/78

CONTRIBUTOR PAUL SCHREINER*

Summary

A collective bargaining agreement automatically terminating the employment of pilots at age 60 is unlawful and void for being discriminatory on the grounds of age, even though the employment ended before the German transposition of Directive 2000/78 was in force.

Facts

The plaintiff was a pilot of British nationality working for a German airline, born in September 1945. He had been employed by the airline since 1992. His employment contract referred to the collective bargaining agreement concluded in 2005 between Condor, Condor Berlin and the competent trade union. The collective agreement included a provision by which the employment of a pilot ended when he or she reached the age of 60 (the "automatic age termination provision"). The plaintiff reached that age in September 2005.

The German transposition of Directive 2000/78, the *Allgemeines Gleichbehandlungsgesetz* ("AGG") did not enter into force until 18 August 2006, after the period for transposition had been extended until the end of 2006.

There are several different national and international regulations governing pilots' licences. None of them foresee the end of employment for a pilot when reaching the age of 60. Of major importance were the regulations of the Joint Aviation Authorities (JAA). The decisive part of those regulations for the case at hand provided that a pilot was still allowed to fly an aeroplane that was used for passenger traffic after reaching the age of 60, provided the cockpit personnel included more than one pilot and the other pilot had not yet reached the age of 60. A pilot was not permitted to fly a plane used for the transportation of passengers after reaching the age of 65.

On 10 October 2005, the plaintiff applied for a declaratory judgment that his employment with the defendant had not ended pursuant to the automatic age termination provision. The local Labour Court dismissed the claim and the Appeal Court went on to dismiss his appeal. The plaintiff decided to take the case to the Federal Court for labour law matters, the *Bundesarbeitsgericht* (the "BAG").

On 17 June 2009, the court postponed the proceedings until after the ECJ's judgment in the *Prigge* case (C-447/09). On September 13, 2011 the ECJ held, in that case, that Article 4(1) of Directive 2000/78 must be interpreted as meaning that a collective bargaining agreement must not be permitted to end the employment of a pilot when he reached the age of 60, on the basis that there are national and international regulations suggesting that the correct age was 65.

Judgment

The BAG held that the age limit was void because it violated basic principles of EU law.

The German AGG did not apply to this case, as the plaintiff had already reached the age limit in 2005, before the AGG came into force. The BAG clarified that the AGG only applies to age limits that have the effect of ending employment after 18 August 2006, the day the AGG entered into force. If the employment ends prior to that date, the AGG does not apply and the validity of the age limit can only be challenged on the basis that it violates other legislation, such as the Works Council Constitution Act, the German Constitution or a directly and horizontally effective provision of EU law. As neither the Works Council Constitution Act nor the Constitution could be invoked, the issue was whether the automatic age termination provision violated EU law.

In the case at hand the BAG held that, the automatic age termination provision was invalid and void on the basis that it breached the prohibition of age discrimination, which is a "general" and therefore directly and horizontally applicable rule (see *Mangold and Küçükdeveci*). Thus, the BAG held that the age limit in question constituted direct discrimination on grounds of age. This meant that, provided the question fell within the scope of EU law the question of whether the provision violated EU law needed to be considered irrespective of the applicability or otherwise of the AGG. The issue was therefore whether the automatic age termination provision fell within the scope of EU law.

In Germany age limits are treated like every other limitation in time, and as such, must be justified in accordance with the Act on Part-time Work and Fixed-term Employment Contracts (the *Teilzeit- und Befristungsgesetz*, "TzBfG"), the German transposition of Directive 1999/70 in order to be valid. In principle reaching a certain age may be a sufficient reason for a limitation in time. For example, the rule in German law that stipulates that a limitation in time that states that employment will end when the employee is eligible to receive state pension is valid.

However, given that the justification of the automatic age termination provision was based on the TzBfG, the age limit fell within the scope of EU law. The fact that the age limitation was contained in a collective bargaining agreement did not alter matters, as the parties to a collective agreement are also bound by the principle of equal treatment.

The question therefore needed to be assessed in terms of whether it was consistent with the protection against age discrimination provided by EU Law. The BAG ruled in line with *Prigge* that there was insufficient reason for the age limit. It held that, by stipulating a lower age limit, the German position had differed in the past from international rulings, even though there were no significant differences between pilots in different countries.

Commentary

This decision has two important aspects:

1. The BAG appears now to follow the decision of the ECJ in *Prigge* and considers the age limit of 60 years for pilots as invalid and void. This contradicts the case law of the past, in which the BAG had always stated that an age limit of 60 is in line with the safety needs of passengers and crew.
2. There is a significant difference between the case at hand and the *Prigge* case – which was also German. In *Prigge* the pilots reached

the age of 60 after the AGG had come into force. Since the AGG is the transposition of Directive EC/2000/78, the BAG needed to refer to the ECJ for a ruling on whether its long standing case law conformed with the Directive. By contrast, in the case at hand, the termination took place before the AGG had entered into force. The BAG nevertheless felt the need to investigate whether the age limit in the contract was in line with protection against age discrimination under primary EU law and, if so, whether it fell within the scope of any EU directive. The BAG also asked whether, in concluding the collective bargaining agreement in 2005, the parties to it had breached their duty not to introduce any new measure making it harder to comply with Directive 2000/78 (the duty of “non-regression”). The BAG answered this question affirmatively.

It is clear then, that following this decision, employers in Germany no longer have any option to end the employment of with pilots when they reach the age of 60.

Comments from the jurisdictions

The Netherlands (Peter Vas Nunes): As in *Prigge*, the termination of employment of pilots at age 60 in the case reported above was based on safety arguments. A similar provision in the KLM collective agreement, under which airline pilots lost their job at age 56 (barring some limited exceptions) was the subject matter of a recent decision by the Dutch Supreme Court (HR 13 July 2012 JAR 2012/208). That provision, however, was based not on safety considerations but on the need for young pilots, who have invested heavily in their training, to be promoted to higher and more lucrative positions (senior, pilot, etc.) within a reasonable period of time. This is only possible if the older generation of pilots retires early. The Supreme Court found this to be a legitimate aim and the means to achieve it proportionate.

Subject: age discrimination

Parties: X –v– Y (a Condor group company)

Court: *Bundesarbeitsgericht* (Federal Labour Court)

Date: 15 February 2012

Case number: 7 AZR 946/07

Internet publication:

www.bundesarbeitsgericht.de → Entscheidungen → case number

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2012/37

Extra paid leave for older employees discriminatory: levelling up (GER)

CONTRIBUTORS PAUL SCHREINER AND DAGMAR HELLENKEMPER *

Summary

Provisions in a collective agreement that grant employees of different ages different annual leave (vacation) entitlements violate section 7 of the German Equal Treatment Act¹ (*Allgemeines Gleichbehandlungsgesetz*, the “AGG”), the German transposition of Directive 2000/78/EC and are therefore invalid and void. In consequence, younger employees are entitled to annual leave entitlements that are equal to those of older employees.

Facts

The plaintiff was born in 1971 and had been employed as a civil servant since 1998. The collective bargaining agreement for civil servants (the “TVöD”) applied to her employment relationship.

Paragraph 26 of the TVöD (entitled “recovery vacation”) provides that employees under the age of 30 are entitled to 26 days of paid annual leave, employees between 30 and 40 to 29 days of paid annual leave and employees over the age of 40 to 30 days of leave. There is no further grant of additional leave for employees over 40.

The plaintiff, not having reached the age of 40, argued that she was entitled to 30 days of vacation in the same way as her older colleagues, since the provision in question presented an unjustified unequal treatment. She sued the defendant for one additional day of vacation for each of the years 2008 and 2009.

The defendant argued that older employees have a higher need of recovery to strengthen their work efficiency and performance. It admitted the unequal treatment, but claimed that the gradual increase in annual leave was justified by section 10 AGG². This section provides that a difference in treatment on grounds of age shall not constitute discrimination if it is objectively and reasonably justified by a legitimate aim. The means of achieving that aim must be appropriate and necessary.

The defendant argued that the preferential treatment of older employees was justified by the need to protect the health and safety of older workers in the face of their greater need for recovery breaks. Older employees have more sick days than younger employees owing to their exposure to occupational stress and pressure. The defendant argued that the need for recovery is substantially higher in older employees. Therefore, the provision did provide an unequal treatment, but this was justified.

The Labour Court in Eberswalde held in the first instance that the plaintiff had the right to one additional day of vacation in each of 2008 and 2009. The defendant appealed to the Regional Labour Court (the “LAG”) of Berlin-Brandenburg, which rejected the plaintiffs’ claim. The plaintiff then appealed the decision to the Federal Labour Court (“BAG”).

Judgment

The BAG held that the TVöD was void because it violated the AGG, and that therefore the plaintiff was granted two additional days of vacation, one for each of 2008 and 2009.

In its opinion the provision presented not only an unequal treatment between employees of different age groups, but direct discrimination under section 3(1) of the AGG³. This section provides that direct discrimination occurs where one person is treated less favourably than another is, has been or would be treated in a comparable situation on any of the grounds referred to under section 1 of the AGG (here: age). The entitlement to a certain number of days of annual leave in paragraph 26 of the TVöD was directly, solely and causally related to the age of the employee.

The BAG explained that the desired aim of section 26 of the TVöD was not explicitly mentioned in the provision and therefore the pursued objective needed to be interpreted from the context. As the AGG also applies to provisions of collective bargaining agreements, the unequal treatment of employees on the basis of age needs to be justified by a legitimate aim in order to be valid. Since no legitimate aim was found in the collective bargaining agreement it was deemed invalid and void.

The BAG did not find the employer's arguments persuasive. The increase of three days once employees reached the age of 30 and one more day when they reached 40 could not be seen as reflecting the gradual increase in work-related stress and pressure on older employees or their greater need for recovery breaks. Had it truly been the goal of the parties to the collective agreement to compensate older employees for this increased need, the increase in annual leave should also have been three days (or more) for employees over 40. Also, no further augmentation of annual leave was provided for the employees over 50 or 60. The court was of the view that the defendant's arguments were not supported by the system it operated. The court held that the provision was more likely to reward length of service with the company and increasing relevant professional experience. However, this was insufficient justification for the unequal treatment.

Accordingly, the court ruled that paragraph 26 of the TVöD was void.

The court held that there was only one way to reverse the effect of the unequal treatment and that was by granting the employee the maximum number of vacation days that an employee could be entitled to under paragraph 26 of the TVöD. The plaintiff was therefore granted 30 days of paid leave for the two past years. Having received 29 days by that point, the plaintiff was therefore entitled to two additional days of paid leave. Note that the court decided not to reduce the leave entitlement to the statutory minimum of 20 days per year, holding that levelling-down was not an option.

Commentary

It should be noted that the BAG did not rule that it was unlawful to gradually increase annual leave in order to relieve work-related stress and pressure on older employees. It simply left open the question on how such provisions should be drafted.

Provisions relating to leave entitlement for different age groups are not only found in collective bargaining agreements, but also in individual contracts. This raises the question of the extent to which this decision also applies to these contracts. According to the BAG's ruling, it was the provision itself that was void because it was discriminatory:

therefore whether it was between the parties to a collective bargaining agreement or in an individual employment contract would make no difference.

In terms of the past, leave entitlement can only be extended to the maximum foreseen in the relevant provision in order to treat all employees equally. But what kind of entitlement should be applied in future?

It is unlikely that a reduction to the minimum statutory annual leave would be in the interests of the parties. The parties to a collective bargaining agreement have the right to amend the agreement with retroactive effect, but the court has no power to order this. Nor can the court order the parties to a collective bargaining agreement to agree a retroactive amendment. Hence, the employers must make a choice: either (i) they could treat the annual leave provision of the collective bargaining agreement as void and grant all employees the statutory minimum paid leave entitlement - with the risk they will be sued by the affected employees; or (ii) grant the maximum amount of paid leave to all employees.

The unions have welcomed this judgment on the assumption that all employees are now eligible for the maximum amount of annual paid leave. However, the BAG's decision does not grant additional leave for the future. All it does is to state that paragraph 26 of the TVöD is void. This judgment will clearly influence the drafting of future collective agreements, in which the relationship between age and increased need for recovery will need to be reflected.

Comments from other jurisdictions

Czech Republic (Nataša Randlová): Until 2001, the Czech Labour Code contained a provision implying an element of direct discrimination based on age and an element of indirect age discrimination based on years of service. The regular annual paid leave granted to an employee in the private sector was three weeks. After serving 15 years with one employer (counting from the employee's 18th birthday), employees were entitled to one additional week of paid leave. This meant that employees under 33 years old could not possibly obtain entitlement to a four-week vacation period and this was discriminatory.

Since 2001, the conditions in the Labour Code have been made equal for everyone, only distinguishing between employees in the private and public sectors and between academic workers - who are entitled to four, five and eight weeks of paid annual leave respectively. Thus, the four-week vacation for private employees represents the minimum length of paid leave. In practice, however, this is often increased beyond the minimum by employers, either through collective or individual agreements or by internal regulations. Many collective agreements contain provisions granting additional paid leave based on seniority, therefore in reality an older employee will often have more days of paid leave than a younger one. In my view, this could give rise to age discrimination claims. However, at the moment there is no case law on this subject and so we cannot know how the Czech Supreme Court would rule.

Ireland (Georgina Kabemba): In Ireland, the Employment Equality Acts 1998-2011 (the "EEA") prohibit discrimination (i.e. less favourable treatment) by employers in relation to conditions of employment and/or remuneration on several grounds, including age. This means that an employer cannot treat employees any less favourably than comparable employees, on the grounds of their age, either directly or indirectly. However, section 34 of the EEA sets out savings and exceptions in

relation to the age ground, in particular that *“it shall not constitute discrimination on the age ground for an employer to provide for different persons [...] different terms and conditions of employment, if the difference is based on their relative seniority (or length of service) in a particular post or employment.”*

On the basis of that exception, there may be occasions where enhanced entitlements to annual leave for older employees may be permissible in certain circumstances but overall, it is important to note that exemptions are construed very narrowly by the Equality Tribunal (where claims of discrimination are brought).

The Netherlands (Peter Vas Nunes): In The Netherlands many collective agreements contained similar provisions in the past, granting older workers additional paid leave. Some collective agreements still do. Until 2005, the Dutch Equal Treatment Commission (CGB) held that such provisions are illegal. Following protest, the CGB commissioned a study, which was presented in late March 2006. The study advised that a provision granting older employees so-called “seniority days” can be objectively justified, but only if (i) the aim of the seniority days is to compensate older employees for reduced ability to cope with their work and to assist them to overcome this; and (ii) the seniority days are an integral part of a broader policy aimed at helping older employees to continue working despite their reduced ability to cope with the work. This broader policy should include, for example, medical guidance, measures aimed at retaining physical and mental fitness, job rotation, vocational training and broadened job descriptions. If both of these criteria are satisfied and the number of extra days’ paid leave is relatively small and proportionate to the stated aim of the policy, then the Equal Treatment Commission accepts the seniority days as justified.

The question is what the sanction should be where seniority days are not objectively justified. In particular, do the younger employees suddenly get a windfall in the form of extra days off (“levelling up”) or do the older employees suddenly lose their benefit (“levelling down”)?

Contrary to the decision of the BAG reported above, two Dutch lower courts and one Court of Appeal have decided in favour of levelling down. They reasoned that an employer cannot be held to a contractual position that is illegal and therefore void.

United Kingdom (Lee Nair): In the UK, employees (and certain other workers) are protected against various types of discrimination by the Equality Act 2010 (the “EqA”). Treating older employees more favourably by increasing their annual leave in accordance with their age would amount to direct age discrimination against younger workers in contravention of the EqA. It is possible to defend direct age discrimination (though not other types of direct discrimination) by fulfilling the objective justification test. This requires that the discrimination must be a proportionate means of achieving a legitimate aim.

The objective justification test is ostensibly the same for direct and indirect discrimination under English law. However, a body of case law is building which suggests it will be easier to defend the latter than the former. In a case decided in 2012 (*Seldon -v- Clarkson Wright and Jakes*), the Supreme Court held that an employer seeking to justify direct discrimination must have a legitimate social policy aim. In other words, a public interest which is also relevant to the individual employer. Such aims could include promoting access to employment for younger people, facilitating the participation of older workers in the workplace, ensuring a balance of experience, facilitating workforce planning and career progression, or protecting older workers’ dignity so that they do not have to go through a humiliating performance management

process when they can no longer do their job. An employer seeking to justify indirect discrimination could rely on a legitimate aim that is only relevant to its own business and does not have any element of public interest.

Because the requirements for justifying direct age discrimination are so onerous, an Employment Tribunal in the UK would therefore be likely to run through the same considerations as the BAG and to reach the same overall decision.

Perhaps for this reason, it is very unusual in the UK for a collective bargaining agreement or employer’s annual leave policy to determine holiday entitlement by reference to age, as in the case at hand. However, a fairly common scheme is for employers to reward long-serving employees with extra holiday days (in other words, making additional holiday a “service-related benefit”). While this would potentially amount to indirect discrimination by impacting less favourably on younger workers, the EqA contains an exemption allowing employers to use such service-related benefit schemes, without the need for objective justification. The exemption is automatic for benefits based on up to five years’ service, even if they are indirectly discriminatory. Where the employer wants to take account of more than five years of service, it would need to show a reasonable belief that providing the enhanced benefit fulfils a business need. However, this is still less of a hurdle than meeting the full test of objective justification.

Subject: age discrimination

Parties: unknown

Court: Federal Labour Court (BAG)

Date: 20 March 2012

Case number: 9 AZR 529/10

Hardcopy publication: NZA 2012, 803

Internet-publication:

<http://juris.bundesarbeitsgericht.de/cgi-bin/rechtsprechung/document.py?Gericht=bag&Art=en&nr=15980>

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(Footnotes)

1 AGG Section 7 Prohibition of Discrimination

- (1) Employees shall not be permitted to suffer discrimination on any of the grounds referred to under section 1; this shall also apply where the person committing the act of discrimination only assumes the existence of any of the grounds referred to under section 1.
- (2) Any provisions of an agreement which violate the prohibition of discrimination under subsection (1) shall be ineffective.
- (3) Any discrimination within the meaning of subsection (1) by an employer or employee shall be deemed a violation of their contractual obligations.

2 AGG Section 10: Permissible Difference of Treatment On Grounds of Age

Notwithstanding section 8, a difference of treatment on grounds of age shall likewise not constitute discrimination if it is objectively and reasonably justified by a legitimate aim. The means of achieving that aim must be appropriate and necessary. Such differences of treatment may include, among others:

1. the setting of special conditions for access to employment and voca-

tional training, as well as particular employment and working conditions, including remuneration and dismissal conditions, to ensure the vocational integration of young people, older workers and persons with caring responsibilities and to ensure their protection;

2. the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;
3. the fixing of a maximum age for recruitment which is based on specific training requirements of the post in question or the need for a reasonable period of employment before retirement;
4. the fixing of upper age limits in company social security systems as a precondition for membership of or the drawing of an old-age pension or for invalidity benefits, including fixing different age limits within the context of these systems for certain employees or categories of employees and the use of criteria regarding age within the context of these systems for the purposes of actuarial calculations;
5. agreements providing for the termination of the employment relationship without dismissal at a point in time when the employee may apply for payment of an old-age pension; section 41 Social Code, Book VI shall remain unaffected;
6. differentiating between social benefits within the meaning of the Works Constitution Act (Betriebsverfassungsgesetz), where the parties have created a regulation governing compensation based on age or length of service whereby the employee's chances on the labour market (which are decisively dependent on his or her age) have recognizably been taken into consideration by means of emphasizing age relatively strongly, or employees who are economically secure are excluded from social benefits because they may be eligible to draw an old-age pension after drawing unemployment benefit.

3 AGG Section 3 Definitions

- (1) Direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on any of the grounds referred to under section 1. Direct discrimination on grounds of sex shall also be taken to occur in relation to section 2(1) No. 1 to 4 in the event of the less favourable treatment of a woman on account of pregnancy or maternity.

2012/38

“Self-employed” lap dancer was employee (UK)

CONTRIBUTOR JUMOKE ADEJIMOLA*

Summary

The Employment Appeal Tribunal (EAT) upheld an appeal by a lap dancer who claimed that she was an employee for the purpose of making an unfair dismissal claim, even though in the industry there is a common view and understanding that dancers are self-employed. The EAT overturned a judgment by the Employment Tribunal (ET), which had found one of the three tests to establish a contract of service - mutuality of obligations - to be lacking. The EAT held that there was mutuality of obligations on the nights the dancer worked and that, therefore, there was an “umbrella” contract of service.

Facts

The case concerns the employment status of a lap dancer, Ms Quashie, who worked in Stringfellows’ night club in Covent Garden, London. Ms Quashie commenced her employment in June 2007 on what is commonly understood in the industry to be a self-employed basis. She was dismissed on 12 December 2008 by Stringfellows for alleged misconduct – drug taking or drug dealing. Ms Quashie denied the allegations and made a claim for unfair dismissal at the Employment Tribunal, in spite of her self-employed status.

On 9 November 2010, the Employment Tribunal held a three-day pre-hearing review, which is a preliminary hearing during which the judge can determine and decide interim or preliminary matters relating to the case. The issue was whether or not Ms Quashie was an employee, and as such whether she was entitled to make a claim for unfair dismissal. The judge also considered whether a contract of employment in the circumstances would be illegal. Stringfellows contended that Ms Quashie was not entitled to make a claim for unfair dismissal as this is only available to those who are employed under a contract of employment (“contract for services”). They further argued that if Ms Quashie was an employee, she had made false representations in her tax returns to the tax authority HMRC (the “Inland Revenue”) by completing them as a self-employed person and claiming expenses. This would render her contract of employment unlawful and disentitle her from claiming for unfair dismissal.

Employment Tribunal’s Decision

The ET judge decided that the tribunal would need to look at the whole picture to determine whether the claimant was under a contract of employment or was self-employed. Under UK law, there are three prerequisite elements that must be present to establish a contract for services, which confers employee status:

- the contract must impose an obligation on the employee to do the work personally;
- there must be mutuality of obligation between employer and employee;
- there must also be some form of control over the employee by the employer.

The judge stated that if all three were present, then the Tribunal would look at the overall picture, including how the claimant was paid,

whether she provided her own equipment, whether she was subject to any disciplinary or grievance procedures, whether she received sick pay and holiday pay, whether she was provided with any other benefits and whether she bore a degree of financial risk or level of responsibility within the business.

The judge stated that the starting point would be the relevant documents, namely:

1. the “club agreement”, which was the standard agreement between the club and its dancers. This was considered relevant even though Ms Quashie had never seen it. The agreement set out the rights and obligations of both parties, including the dancer’s obligation to provide her work personally, i.e. without being allowed to use a substitute. The agreement labelled the arrangement as self-employment;
2. the house rules, which the claimant had also not received;
3. the club’s welcome booklet, which contained the same material as the house rules;
4. the licence provided to the club by Westminster City Council for the operation of the premises, which required all dancers to fill in an engagement form and stipulated a minimum fee to be paid to the dancers;
5. the work Rota, which was drawn up by a person engaged by Stringfellows as a “house mother”.

The ET judge made the following findings of fact. All dancers were paid in “heavenly money”, which were vouchers that prevented cash being exchanged between customers and dancers. The dancers were looked after by a house mother who took care of their appearance and general well-being. The dancers were responsible for the payment of the house mother and other club facilities. In addition, they had to pay £15 upfront each night to the house mother before their shift. From the heavenly vouchers received, the club deducted a commission fee, a house fee and any relevant fines. Whatever was left over was placed as cash into an envelope for the dancers to receive the next time they attended the club.

The ET decided that only two out of the three tests that were required to establish a contract of service were present. Ms Quashie had provided work personally and Stringfellows did have a degree of control over her. However, the Tribunal decided that Stringfellows had never paid the claimant, rather, the claimant paid Stringfellows to be able to dance at the venue. Stringfellows was not obliged to pay the claimant anything and was not contractually obliged to provide her with work. Therefore, the essential wage/work bargain that shows mutuality of obligations was missing.

Mutuality of obligations generally means that the employer is obliged to offer work and the employee has a corresponding obligation to accept and perform the work. Both of these obligations are necessary to establish the existence of a contract of employment. The courts have developed this further. For example, they have held that mutuality of obligations need not always include the obligations to provide and perform work. However, there must be some mutuality of obligations between the parties for there to be a finding that a contract of employment exists. This means that each of the parties is obliged to do something for the other party under the contract.

The Tribunal found that there was no mutuality of obligations during periods when Ms Quashie was not dancing at the club. During the

periods she was not working, the club did not have to provide her with work and she did not have to attend the club. On this basis, the Tribunal found that Ms Quashie was self-employed and did not think it necessary to deal with the illegality point. The ET ruled that it did not have jurisdiction to hear her case and therefore dismissed her claim for unfair dismissal. Ms Quashie appealed to the Employment Appeal Tribunal and Stringfellows cross-appealed on the issue of illegality.

Employment Appeal Tribunal's Decision

On 26 April 2012, the EAT allowed Ms Quashie's appeal, having analysed the working relationship between her and Stringfellows and carefully examined the relevant documents. On the nights she presented herself for work, there was mutuality of obligations. She was contractually obliged to work on those nights, provide some free dances and follow the instructions of staff. Likewise, Stringfellows was obliged to provide an opportunity to her to dance on those nights and allow her to collect heavenly money vouchers which Stringfellows was obliged to exchange into cash for Ms Quashie. It did not matter that her pay came indirectly through vouchers from customers. The ET judge was wrong to narrowly focus on the wage/work bargain as it does not cover the many different types of complex employment arrangement that exist and which need not necessarily involve work being exchanged for cash. The judge gave the example of Ms Quashie agreeing to dance in exchange for the club paying her university fees. Furthermore, if Ms Quashie refused to follow instructions from staff or did not attend work, she risked being fined and money would be deducted from the vouchers given to her by customers.

The EAT also held that there were no gaps in between her nights of work that were sufficient to disturb the finding that there was an umbrella contract. An umbrella contract is where a person is engaged on a series of individual contracts, with an expectation of continual engagement. Even if there are gaps between employment, continuity of employment is preserved. The date the Rota was published was the date of acceptance of the contract and any short gaps still constituted employment. The EAT noted that Ms Quashie was still obliged to turn up to weekly unpaid Thursday meetings and would be fined for not doing so. The continual obligation to turn up on Thursdays each week was enough to establish an employment relationship. She had to notify Stringfellows when she wished to take a holiday and give her return date. She was not permitted to take a holiday for more than four weeks and if she did she would have to audition for the job again. As long as she did not take such a break, she was entitled to turn up and dance and on that basis, during her holidays, she maintained employment status. The fact that the claimant could work elsewhere on her nights off was not sufficient to counterbalance the finding of an employment relationship.

The EAT concluded that Ms Quashie had over one year of continuous employment and therefore qualified to claim unfair dismissal. Her case was remitted back to the Employment Tribunal to determine her unfair dismissal claim and whether or not the contract was void because it may have been performed illegally. Permission to appeal was refused.

Commentary

The decision is of particular interest because it is a revolutionary breakthrough for UK lap dancers and those working in that industry as "self-employed". Up until this judgment, lap dancers had always been viewed as self-employed. The EAT decision serves as a warning to employers to not assume that any arrangement dressed up as self-employed will necessarily overcome the three tests that establish who is an employee under UK common law. Examination and analysis at

appellate level may change what is described contractually as self-employment to employee status. Therefore, employers should carefully scrutinise contracts and arrangements in the light of this judgment.

Stringfellows argued in the appeal that it was widespread practice for dancers to be self-employed and that this arrangement, as opposed to giving them a contract of employment, was in the public interest. My view is that this argument is weak. To treat workers as employees by exercising a level of control over them, but then deny them the protection afforded to employees cannot be in the public interest. I agree with the EAT conclusion that the fact that she could work elsewhere on her off-nights was not sufficient to defeat the arguments to support employee status. Clearly, employees with contracts of employment can and do work in jobs other than their main job, subject to the terms and conditions of their contract.

In my opinion, the control Stringfellows had over Ms Quashie was more than could normally be expected in self-employment – there was a Rota, a compulsory weekly meeting and sanctions if she did not attend or obey instructions. In addition, the fact that she could not take an extended holiday and would effectively lose her job if she did, is indicative of an employment relationship. This case may cause employers to loosen their contractual control over the so-called "self-employed" and afford them greater freedom, so as to avoid employment tribunal claims.

The decision mirrors the approach of the Court of Appeal in its judgment of 26 February 2006, in the case of *Prater -v- Cornwall County Council* [2006] IRLR 362. Mrs Prater had worked for a local authority on a succession of short-term teaching assignments over a ten-year period. The local authority argued that the mutuality of obligation in each successive contract was not sufficient to create a contract of service because at the end of each contract, they were not obliged to offer work and she was not obliged to accept work. Mrs Prater won her ET claim for a declaration of written particulars of employment. The Court of Appeal dismissed the local authority's appeal, deciding that the periods between her short term assignments were temporary cessations of work and therefore she was continuously employed throughout the ten-year period.

A similar approach was followed by the Supreme Court in *Autoclenz -v- Belcher & Ors* [2011] UKSC 41 in which the Court dismissed Autoclenz's appeal against the judgments of the ET and EAT. The dispute was about written clauses in the claimants' contracts that appeared to bar them from "worker" status for the purposes of the Working Time Regulations and the national minimum wage. The claimants were car valets working for Autoclenz under what Autoclenz argued was a self-employed arrangement. The ET held that they were employees or, in the alternative, workers. The EAT allowed Autoclenz's appeal in part and held that the claimants were only workers. The Court of Appeal reinstated the ET decision, stating that the actual legal obligations should be considered when determining employment status. Autoclenz appealed to the Supreme Court. The Supreme Court upheld the decision of the Court of Appeal, finding that the car valets were employed under a contract of employment. The car valets were expected to attend work and had no control over their hours or the way in which they carried out their work. Having carefully examined the evidence, the Court held that "*These are findings of facts that Autoclenz cannot sensibly challenge in this court*".

These cases show that the Employment Tribunal and other UK courts are not willing to accept contractual descriptions that amount to

self-employment without carefully dissecting the contract. They will carefully consider all of the circumstances, including the reality of the working relationship.

Comments from other jurisdictions

Austria (Martin Risak): In Austrian law the notion of “personal dependence and subordination” plays a major role when determining whether somebody is deemed an employee or not. Working in a state of personal dependence means that work is done in a position of subordination, i.e. under the command, authority and control of another and with resources belonging to another, namely the employer. Persons who work for others but are not in a position of personal dependence, i.e. who are not subject to command or control, are not employees. A major criterion of this concept is the duty to work in person as well as to be obliged to actually work – if somebody has no obligation to work under an umbrella contract (such as teachers in a language school who only sign a rota when they want to but are then obliged to work) the courts tend to see this as a “free service contract” not covered by employment law and they will not split this up into a series of employment contracts with a duty to work.

In Austria there have been cases where lap dancers have been subject to court procedures dealing with issues under the Act on the Employment of Foreign Nationals. The question of whether they were employees did not need to be solved as the Act introduces the notion of “employee-like persons” in order to be able to deal with any attempts by employers to evade the application of the Act. Employee-like persons are those who work for others on the basis of personal independence (i.e. not in a relationship of subordination) but are economically dependent on them – and without doubt most foreign lap dancers fall into this category.

Germany (Klaus Thönissen): Under German law the determination of whether an employment relationship has been established depends on the field of law one is dealing with. The definitions differ slightly within the areas of employment, social insurance and tax law.

For the purposes of employment law the individual will be recognised as an employee if he or she falls within the following definition: he or she works in “personal dependency” in an organisational unit based on a private contractual obligation. A two-pronged-test helps distinguish between an independent contractor and an employee, the first part of which is to establish the degree of the personal dependency and the hierarchical subordination within the organisational unit. The greater the levels of dependency and subordination the more likely the individual is to qualify as an employee. Naturally, this distinction can only be made on a case-to-case basis.

Looking at the case at hand, Ms Quashie would be considered as an employee under German law as well. As the EAT correctly pointed out, Ms Quashie was personally dependent and had a duty to obey instructions from Stringfellows. Based on the contract between the parties she was obliged to work on particular nights, provide some free dances and follow instructions given by staff. The contract was also private in nature, because running the dance club was part of a private business.

In addition, as far back as 1972, the Federal Labour Court (*Bundesarbeitsgericht*) rendered a judicial opinion that permitted the conclusion that a lap dancer could be considered as an employee (BAG 5 AZR 512/71).

The Netherlands (Peter Vas Nunes): As a Dutch employment lawyer, what interests me most in this case report is the author’s comment that this judgment represents a revolutionary breakthrough. I cannot imagine a Dutch court being hesitant to consider the legal relationship between Stringfellows and Ms Quashie as one of employment. If this judgment is revolutionary, why was Stringfellows not given leave to appeal?

The three requirements under English case law for establishing a contract of services – an obligation to work personally, mutuality of obligations (in particular: pay) and control – are recognisable and I would expect them to be fairly similar in all European jurisdictions. The same applies to the author’s comments that the UK courts “are not willing to accept contractual descriptions” but rather consider “the reality of the working relationship”. Dutch lawyers will recognise this reasoning. They will also find resemblance to the Dutch situation where the author indicates that this judgment “may cause employers to loosen their contractual control over the so-called “self-employed” and afford them greater freedom, so as to avoid employment tribunal claims”. This is precisely what Dutch employers attempting to circumvent the rules on employment do. They provide in the contract that the employee is not obliged to perform the services personally, need not turn up for work, are free to send a substitute, etc. A well-known example concerns newspaper deliverymen. If the contractual description aligns with reality and the worker really does fail to turn up regularly without fear of losing his work, etc, the courts will accept self-employed status, but where the worker is *de facto* obliged to perform his work personally, for example because he will not be offered more work if he makes more than very occasional use of his right to stay away or be substituted, the courts will as a rule see a contract of employment.

A difference between UK law and Dutch law that is relevant to employment status issues is that the requirements for establishing an employment contract between the employer and the person providing work (i.e. under civil law contract) are different from those for establishing employment status under national insurance and tax legislation. An individual may be an “employee” for tax and/or social insurance purposes but not for contractual purposes or the other way around.

Subject: employment status

Parties: *N.E. Quashie - v - Stringfellows Restaurants Ltd*

Court: Employment Appeal Tribunal

Date: 26 April 2012

Case number: UKEAT/0289/11/RN

Internet publication www.bailii.org

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2012/39

Fixed-termers protected by collective redundancy rules (PL)

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Summary

The termination of fixed-term contracts is covered by the Polish law transposing the Directive on collective redundancies.

Facts

In January and February a privately owned company carried out numerous dismissals. Around 80 employees were given notice of termination and over 90 employees signed termination agreements. One of the employees who was dismissed was the plaintiff, Ms Marzena W. She had a five year fixed-term contract that contained a clause allowing either party to terminate it prematurely by giving notice. The employer made use of this clause, giving the plaintiff notice on 30 January 2009.

The plaintiff knew that her employer was in the process of a collective redundancy operation and suspected that her employer had failed to observe the rules that apply to collective redundancies, such as the obligation to consult with the relevant unions and to provide them with a list of the employees being made redundant. These rules are set out in a Polish statute called the Act on Specific Rules for Terminating Employment Relations for Reasons Not Attributable to Employees (the "Act"). The Act is a transposition of Directive 98/59. The plaintiff asked the National Labour Inspectorate (*Pantswowa Inspekcja Pracy*, the "PIP") to investigate whether her suspicion was correct.

The plaintiff brought legal proceedings. She claimed two things: (i) a statutory severance payment, to which under Polish law any employee who is dismissed for reasons unrelated to performance is entitled; and (ii) compensation for the employer's failure to observe the collective redundancy rules.

The court of first instance dismissed the claim, erroneously reasoning that the termination of fixed-term contracts is not covered by the Act. On appeal this judgment was partially reversed. The Court of Appeal awarded the severance payment but turned down the claim for compensation for failure to comply with the Act, again reasoning that the Act does not apply to the termination of fixed-term contracts. The plaintiff was given leave to appeal to the Supreme Court on a point of law, namely whether or not the Act applies to fixed-termers.

Judgment

The Supreme Court noted that the Act must be construed broadly, in line with the Directive and found there was no reason to exclude fixed-term contracts from its scope. The procedure to be followed in the event of a collective redundancy, in particular the obligation to consult with the unions *before* giving notice of termination to any of the employees in question, is obligatory. Violation of that procedure constitutes a breach, not only *vis-à-vis* the unions, but also in relation to the individual employees being dismissed. Therefore, the plaintiff's dismissal was in breach of the law and gives rise to compensation.

Commentary

The judgment described here very clearly indicated the necessity to carry out the complete procedure for collective redundancies irrespective of whether workers are employed under a contract of fixed or indefinite

duration. Any failure to follow this procedure by the employer results in a breach of the provisions on termination of employment contracts. Under Polish legislation this means that the employee has the right to a severance payment pursuant to the Labour Code in respect of the failure to fulfill the formal requirements for termination of employment contracts. This judgment is a clear indication to employers that, notwithstanding that there is no requirement to specify the reasons for termination of fixed term contracts, they should include all workers who are being given notice of termination in the collective redundancy procedures, in case the actual reason for terminating the employment relationship is not attributable to the employee.

It is also worth noting that the Supreme Court adopted a pro-European interpretation and examined the compatibility of the rulings of the courts of first and second instance with EU law. This is a positive development since, despite over eight years of membership of the EU, the Polish courts often fail to take EU law sufficiently into account.

Subject: collective redundancy

Parties: Marzena W – v – employer

Court: *Sąd Najwyższy* (Supreme Court)

Date: 14 February 2012

Case number: II PK 137/11

Hardcopy publication: Monitor Prawa Pracy, No. 6/2012, pp.315-316

Internet-publication: not yet available

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2012/40

Supreme Court accepts dismissal for private computer use despite monitoring without warning (CZ)

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Summary

An employer may monitor whether its employees use company computers for private purposes, even without their knowledge and, if it appears that an employee has used a company computer to visit websites unrelated to work, it may dismiss the employee for cause.

Facts

The employee in this case surfed websites unrelated to work during working hours. In particular, in September 2009, he spent more than half of his working hours (approximately 103 hours) browsing websites that were unrelated to the work performed by him under his employment contract. The employer terminated the employee's employment relationship with immediate effect upon discovery of this, on the basis that it was a particularly serious breach of his working obligations.

The employee admitted that during working hours he sometimes used the company computer for personal purposes. However, he rejected the charge that it was at the expense of his work and brought an action against the employer. He disagreed that surfing unrelated websites could be considered as a particularly serious breach of his working obligations.

The Court of First Instance ruled that the summary termination by the employer was valid, as browsing websites unrelated to work had taken more than half his working hours and, therefore, the Court considered it as a particularly serious breach of his obligations as an employee.

On appeal to the Court of Second Instance, the employee argued – among other things – that by reviewing his Internet activities without his prior knowledge or consent, his employer had been secretly and illegally monitoring him and such illegal monitoring cannot be used as grounds for terminating employment. The Court, however, upheld the summary dismissal and confirmed the previous decision. It also declared that reviewing the employee’s activities on the Internet could not be considered secret monitoring of the employee, even though it had taken place without his prior consent, as the employer had not monitored the contents of the websites the employee had visited or the contents, for example, of his emails and text messages.

The employee filed an extraordinary appeal to the Supreme Court in which he argued that monitoring his Internet activities constituted secret monitoring of an employee, which is against the law.

Judgment

The Supreme Court upheld the decision of the Court of Second Instance and dismissed the extraordinary appeal. It reasoned in its judgment that it is necessary to take into account that the intent of the employer’s monitoring was not to learn the contents of the employee’s e-mails, SMSs or MMSs. It was only performed to make sure the employee was not breaching the prohibition on using the employer’s information technology for personal purposes (to be found in the Czech Labour Code) or the prohibition on viewing websites unrelated to work (to be found in the employer’s workplace regulations).

The Supreme Court concluded that monitoring the employee’s activities on the Internet was only aimed at protecting the employer’s property and there was no intention to invade the employee’s privacy. In the court’s opinion, the employer was not obliged to inform the employee before conducting such checks.

For the above reasons, the Supreme Court also agreed with the Court of Second Instance that the evidence presented in the case was admissible, even though it was obtained by monitoring without the employee’s consent or knowledge, and that the employee’s privacy was only minimally invaded (if at all).

The Supreme Court explained that the employer is entitled to make adequate checks to ascertain whether employees are using work equipment only for work purposes. How much is “adequate” is assessed based on many factors, but especially the duration and the extent of the check and also any possible interference with the employee’s privacy.

Commentary

Besides determining whether the termination of the employment relationship in this particular case was valid or invalid, a conflict of two fundamental principles of employment law became a subject of the

dispute: the right of the employer to protect its property and the right of the employee to protect his privacy.

In terms of employment relationships, the protection of employee’s privacy is limited by the nature of his work. The Czech Labour Code itself expressly prohibits employees from using the employer’s equipment other than for purposes related to work for their employer. The Labour Code allows the employer to monitor compliance with this prohibition to an “adequate” extent.

Following the judgment of the Supreme Court, when evaluating the adequacy requirement, a number of elements, including duration and extent of the checks and any possible invasion of the employee’s privacy must be taken into account.

However, the question of precisely how an employer may monitor websites visited by an employee still remains unclear. The Supreme Court stated in this decision that information about a specific website already points to invasion of an employee’s privacy. On the other hand, it is not a breach of privacy protection if the employer only monitors whether and to what extent the employee visits non-work-related websites.

One problem with this is that the only way to find out whether an employee has visited websites unrelated to work may be to note which sites he has visited – thereby invading his privacy to a certain extent. The Supreme Court may need to address this issue in the near future.

Academic commentary

Dr Petr Hůrka, Czech member of the Board of Academic Editors: This decision is a breakthrough rule in terms of interpretation and application where it comes to finding consistency between protecting property of the employer used for performance of the employee’s work and protecting the employee’s privacy during work. Monitoring by the employer is a proper procedure if (1) the employee is informed in advance of monitoring; (2) it is directed solely at the employer’s property (i.e. electronic equipment and computer network tracking) and (3) it merely identifies the websites visited by the employee during working hours without actually monitoring the employee’s private activities. In this way, the employer is able to protect its property and equipment. The employee is obliged only to use the employer’s equipment for work-related purposes – and this is expressly stated in the Labour Code, meaning that the employee must be aware of the fact that the employer is entitled to exercise control over him or her. The employee understands that the employer is entitled to ascertain that the employee is using its equipment for private purposes. But this is where monitoring ends: the moment the employer realizes that it is interfering with the employee’s privacy it must not go on to monitor the content of the employee’s activities.

The definition of mutual rights and obligations provided by the decision of the Supreme Court in this case seems to me to be eminently useful.

Comments from other jurisdictions

Austria (Andreas Tinhofer): This case is very likely to have been decided in the same way in Austria. It is a well-established principle that employees must not use a substantial amount of their working time for pursuing private interests. This applies to private phone calls in the same way as any other form of communication, and it includes use of the Internet which is not work-related.

In one case, an employee used the Internet at his workplace for at least 1.5 hours daily for private purposes and downloaded a large amount of film and music. The Supreme Court confirmed that summary dismissal was reasonable, given particularly, the risk to the employer's IT system of downloading potentially virus-infected files or files that may infringe another person's copyright. The Court also said that the excessive downloading of files puts a considerable strain on the employer's IT system. In such a situation a prior warning to the employee was not necessary (29 September 2011, 8 ObA 52/11x).

In Austria, evidence may be used in the labour court even if obtaining it has infringed privacy rules. The same applies to cases where a control measure is lawful only if it is agreed with the works council. (Such an agreement is required if employees' Internet usage is controlled regularly and not just where there is a well-founded suspicion that a specific employee uses the Internet excessively for private purposes.)

Germany (Dagmar Hellenkemper): The Czech decision has two interesting aspects. First, the dismissal on grounds of a particularly extensive breach of contract based on the prohibited private use of the Internet. Second, the question whether or not proof of such extensive private use during work hours can be obtained illegally.

Considering that in this case the private use of the Internet was prohibited by the Czech Labour Code and the employer's working rules, a German Court would probably have reached a similar decision. In other words, where a prohibition on private Internet use is as clear as it is in the above case, dismissal on grounds of breach of contract is likely to be upheld by the courts. Considering that the employee spent half of his regular working time surfing the Internet, a prior warning would probably have been considered unnecessary. The German Federal Labour Court (the "BAG") has upheld a few cases of dismissal for private use of the Internet. The employees had usually visited pornographic sites. While in these cases the employees had confessed to the breach of contract, in the above case the employee was monitored without his knowledge or consent.

In Germany, the employer is permitted to monitor Internet use "in an appropriate manner", meaning random checks are allowed, as well as an examination where there is specific suspicion of misuse. Therefore, in cases of extensive use of the Internet for private purposes, the employer is able to provide admissible proof of misuse with or without the employee's consent. Generally, section 87(6) of the German Works Council Act gives the works council a right of co-determination in relation to the introduction and use of technical devices designed to monitor the behaviour or performance of employees. This is aimed at preventing misuse of such monitoring by the employer and to protecting the employees' right to privacy.

The Netherlands (Peter Vas Nunes): Surprisingly, none of the Czech courts involved in this case seems to have made reference to the ECtHR's case law, such as its 2007 ruling in *Copland* [appl. 62617/00]. In that case, the ECtHR held that information derived from the monitoring of personal Internet usage is covered by the notion of "private life" and "correspondence" pursuant to Article 8 of the ECHR. If the employee in the Czech case reported above was not warned that his Internet usage would (or might) be monitored, surely he had a "reasonable expectation of privacy"? The employer in this case must have monitored which sites the employee visited, otherwise it could not have known that those sites were unrelated to the employee's work. The employer must also have logged the duration of each Internet visit, or else it would not

have known that the employee spent 103 working hours in September 2009 visiting non-work-related websites. Whether or not the employer intended to invade the employee's privacy should not be relevant.

I cannot imagine a Dutch court would have accepted a dismissal such as the one reported here, given that the monitoring of the employee's usage was illegal and the employee had not been warned that continued breach of company policy might lead to summary dismissal. However, contrary to at least one Italian and one Portuguese court (see EELC 2009/40 and EELC 2010/70), but in line with at least one Luxembourg court (see EELC 2009/18), a Dutch court probably would have found the evidence of the employee's computer usage admissible, even though it had been acquired illegally. To date, only a few lower Dutch courts have disqualified illegally obtained evidence.

Subject: privacy

Parties: P.B. – v – Kasalova pila, s.r.o.

Court: *Nejvyšší soud České republiky* (Supreme Court)

Date: 16 August 2012

Case number: 21 Cdo 1771/2011

Internet publication:

http://www.nsoud.cz/Judikatura/judikatura_ns.nsf/WebSearch/B0ED0CEF751D472DC1257A61004D599C?openDocument&Highlight=0

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2012/41

Summary dismissal for misappropriation of property (DK)

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Summary

Case law that addresses the difficult question of whether a dismissal is justified serves an important purpose in Danish labour law. Since there is no legislation directly regulating this matter, case law serves as a guideline for future cases – both in relation to defining a justified (summary) dismissal but also in relation to the burden of proof. The following case is an example of both.

Facts

In Denmark, there is no legislation that directly regulates employers' power to dismiss employees – with or without notice. Case law has established, however, that employers are permitted to summarily dismiss employees for material breaches of contract. In some cases, there is no doubt that a summary dismissal is appropriate, but in most cases it is not immediately clear whether the most appropriate sanction is a warning, a dismissal with notice or a summary dismissal. In this case, the question was whether removing the employer's property constituted a material breach, since the police did not regard it as theft.

The employee, a chauffeur and handy-man, had worked for a small printing company for 16 years. In the eyes of the employer, he was a loyal employee, who was always prepared to go the extra mile when needed. But one day the employee removed one of the employer's photocopiers. When the manager found out that the employee had taken the photocopier, he immediately confronted the employee. However, the two of them did not see eye-to-eye about what had happened.

The employee explained that the managing director had told him that the photocopier was to be discarded, and that he should take care of this. The following Sunday, when, as often before, he went into work to do some cleaning, he decided to discard the photocopier. He explained that the reason he did it that day was that his stepson was with him. The stepson had a car with a lift, and as the photocopier weighed 400-500 kg, it was an obvious opportunity to get rid of it.

The managing director denied having asked the employee to discard the photocopier. The photocopier may have been old, but it was still functional. Since the company was having financial problems, they would never throw away anything that was still working. Furthermore, the managing director explained that, when confronted with the situation, the employee had said that his stepson's employer had paid about EUR 675 for the photocopier – something that the employee subsequently claimed he had never said.

Although the employee's stepson returned the photocopier, the managing director felt that trust had been breached and decided to summarily dismiss the employee. The next day he also reported the matter to the police, but the prosecution service dropped the case against the employee, saying there was no proof of theft.

Since the situation was not a matter of theft, the employee thought the summary dismissal was unjustified. He therefore brought proceedings against the employer, claiming three months' salary (corresponding to his notice period), severance pay and compensation for unfair summary dismissal.

The district court, after hearing testimony by the employee and by the employer's managing director, found in favour of the employee. The judge emphasised that at the time the employee removed the photocopier, it occupied a spot where it would immediately be noticed if removed. The judge also noted that the employee had been a loyal employee for 16 years. For these reasons, and with reference to the employee's version of events, the judge did not find that the company had discharged the burden of proving that the summary dismissal was justified.

Judgment

The employer appealed to the High Court. With reference to the statements given before the lower court and especially the fact that the photocopier was still functional, the Danish Eastern High Court did not believe that the employee had been told to discard the photocopier. On the contrary, the court believed the employer's version of events including its statement that the employee had told the managing director that he had sold the photocopier for about € 675. On those grounds, the High Court ruled that the employee was in material breach of his contract by removing the employer's property. The summary dismissal was therefore justified.

The employee did not seek leave to appeal to the Supreme Court, presumably because such leave would almost certainly have been denied.

Commentary

What makes this case interesting from a Danish perspective is that a civil court, which applies a balance of probabilities test, can consider misappropriation is established even where a criminal conviction would be impossible for lack of proof "beyond reasonable doubt". Employers can be justified in summarily dismissing employees for misappropriation of company property, even where the misappropriation does not qualify as theft. The deciding factor in the assessment of the proportionality of the employer's decision to dismiss summarily is not whether the employee has committed a criminal offence, but whether the employee has acted contrary to his duty.

The question of whether an employee has acted contrary to his duty is a question of who can prove what. In cases like this, the only evidence will often be the statements of the employee and the employer and it will be a question of fact for the courts to determine whose evidence they prefer. Nevertheless, rulings like these are important as guidelines for employers, lawyers and judges when similar cases emerge.

It should also be noted that according to the general Danish rules on burden of proof, it is for the employer to prove that the employee's action/non-action constitutes gross misconduct/breach of contract and that summary dismissal therefore is justified. Whereas the district court gave weight to statements attesting to the employee's loyalty, the High Court was persuaded by the employer's assertion that they would never throw away something that was still working because of the company's financial problems. Matters such as this will always come down to whose explanation the court finds more believable.

Comments from other jurisdictions

Austria (Andreas Tinhofer): It is impossible to predict how this case would have been decided in Austria. It is irrelevant that the employee was not prosecuted, since the employment court is not bound by the judgment of a criminal court. However, the issue of evidence would have been crucial to the outcome. As in Denmark, the employer must prove the facts justifying a summary dismissal. But the court would not go so far as in The Netherlands – requiring the employer to prove that no permission had been given – which would be very difficult to do.

A criminal offence committed by an employee against his or her employer or its property is normally sufficient grounds for a summary dismissal. In such a situation, the fact that the employee had given 16 years of loyal service to the company would not have made any difference.

This case was complicated, however, by the dispute as to whether the employee had been told to discard the photocopier or had just sold it to make some money for himself. Such boldness seems a bit unlikely, but in the end it was for the court of first instance to assess all the evidence presented by the parties and make a finding of fact.

Germany (Klaus Thönißen): In contrast to the situation under Danish law, an employer in Germany has the option to terminate without notice. The Civil Code provides in section 626(1) the following rule:

"The service relationship may be terminated by either party to the contract for a compelling reason without complying with a notice period if facts are present on the basis of which the party giving notice cannot reasonably be expected to continue the service relationship to the end of the notice period or to the agreed end of the service relationship, taking all circumstances of the individual case into account and weighing the interests of both parties to the contract."

Under this rule a two-step analysis is necessary. The first is to decide whether or not the employee's conduct could justify termination without notice in general terms. The second step is to assess the circumstances of the case, including the seniority of the employee and his previous behaviour. The labour court must decide, based on its assessment of the circumstances whether or not the termination without notice was justified.

In a case like this, where the termination is based on a suspicion, an employer has certain additional duties of which he must be aware. First, he must investigate the whole situation. As part of this, he must offer the employee a hearing and the right to contact a lawyer, if the employee so requests. The purpose of this is to give the employee the right to rebut the employer's allegations. By the end of the investigation the employer needs to be convinced of the employee's misconduct beyond reasonable doubt if he wishes to dismiss him summarily.

Ireland (Georgina Kabemba): In Ireland, employees have both common law and statutory rights in relation to their employment and the termination thereof. An employee may choose whether he wants to proceed by way of unfair dismissal (statutory remedy) or wrongful dismissal (common law). At common law, an employer can terminate an employee's employment for any reason on the giving of the appropriate notice. However, even if an employee can be dismissed at contract level for any reason, the same dismissal must satisfy a much narrower test under the Unfair Dismissals Acts 1977-2007 (the "UDA"), which makes this common law discretion of limited use.

Employees with one year's service are entitled to the benefit of the protections of the UDA. In a nutshell, the UDA provide that a dismissal is deemed unfair unless the employer can prove that it was both substantively and procedurally fair. An employer must justify a dismissal either by showing that the dismissal was because of the capability, competence or qualifications of the employee, the conduct of the employee, redundancy, the employment being prohibited by statute, or because there were other substantial grounds justifying the dismissal, subject to the dismissal having been effected in a fair and reasonable manner.

Summary dismissal arises in cases of gross misconduct which often involve fraud or theft on the part of the employee. Even in these cases, the courts and tribunals will expect an employer to carry out an investigation with due regard to the employee's right to fair procedure and natural justice. The Employment Appeals Tribunal (EAT) that hears cases under the UDA will always very closely examine the actions of an employer that result in the summary dismissal of an employee.

In Ireland, apart from the risk of an unfair dismissal claim, there is also a risk that an employee could apply to the High Court for an injunction to prevent his dismissal. An injunction may be granted where an employer failed to comply with the correct contractual notice, an agreed disciplinary procedure or failed to follow fair procedures, where damages would not be an adequate remedy and the balance of convenience favours the granting of an injunction.

The Netherlands (Peter Vas Nunes): Dutch law makes it hard to terminate the contract of a permanent employee. This can make it tempting for an employer to seize any opportunity that comes along to apply the doctrine of summary dismissal, particularly where the employee in question is someone he would not mind getting rid of. This is because the cumbersome rules on termination that apply in "normal" termination situations (dismissal permit, dismissal prohibitions, notice period, etc.) do not apply. An employee who is caught stealing, for example, can in many cases be dismissed without the usual

formalities, immediately and at no cost. This fact, in combination with the severe impact of a summary dismissal on the employee (sudden loss of income, no eligibility for unemployment benefits, damaged reputation, etc.) have led to the creation of extensive case law, one effect of which is to accept summary dismissal only in the most serious cases. Although malicious intent is not always a requirement, an employee who, for example, removes a photocopier without intent to steal, will usually find the court on his side. Moreover, the court takes into account the employee's personal circumstances, such as age, seniority, performance, addiction and personal difficulties. Finally, the burden of proof that a misdemeanour is sufficiently serious to warrant summary dismissal, rests squarely on the employer's shoulders.

Unfortunately, the case reported above fails to specify a number of essential details, such as: where the photocopier was when its removal from the employer's premises was discovered, how and when the photocopier was returned and why the stepson did not testify. However, let us suppose that the facts were simply as follows: the employee removes a reasonably valuable photocopier from the office and sells it, he makes no effort to conceal this, he claims that the director allowed it, the director denies having given permission and there is no further evidence. In theory, the court could require the employee to prove the permission - which he cannot do - so that the "theft" is established. But would a court really do this? The court could also require the employer to prove that no permission had been given. This may sound strange, but it is standard Dutch case law that, for example, an employee who was fired because he failed to show up for work and who says he was sick need not prove he really was sick, but the employer must prove the employee was not sick, unless there are circumstances under which the court reverses the burden of proof. Similarly, where an absent employee says he was granted a day off work and the employer denies this, the employer may be required to prove the lack of permission, which will often be impossible to do. In a 1981 case the Supreme Court upheld a judgment where this was decided, but in that case it was common ground that the employee had asked for a day off and the dispute was whether the employer had granted or rejected the request. Had the employer denied having been asked for a day off, the court may have ruled in his favour. In brief, who bears the burden of proof (a question that is frequently synonymous with who loses the case) can depend on seemingly unimportant details.

Subject: Summary dismissal

Parties: Company (A) - v - Employee (B)

Court: Danish Eastern High Court

Date: 15 March 2012

Case number: B-3340-11

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2012/42

Directive 98/59 trumps Luxembourg insolvency law and liquidators must reinstate a wrongly dismissed employee representative (LU)

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Summary

Luxembourg law obligates the liquidators of an insolvent company to dismiss all employees immediately. Complying with this law, the liquidators in this case dismissed the staff of the Luxembourg branch of the Icelandic bank *Landsbanki*, including the plaintiff, who was an elected employee representative. In 2011, the ECJ ruled that Directive 98/59, which obliges employers to consult with employee representatives before initiating a collective redundancy, applies even in situations where the employer is bankrupt. Applying this ruling to the situation at issue, the Luxembourg court declared the plaintiff's dismissal to have been void and ordered his reinstatement, even though he had meanwhile found another job.

Facts

On 12 December 2008 a Luxembourg court ordered the dissolution and winding up of the Luxembourg subsidiary of the Icelandic credit institution *Landsbanki*. This bank had been hit by the financial crisis. On 15 December 2008 the liquidators informed the bank's employees that they were dismissed with immediate effect. This was in line with Article L.125-1 of the Luxembourg Labour Code, which provides that in certain events, such as the insolvency of an employer, all employment contracts terminate automatically and with immediate effect.

The plaintiff was one of the employees who were dismissed. On 24 December 2008 he applied to the President of the District Court sitting in Labour Matters (the "President"), claiming that his dismissal was invalid and asked the court to reinstate him. He based his claim on Article L.415-11 of the Labour Code. This provision affords special protection to elected employee representatives, who may not be dismissed, other than in case of serious misconduct, until six months following the expiry of their elected term of office. An employee who has been dismissed in violation of Article L.415-11 may apply to the President to have his dismissal declared invalid and to obtain an order for his reinstatement.

The President turned down the plaintiff's request. On appeal the plaintiff invoked not only Article L.415-11, but also Articles L.166-1 to L.166-5 of the Labour Code. These provisions are the Luxembourg transposition of Directive 98/59. Article 2(1) of this Directive provides that "where an employer is contemplating collective redundancies, he shall begin consultations with the workers' representatives in good time with a view to reaching an agreement", i.e. to negotiate a social plan. The President of the Court of Appeal sitting on Labour Matters (the "Appellate President") did not rule on Articles L.166-1 to L.166-5 and rejected the employee's claim, merely holding that the liquidators had applied Article L.125-1 correctly.

The plaintiff appealed to the Luxembourg *Cour de cassation* (Supreme

Court). It decided to ask the ECJ for guidance. On 3 March 2011, the ECJ delivered its ruling (joined cases C-235/10 to 239/10 in the matter of *Claes - v - Landsbanki*, reported in EELC 2011-1 page 40). The ECJ ruled that: "1. Articles 1 to 3 of [...] Directive 98/59 [...] must be interpreted as applying to a termination of the activities of an employing establishment as a result of a judicial decision ordering its dissolution and winding up on grounds of insolvency, even though, in the event of such a termination, national legislation provides for the termination of employment contracts with immediate effect.

2. Until the legal personality of an establishment whose dissolution and winding up have been ordered has ceased to exist, the obligations under Articles 2 and 3 of Directive 98/59 must be fulfilled. The employer's obligations pursuant to those provisions must be carried out by the management of the establishment in question, where it is still in place, even with limited powers of management over that establishment, or by its liquidator, where that establishment's management has been taken over in its entirety by the liquidator".

Acknowledging this preliminary ruling, the Luxembourg *Cour de cassation* reversed the Appellate President's order, holding that, by ruling that the plaintiff's employment contract had been terminated with immediate effect following the declaration of bankruptcy, the President had violated Articles L.166-1 to L.166-5 of the Luxembourg Labour Code and Articles 2 and 3 of Directive 98/59. The *Cour de cassation* referred the case back to the Appellate President.

In the new proceedings before the Appellate President, the liquidators argued that the plaintiff's claim was inadmissible on the grounds that Article 452 of the Commercial Code provides for the suspension of any individual lawsuits from the date that insolvency has been declared. The judge rejected this argument, noting that said Article 452 only applies to pecuniary claims, not to an action for invalidity of dismissal and reinstatement.

The judge also dismissed the liquidator's second procedural argument, which was that the plaintiff had not invoked Articles L. 166-1 to L. 166-5 until the appeal stage. The Appellate President declined to rule on those provisions, holding that his jurisdiction was limited to Article L. 415-11, which provides for special jurisdiction, created for the protection of elected employee representatives against dismissal. As for the merits of the case, the liquidators advanced three arguments. The first was that reinstatement was impossible given that the Luxembourg branch of *Landsbanki* had ceased to exist.

In the second place, the liquidators observed that Luxembourg law does not permit liquidators to take over the management of a company (as the ECJ seemed to have assumed) other than for the purpose of selling off its assets and distributing them amongst the company's creditors. According to Luxembourg law, a company is deemed to continue to exist following its dissolution, but only for the purpose of being wound up. Therefore, the liquidators would be violating Luxembourg law if they allowed the plaintiff's employment to continue and if they negotiated with him concerning a social plan.

Finally, the liquidators pointed out the fact that the plaintiff had accepted employment elsewhere and therefore could not be reinstated.

The Appellate President dismissed all of these arguments. It noted that the winding-up of the bank was still in progress and that, therefore, there was nothing to prevent the liquidators from fulfilling their obligations under Directive 98/45. Accordingly, the Appellate

President declared the plaintiff's dismissal to be void and it ordered the liquidators to reinstate him.

Commentary

The present decision will have a major impact on the Luxembourg law of insolvency since prior to this ruling, the liquidators of bankrupt companies had never negotiated social plans, but only declared the termination of employment contracts with immediate effect, supported by Article L.125-1 of the Labour Code.

In this respect, the present order is also very interesting as it shows how a national judge can use the primacy of European law to solve discrepancies in national legislation.

Indeed, in Luxembourg law, on the one hand, Article L.166-1 and seq. of the Labour Code reflects the obligations set forth by Directive 98/59 and provides for the duty to negotiate a social plan when collective dismissals are in prospect. On the other hand, Article L.125-1 of the Luxembourg Labour Code provides for the termination of the employment contract with immediate effect when the employer's insolvency has been declared. Termination of the employment contract has the effect of preventing the opening of a consultation process and the negotiation of a social plan.

This discrepancy between these legal provisions is made further visible in the present matter for employee representatives who have a specific role in the negotiation process. Pursuant to Article L.166-3 of the Luxembourg Labour Code, they need to be informed in order to make "*constructive proposals*". Further, pursuant to Article L.415-1 of the Luxembourg Labour Code, employee representatives are protected against dismissal, except in cases of serious misconduct. In this regard, it should be stressed that Article L.125-1 of the Luxembourg Labour Code represents an automatic cause of termination of the contract, so that the protection against dismissal provided by Article L.415-1 does not apply in such a case.

However, the judge ruled that the dismissal was void, which may be interpreted as meaning that the decisions of the Cour de Cassation and of the ECJ have given primacy to Directive 98/59 over Article L.125-1 of the Luxembourg Labour Code. Therefore in the present case, Article L.125-1 does not apply and consequently the termination of the contract will be void for lack of valid cause and considered as a dismissal infringing Article L.415-1 of the Luxembourg Labour Code.

Nonetheless, to what extent Article L.125-1 of the Luxembourg Labour Code should be set aside remains unanswered. In fact, a provision incompatible with a Directive may be disregarded, but only to the extent required to comply with European law, according to the relative effect of the ruling of the ECJ on national legislation. It is unclear if Article L.125-1 of the Luxembourg Labour Code could still be used by liquidators to terminate an employment contract, once they have complied with their obligation to organise negotiations for a social plan. The judge did not take a position on this issue and did not even explain his reasoning, which is one of the biggest flaws of this decision. As it is very unlikely that Article L.125-1 of the Luxembourg Labour Code will have any effect in future, the liquidators of companies will now have to decide on the basis on which they choose to dismiss employee representatives, once a social plan has been negotiated or, more probably, has failed. It is currently impossible to know whether liquidators have to respect the protection of employee representatives against dismissal or can terminate their contracts, once all other employees have been made redundant. In the first case, it should be noted that the protection of employee representatives is extended to six months after the end of their term, pursuant to Article L.415-12 of the Luxembourg Labour Code.

In this regard, one might ask if it makes any sense to maintain the

work relation with a company that is certain to cease to exist and that has, in most cases, not enough assets to pay its debts. The paradox of this decision is particularly illustrated in the present matter, where even though the employee had already found new employment, his reinstatement was ordered.

This situation is all the more problematic since the whole process of negotiation of a social plan may last at least 38 days under Luxembourg law and, in accordance with Article 2101 of the Civil Code, salaries, wages for the six last months of work, allowances and compensation resulting from the termination of the employment contract are subject to "*super-priority*" over and above all others claims. According to Article L.126-1 of the Labour Code they are also guaranteed by the State, up to a limit of six times the amount of the minimum wage.

Since it is very probable that Article L.125-1 of the Labour Code will no longer have any effect, liquidators will have to respect the legal provisions on notice periods for each redundancy, which will further increase the debts of the insolvent company and put pressure on the State guarantee. Consequently, this case has launched tough negotiations with the trade unions in Luxembourg on how to amend a system of guarantee that is no longer sustainable.

In conclusion, although this case may be legally well-founded, it is hardly very realistic. The liquidators, by law, have no choice other than to offer only the legal minimum to the employees in the negotiation of the social plan, since they could otherwise breach their obligations *vis-à-vis* other creditors of the company for not respecting the principle of equality of creditors. In such circumstances, one might ask if it makes sense to oblige the liquidators to negotiate a social plan for a further 38 days, when their margin for negotiation is legally restricted.

In any event, Luxembourg bankruptcy law has been seriously eroded by the order of 8 December 2011. The various legal implications surrounding this order will surely give food for thought to the legislator and the judge.

Comments from other jurisdictions

Germany (Dagmar Hellenkemper): No similar case is likely to arise in Germany. The liquidator has the right to terminate employment contracts. For employees with long notice periods the German Insolvency Act provides that the termination period can be reduced to three months regardless of the employee's individual contractual notice period. Most insolvencies coincide with modifications to the enterprise pursuant to section 111 of German Works Council Act, which provides that in these cases the "*employer shall inform the works council in full and in good time of any proposed alterations*", and that both parties shall find a way to reconcile their interests. Therefore, a social plan, including any redundancy payments, will usually be agreed upon by the parties. If an agreement cannot be reached within three weeks, section 122 of the Insolvency Statute gives the liquidator the right to request approval of the Labour Court for the modifications to the enterprise without having to offer a social plan.

Ireland (Georgina Kabemba): An insolvency situation affecting any business will have significant consequences for its employees. The effect of an employer's insolvency on the employment relationship will be determined largely by the type of insolvency situation that arises (e.g. whether it is an examinership, receivership or liquidation).

In a court-ordered liquidation, the Winding-Up Order usually constitutes notice of immediate dismissal. The effect is that the employee has been dismissed and becomes entitled to arrears of salary up to the date the Order is made and damages for wrongful dismissal in addition to his or her statutory rights to notice pay and redundancy etc.

In Ireland, the Protection of Employment Act, 1977 as amended by the

Protection of Employment (Exceptional Collective Redundancies and Related Matters) Act, 2007 (the “PE Acts”), provides the regulatory framework for making redundant large numbers of employees within a specified period of time. In particular, the PE Acts put in place certain notification and consultation obligations that apply where an employer is planning to implement a collective redundancy.

The PE Acts provide for a deviation from the obligation to inform and consult with employee representatives where the collective redundancy arises from the employer’s business being terminated following winding-up proceedings. The obligations under the PE Acts will, however, apply to proposed redundancies in any scenario falling short of a business closure, even where it is a Receiver who is implementing the redundancies.

The Netherlands (Peter Vas Nunes): Dutch law has for many years provided that the obligation to inform and consult as set out in Article 2 of Directive 98/59 also applies in insolvency situations. Until 1 March 2012, however, this provision had no teeth. Since that date an employee who has been dismissed before the obligation to inform and consult has been discharged, can nullify his dismissal. I assume that liquidators now take care to inform and consult before sending out the dismissal notices, however pointless this may be in the majority of cases.

Subject: collective redundancy

Parties: *X - v - Landsbanki* in liquidation

Court: President of the District Court, sitting in Labour Matters

Date: 8 December 2011

Case number: not known

Internet publication: not yet

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2012/43

Does an employer’s dismissal procedure engage the right to a fair trial under Article 6 of the European Convention on Human Rights?

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Summary

The UK Court of Appeal has decided that an employer’s decision to dismiss an employee is not a determination of that employee’s civil rights for the purposes of Article 6 of the European Convention on Human Rights (ECHR), which governs the right to a fair trial. Article 6 is therefore not engaged by disciplinary proceedings taken by an employer against an employee.

Facts

Dr Mattu was a consultant doctor employed by the University Hospitals of Coventry and Warwickshire NHS Trust (the “Trust”). He also had an honorary post with Warwick University that included research (a dual arrangement not uncommon in the National Health Service). The Trust’s disciplinary procedure, which was incorporated into Dr Mattu’s contract of employment, stated that “*where a case involving issues of professional conduct proceeds to a hearing under the employer’s disciplinary procedure, the [disciplinary] panel must include a member... who is medically qualified*”.

Dr Mattu was suspended for disciplinary reasons in 2002 but the disciplinary hearing did not take place until 2007, when he was given a warning. Following this lengthy suspension it was clear that he needed re-skilling to be able to return to safe practice. However, Dr Mattu and the Trust disagreed upon what this retraining programme should include. Dr Mattu wished it to include six months’ academic re-skilling as well as clinical re-skilling and he repeatedly refused to agree to the trust’s action plan because it did not include academic re-skilling. The Trust started a second set of disciplinary proceedings against him, alleging that, by refusing to sign the action plan and failing to co-operate with the re-skilling process, he had repeatedly refused to comply with the Trust’s reasonable requirements. It also claimed that Dr Mattu had not treated management with courtesy and respect and had made himself unmanageable. There was no medically qualified person on the disciplinary panel. The panel decided that Dr Mattu was guilty of gross misconduct and he was dismissed without notice. Dr Mattu appealed internally against this decision, but the appeal was dismissed.

Dr Mattu then brought a claim in the High Court for breach of contract (as the disciplinary procedure was contractual). He sought a declaration that his dismissal was ineffective; asked the court for injunctive relief; and claimed damages. Dr Mattu lost in the High Court and appealed to the Court of Appeal.

Judgment

There were two questions before the Court of Appeal:

- (1) Whether the disciplinary process which applied to Dr Mattu constituted the determination of a civil right to which Article 6 of the ECHR applied; and
- (2) Whether the allegations against Dr Mattu raised issues of professional conduct, such that the obligation (in the disciplinary procedure) to have a medically qualified person on the panel arose.

On the first point, Dr Mattu argued that, following his dismissal, he was unable to get another job as a doctor. The practical effect of his dismissal, he claimed, was that he was prevented from practising his chosen profession.

The Court devoted most of its time and reasoning to the first question. It clarified that the right to carry on one’s profession is a civil right and that a process potentially resulting in a legal ban on practising that profession would engage Article 6. This could include, for example, a decision by the UK General Medical Council to “strike off” a doctor. In contrast, an employer’s decision to dismiss is the exercise of a contractual power, which does not “determine” a civil right, and therefore Article 6 is not engaged. The determination of civil rights occurs, following dismissal, in a court or employment tribunal, if that individual brings a claim. Article 6 would apply to the court or tribunal proceedings.

The Court was influenced in coming to this decision by the fact that whether or not Article 6 applies cannot vary depending on the particular facts of each case, namely whether any particular individual could or could not obtain other employment in his or her chosen profession.

It would, for instance, make no sense if in two otherwise similar situations, Article 6 did not apply to a senior consultant because she would be able to secure another job easily due to her experience while Article 6 would apply to a junior doctor who could not find alternative employment, halting his career.

The Court stated that, in its opinion, there was something “highly artificial” in applying Article 6 to an employer’s contractual disciplinary procedures. The Court further noted that any perceived denial of Dr Mattu’s right to practise medicine as a result of the dismissal was not due to the fact that the trust had dismissed him. Instead, if Dr Mattu could not find another job as a doctor, it was because other potential employers had exercised their lawful freedom to refuse to employ him. On the second point, the Court made its decision by a majority and concluded that, on the facts, the allegations did not relate to professional conduct and in those circumstances the trust’s disciplinary procedure did not require a medically qualified professional to be on the panel. The disciplinary panel had to determine whether it was reasonable for the Trust to require Dr Mattu to return to work without academic re-skilling and whether Dr Mattu’s conduct had shown him to be unmanageable. These issues did not require medical expertise to determine, but were employment issues.

Commentary

There was some suggestion in previous cases that disciplinary proceedings in the public sector must comply with Article 6, where the outcome of those disciplinary proceedings might indirectly lead to the loss of a right to practise a profession. For example, it was suggested that the fact of a dismissal (and the circumstances surrounding it) would have a persuasive influence on the regulatory body for that profession, when it came to deciding whether an individual should be allowed to continue to practise that profession. While there may still be some (very narrow) scope to make such arguments, the Court in *Mattu* suggested that regulatory bodies are independent enough to reach their own conclusions. The Court also believed that the better solution was to ensure that the proceedings of the regulatory body were Article 6 compliant, rather than putting this onus on individual employers. This decision confirms that Article 6 does not apply to employers’ disciplinary processes. As such, it will be a very welcome judgment for employers, particularly in the public sector, who had been concerned that they were under the onerous obligation to conduct any disciplinary procedures rather like legal proceedings, so as to make them compliant with Article 6.

More widely, this decision is part of a developing body of case law in which the UK courts have shown themselves reluctant to use human rights arguments to expand employment law rights. The courts seem to be of the view that UK employment law offers employees sufficient protection in terms of their position as employees.

Comments from other jurisdictions

Germany (Dagmar Hellenkemper): German Courts have applied Article 6 ECHR to disciplinary actions in the public sector following the decision of the ECtHR of 16 July 2009 (Case no. 1126/05). However, whether or not disciplinary actions in the private sector are subject to Article 6 has not yet been decided by a German Labour Court.

Subject: European Convention on Human Rights: Article 6
Parties: Mattu – v – University Hospitals of Coventry and Warwickshire NHS Trust
Court: Court of Appeal
Date: 18 May 2012
Case Number: [2012] EWCA Civ 641
Internet publication:
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2012/44

Fixed-term employees entitled to same redundancy payment as comparable permanent employees, even where there is no internal comparator (IR)

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Summary

In this case, the Rights Commissioner, the Labour Court and the High Court held that an ex-gratia redundancy payment was a condition of employment, and that a fixed-term worker was entitled to the same ex-gratia redundancy payment as a comparable permanent employee. Of significance in this case is the fact that the comparable permanent employee(s) were not employed by the complainant’s employer, but by other employers in the same sector.

Facts

Dr Naomi Bushin was employed by University College Cork (“UCC”) as a full-time researcher on an EU-funded Marie Curie Excellence Grant Project in the Department of Geography on a fixed-term contract that lasted for a total of 3½ years, from 1 April 2006 until 30 September 2009. When the contract came to an end, Dr Bushin was made redundant and a statutory redundancy payment was paid to her by UCC. The exact amount of this statutory payment is not known but would have equalled 3½ years x 2 weeks per year of service + one bonus week = 8 weeks of salary, possibly capped.

Dr Bushin brought a complaint pursuant to the Protection of Employees (Fixed-Term Work) Act 2003 (the “2003 Act”) to a Rights Commissioner claiming that a “comparable” employee with a permanent employment contract would have received an additional “ex gratia” redundancy payment of 4 weeks’ salary per year of service.

The 2003 Act is the Irish transposition of Directive 1999/70. Section 6 of the Act provides that in respect of employment conditions, fixed-term workers shall not be treated in a less favourable manner than comparable permanent workers solely because they have a fixed-term contract, unless different treatment is justified on objective grounds. Section 5(1) of the 2003 Act sets out three situations in which fixed-term and permanent employees can be considered comparable:

(a) where the fixed-term employee and the permanent employee are

employed by the same employer or by an associated employer;

(b) if the first scenario does not apply, where the comparable permanent employee is specified in a collective agreement; and

(c) if neither of the above scenarios apply, where the comparable permanent employee is employed in the same industry as the fixed-term employee.

Section 5(2) of the 2003 Act requires that comparators either perform the same work under the same or similar conditions, or the work performed by the relevant fixed-term employee is equal to or greater in value to work performed by the permanent employee comparator.

Dr Bushin compared herself to permanent employees in different positions than researcher and in different universities than UCC, because UCC claimed that it had never made a redundancy payment to a permanent employee. In other words, Dr Bushin based her claim on subsection c of section 5(1) of the 2003 Act.

The Rights Commissioner found in favour of Dr Bushin. On appeal by UCC to the Labour Court, the Rights Commissioner's decision was upheld and it was determined that Dr Bushin was entitled to an ex-gratia redundancy payment in addition to her statutory entitlement.

In its determination, the Labour Court found that no appropriate comparator could be identified within UCC and that section 5(1)(a) was therefore not applicable to Dr Bushin. Given that there was no comparable permanent employee as intended by section 5(1)(b), the court resorted to section 5(1)(c). It identified as a comparable permanent employee, a number of employees within the sector of tertiary (university) education. It held that the comparator had been treated in a more favourable manner in similar circumstances as Dr Bushin and found as a matter of law, an ex-gratia redundancy payment comes within the meaning of conditions of employment for the purposes of section 6 of the 2003 Act.

The Labour Court also rejected UCC's submission that enhanced redundancy payments to permanent employees could be objectively justified under section 7 of the 2003 Act. Section 7 of the 2003 Act lays down a requirement for objective justification of less favourable treatment and provides that a ground shall not be considered as objective unless it is based on considerations other than the status of the employee as a fixed-term worker.

UCC appealed the Labour Court determination to the High Court on a point of law. UCC argued that the Labour Court had erred in law in its construction and application of sections 5, 6 and 7 of the 2003 Act, primarily on the following grounds:

1. there were comparable permanent employees within UCC and in that respect, section 5(1)(a) of the 2003 Act should have been used, (this would have resulted in the Labour Court determining that as UCC had never made a redundancy payment to a comparable permanent employee, there could be no issue of less favourable treatment);
2. the Labour Court had erred in holding that enhanced redundancy terms constitute "*conditions of employment*"; and
3. the Labour Court erred in failing to recognise that enhanced redundancy terms for permanent employees could be objectively justified.

In response to UCC's arguments, Dr Bushin accepted that, in construing section 5(1) of the 2003 Act, consideration must be given first to section 5(1)(a) of the 2003 Act, and where no appropriate comparator exists within the category set out at section 5(1)(a) then consideration must be given to sections 5(1)(b) and 5(1)(c) respectively. Dr Bushin argued that this was exactly what the Labour Court had done and further, at no point during the hearing did the Labour Court reject UCC's assertion that it had never made a permanent employee redundant. She further argued that the Labour Court did not reach its determination by ignoring section 5(1)(c).

High Court Judgment

The High Court (Justice Kearns) upheld the Labour Court's determination and confirmed that Dr Bushin was entitled to an ex-gratia redundancy payment similar to a comparable permanent employee, calculated on the basis of four weeks' pay per year of service, in addition to her statutory redundancy entitlement.

In relation to UCC's first argument, the High Court was satisfied that the Labour Court had considered section 5(1)(a) of the 2003 Act and its possible application to Dr Bushin, as evidenced by the fact that the Labour Court had considered several categories of permanent employees including staff and employees at other national tertiary educational establishments. It was decided by the Labour Court that none of these employees fell within section 5(1)(a) and as such, it proceeded to consider section 5(1)(b), which similarly did not apply, before proceeding to consider section 5(1)(c). Justice Kearns stated that as no permanent employees employed by UCC had been made redundant, he could not see how any such permanent employee would be an appropriate comparator.

Mr Justice Kearns opined that UCC's argument that the Labour Court had failed to properly consider section 5(1)(a) of the 2003 Act was based on an incorrect premise. He stated that there is an inherent artificiality in arguing that no issue of discrimination could arise because no permanent employees employed by UCC were made redundant. Such an interpretation of what should be considered an appropriate comparator, would be contrary to the purpose of Council Directive 1999/70/EC concerning the Framework Agreement on Fixed Term Work and would foster discrimination by encouraging employers to select fixed term employees for redundancy ahead of permanent employees, to avoid setting a precedent of enhanced redundancy payments to permanent employees for comparison purposes with fixed-term workers.

In relation to the second limb of UCC's appeal, the High Court held that the Labour Court was correct in law in determining that an ex-gratia payment was a condition of employment. In doing so, it relied on the ECJ's decision in the *Barber* case (C-282/88), in which it was held (at paragraph 16) that: "*A redundancy payment made by the employer [...] cannot cease to constitute a form of pay on the sole ground that, rather than deriving from the contract of employment, it is a statutory or ex gratia payment*".

In relation to the final point of UCC's appeal, the High Court held that the Labour Court was correct to consider the issue of objective justification under section 7 of the 2003 Act, given that it had found that Dr Bushin was treated less favourably than appropriate comparators. Mr Justice Kearns held that Dr Bushin was denied an *ex-gratia* payment on the basis that she was a fixed-term employee, as *ex-gratia* payments were made to valid comparators. There was no possibility of Dr Bushin receiving different but no less favourable treatment and as the contention being advanced by UCC was based entirely on the status of Dr Bushin, in arguing that the Labour Court had erred in failing to recognise that enhanced redundancy terms for permanent employees could be objectively justified, UCC's argument was precluded by section 7 of the 2003 Act.

Mr Justice Kearns was satisfied the Labour Court had given every aspect of the matter careful and comprehensive consideration, and in light of his view that bodies such as the Labour Court are entitled to a significant degree of respect in relation to their determinations, he upheld its determination and dismissed UCC's appeal.

Commentary

This judgment demonstrates the Irish High Court's ongoing reluctance to intervene in Labour Court and other specialist employment bodies'

determinations. The judgment also makes clear that the Labour Court was correct in its assessment of the broad scope of section 5(1)(c) of the 2003 Act for comparator purposes, in that the comparator it used was not employed by the Dr Bushin's employer but by employers in the same sector.

The Irish Federation of University Teachers ("IFUT") welcomed the decision, with its general secretary stating that it was "*a very important day for fixed-term workers, a huge number of whom are employed in universities*". The IFUT particularly highlighted that the High Court had acknowledged that UCC's position would foster discrimination by encouraging employers to select fixed-term employees ahead of permanent employees. And indeed, it is clear that this judgment has given many academics in Irish universities a greater security of tenure. This decision, it seems to us, results in the perverse situation that a fixed-term employee has a greater legal entitlement to an *ex-gratia* payment than a permanent employee in the undertaking concerned as, strictly speaking, a permanent employee has no legal right to force the employer to make an *ex-gratia* payment - otherwise it would not be *ex-gratia*.

Comments from other jurisdictions

The Netherlands (Peter Vas Nunes): The Dutch pride themselves on what they believe to be one of the most employee-friendly employment laws in the world. They often overlook a major flaw, a glaring and, in my view, harsh inequality between permanent and fixed-term workers. Admittedly, Directive 1999/70 has been transposed, by means of Article 7:649 Civil Code, but how effective is that provision in practice?

Almost all permanent employees who (despite the rules protecting them against dismissal) are made redundant are paid a severance award, commonly calculated on the basis of a formula yielding one to two months' salary for every year of service. It is not uncommon for an employer to have to pay an employee a lump sum equalling two, three or more years' salary upon dismissal.

By contrast, an employer can decide not to extend a fixed-term contract at will without paying the employee anything. Although this inequality of treatment is sometimes questioned, it is still the norm, and to my knowledge it has never been seriously challenged in court. This may have to do with the interpretation given to "employment conditions" in said Article 7:649. It prohibits employers, in the absence of objective justification, from differentiating between permanent employees and fixed-termers in respect of "employment conditions". I suspect that not all lawyers see a severance award as an employment condition. Wrongly so, as the judgment reported above makes clear.

Subject: Fixed-term employment

Parties: University College Cork – v – Bushin

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ECJ COURT WATCH

SUMMARIES BY PETER VAS NUNES

RULINGS

ECJ 5 July 2012, case C-141/11 (*Torsten Hörnfeldt - v - Posten Meddelande AB*) ("**Hörnfeldt**"), Swedish case (AGE DISCRIMINATION)

Facts

Torsten Hörnfeldt was a postal worker. When he turned 67, his contract ended pursuant to the "67-year rule" under Swedish law. This rule provides that (i) all employees have the right to remain employed until the end of the month in which they reach the age of 67 and that (ii) employment contracts terminate automatically at that age, provided the employer gives one month's notice. Mr Hörnfeldt, who had worked part-time for many years, received monthly retirement benefits that were lower than he considered sufficient. He brought proceedings seeking to annul the termination of his contract on the ground that the 67-year rule constitutes unlawful age discrimination.

National proceedings

The court, basing its findings on, *inter alia*, *Mangold*, took the view that the 67-year rule was age discriminatory and referred to the ECJ the question of whether the difference of treatment could be regarded as objectively justified, noting that no explanation of specific grounds for the unconditional right given to an employer to dismiss an employee at age 67 is to be found in the preparatory documents relating to the 67-year rule and that that right is independent of the amount of pension to which the employee is eligible.

ECJ's findings

1. It cannot be inferred from Article 6(1) of Directive 2000/78 that a lack of precision in the national legislation as regards the aim pursued has the effect of automatically excluding the possibility that that legislation may be justified. In the absence of such precision, it is important that other elements, derived from the general context of the measure concerned, should make it possible to identify the underlying aim of the measure and whether the means put in place to achieve it are appropriate and necessary (§ 24).
2. As for the aim of the 67-year rule, the Swedish government argued that that rule seeks (i) to avoid termination of employment contracts in situations which are humiliating for workers by reason of their advanced age; (ii) to enable retirement pension regimes to be adjusted to rules that came into effect in 1996; (iii) to reduce obstacles for those who wish to work beyond age 65; (iv) to adapt to demographic developments and to anticipate the risk of labour shortages; (v) to establish a right, and not an obligation, to work until age 67; and (vi) to make it easier for young people to enter the labour market (§ 26).
3. The ECJ has held that the automatic termination of the employment contracts of employees who meet the conditions as regards age and pension contributions has, for a long time, been a feature of employment law in many Member States. It is a mechanism based on the balance to be struck between political, economic, social, demographic and/or budgetary considerations and the choice to be made between prolonging people's working lives or, conversely, providing for early retirement (§ 28).
4. Encouragement of recruitment undoubtedly constitutes a legitimate aim of Member States' social or employment policy, in particular when the promotion of access of young people to a profession is involved (§ 29).

5. Therefore, aims such as those described by the Swedish Government must, in principle, be regarded as objectively and reasonably justifying a difference in treatment on the grounds of age such as that provided by the 67-year rule (§ 30).
6. In the light of the broad discretion granted to Member States to choose to pursue a particular aim and to define measures to implement it, it does not appear unreasonable to take the view that a measure such as the 67-year rule may be appropriate for achieving the aims set out above (§ 32).
7. In order to examine whether the 67-year rule goes beyond what is necessary for achieving its objective, it must be viewed against its legislative background and account must be taken both of the hardship that it may cause to the persons concerned and of the benefits derived from it by society in general. Relevant factors in this regard are the fact that in Sweden (i) employees have the unconditional right to continue in their profession until age 65; (ii) the 67-year rule does not establish a mandatory scheme of automatic retirement, in that the parties may agree to continue their relationship beyond age 67, if so desired on the basis of a fixed-term contract; (iii) the 67 year rule takes account of the fact that the worker is entitled to a pension; and (iv) persons who cannot obtain an adequate pension are eligible for basic benefits (§ 38-44).
8. In *Rosenblatt* the ECJ accepted a lower retirement age and Ms Rosenblatt's retirement pension was significantly lower than that of Mr Hörnfeldt (§ 45)

Ruling

The second subparagraph of Article 6 (1) of Council Directive 2000/78 [...] must be interpreted as not precluding a national measure, such as that at issue in the main proceedings, which allows an employer to terminate an employee's employment contract on the sole ground that the employee has reached the age of 67 and which does not take account of the level of the retirement pension which the person concerned will receive, as that measure is objectively and reasonably justified by a legitimate aim relating to employment policy and labour-market policy and constitutes an appropriate and necessary means by which to achieve that aim.

ECJ 7 June 2012, case C-106/11 (*M.J. Bakker - v - Minister van Financiën*) ("**Bakker**"), Dutch case (SOCIAL INSURANCE)

Facts

In 2004 Mr Bakker, a Dutch national, lived in Spain and was employed by a Dutch company for whom he worked outside the EU on board a dredging vessel that carried the Dutch flag. Under Dutch law he was not insured compulsorily for social insurance, because the Dutch social insurance legislation applies only to residents of The Netherlands and non-residents who work there. Nevertheless, the Dutch authorities took the position that Mr Bakker was compulsorily insured and therefore owed contributions. This position was based on Regulation 1408/71. Article 2(1) of this Regulation provides that it applies to "employed persons" who are subject to the legislation of one or more Member States and Article 13(2)(c) provides that a person employed on board a vessel flying the flag of a Member State shall be subject to the legislation of that State.

National proceedings

Mr Bakker challenged the assessment sent to him in respect of national insurance contributions but lost his case in two instances. He brought the case to the Supreme Court. This court noted that the definition of "employed person" in Article 1(a) of Regulation 1408/71

requires the interested party to be insured, compulsorily or on an optional basis, for one or more of the contingencies referred to in that provision [disability, old age, etc.]. The Supreme Court queried whether it is possible for someone in Mr Bakker's situation, who, in the light solely of national legislation, is not compulsorily insured because he does not reside in The Netherlands, to nonetheless have the status of an "employed person" within the meaning of Regulation 1408/71.

ECJ's findings

1. The ECJ rejects Mr Bakker's arguments (i) that a dredging vessel moored off a coast is covered by the concept of "vessel" in Article 13(2)(c) and (ii) that pursuant to the UN Convention on the Law of the Sea, work carried out on board a dredger comes under the jurisdiction of the relevant coastal State and not under that of the flag Member State (§ 24-30).
2. The effect of Article 13(2)(c) is that a provision of the applicable national legislation pursuant to which cover by the social security scheme established by that legislation is conditional on residence in the Member State concerned, may not be relied on against the persons referred to in Article 13(2)(c) (§ 31-35).

Ruling

Article 13(2)(c) of Regulation 1408/71 [...] must be interpreted as precluding a legislative measure of a Member State from excluding from affiliation to the social security scheme of that Member State, a person [...] who holds that Member State's nationality but does not reside in it and is employed on board a dredger flying the flag of that Member State and operating outside the territory of the European Union.

ECJ 4 October 2012, case C-115/11 (*Format - v - ZUS*) ("Format"), Polish case (SOCIAL INSURANCE)

Facts

Mr Kita, a Polish national living in Poland, was employed by the Polish subcontractor "Format". Format's business consisted of subcontracting work on construction projects in other EU countries and of recruiting and employing staff in Poland to work on those sites.

Mr Kita worked for Format twice in France (for over four months in 2006 and just under eight months in 2007) and once in Finland (for four months in 2008). Each time, upon termination of his contract, he returned to Poland. Each time that Format sent Mr Kita to work on its project in France (2x) and Finland, it entered into an employment contract that defined the place of employment as being "operations and building sites in Poland and within the territory of the European Union (i.e. Ireland, France, Great Britain, Germany and Finland), as instructed by the employer". Thus, under the terms of the contract, Format could, at will, instruct Mr Kita to move from a building site in one Member State to a site in another Member State.

In the course of 2008, Format applied to the Polish Social Security Institution "ZUS" for E101 certificates covering the years 2008 and 2009. An E101 certificate under the former Regulation 1408/71 [*Editor: now an A1 certificate under Directive 883/2004*] is a certificate, issued to an employer in respect of an employee, stating that the latter remains covered by the social security legislation of his home country and, therefore, not by the legislation of the country where he is to work temporarily.

In other words, what Format wanted, is permission to apply the (cheaper) Polish social insurance legislation to Mr Kita rather than the (more expensive) legislation of the Member State where Mr Kita was to perform his work. The relevant provisions of Regulation 1408/71 are Articles 13 and 14. Article 13 basically provides that an employee shall be governed by the social insurance legislation of a single Member State only and, if he works in one Member State, he is subject to the legislation of that State. Article 14(1) provides that, subject to certain conditions, "a person employed in the territory of a Member State by an undertaking to which he is normally attached, who is posted by that undertaking to the territory of another Member State to perform work there for that undertaking shall continue to be subject to the legislation of the first Member State". Article 14(2) gives different rules for "a person normally employed in the territory of two or more Member States".

National proceedings

The ZUS refused to issue E101 certificates on the ground that Mr Kita was not "a person normally employed in the territory of two or more Member States" within the meaning of Article 14(2) of the Regulation. Format appealed to the local Social Security Court. It ruled in favour of the ZUS. Both Format and Mr Kita appealed. The Court of Appeal referred questions to the ECJ.

The referring court started from the premise, which was not contested before the ECJ, that Article 14(1) of Regulation 1408/71 did not apply to Mr Kita's situation, on the ground that Format did not usually carry out significant activities in Poland, as required by Article 14(1) according to the ECJ's case law. Therefore, the issue narrowed down to a choice between Article 13 (place of work) or Article 14(2) (normally employed in two or more Member States).

ECJ's findings

1. The referring court essentially wished to know whether the concept of "a person normally employed in the territory of two or more Member States" within the meaning of Article 14(2) refers not only to employees who work concurrently in more than one Member State, but also to those who, at least under the terms of their employment contract, are required to perform their work in several Member States, without that work having to be carried out in several Member States at the same time or almost simultaneously (§ 35).
2. To fall within Article 14(2), a person must "normally" be employed in two or more Member States. It follows that, if employment in a single Member State constitutes the normal arrangement for the person concerned, such employment cannot fall within the scope of Article 14(2). In a situation such as that of Mr Kita, it is necessary to take account of the existence of a divergence between the terms of the contract (work to be performed anywhere within the EU) and the way in which the obligations were performed in practice (in one country at a time) (§ 39-41).
3. E101 certificates tend to be issued before or at the start of the period they cover. The assessment of the facts must be carried out at that time. That is why the description of the work to be performed abroad as evidenced by the contractual document is of particular importance - provided, of course, that the terms of those documents are consistent with the foreseeable activities (§ 42-43).
4. When assessing the facts with a view to determining the social security legislation applicable for the purpose of issuing an E101 certificate, the institution concerned may, where appropriate, take account not only of the wording of the contractual documents, but

also of factors such as the way in which employment contracts between the employer and the worker concerned had previously been implemented in practice, the circumstances surrounding the conclusion of those contracts and, more generally, the characteristics and conditions of the work performed by the company concerned, insofar as those factors may throw light on the nature of the work in question (§ 45).

5. Given that Mr Kita performed work continuously for several months in one Member State at a time, returning to Poland when the work was finished, it cannot validly be maintained that an employed person in a situation such as Mr Kita's can fall within the concept of "a person normally employed in the territory of two or more Member States" within the meaning of Article 14(2) of Regulation 1408/71 (§ 46-49).

Ruling

Article 14(2)(b) of Regulation (EEC) No. 1408/71 [...] must be interpreted as meaning that, in circumstances such as those at issue in the main proceedings, a person who, under successive employment contracts stating the place of employment to be the territory of several Member States, in fact works during the term of each of those contracts only on the territory of one of those States at a time, cannot fall within the concept of "a person normally employed in the territory of two or more Member States", within the meaning of that provision.

OPINIONS

Opinion of Advocate-General Sharpston of 20 September 2012, case C-363/11 (*Commissioner of the Elegktiko Sinedrio with responsibility for the Ministry of Culture and Tourism – v – Audit Service of the Ministry of Culture and Tourism and Konstantinos Antonopoulos*) ("**Antonopoulos**"), Greek case (FIXED-TERM EMPLOYMENT)

Facts

Mr Antonopoulos was a fixed-term employee of the Ministry of Culture and Tourism, which employed him for the 12-month period between November 2008 and October 2009. He was a member of a trade union. In that capacity he was authorised to take 34 days' leave on trade union business.

Greek law distinguishes between several categories of employees in civil service and other public positions. One such category includes permanent and fixed-term employees who occupy certain types of permanent post provided for by law ("permanent post employees"). Another category includes fixed-term employees recruited in order to meet unforeseen and urgent needs ("temporary post employees"). One difference between these categories is that the former retain their full salary while on leave on union business, whereas the latter do not. Mr Antonopoulos was a temporary post employee, therefore he did not receive salary for the 34 days during which he was on leave on union business. His employer, the Ministry, wanted to pay him his salary for this period, but the Commissioner of the *Elegktiko Sinedrio* (an auditing body) (the "Commissioner") refused to authorize the payment on the ground that Mr Antonopoulos' employment status did not entitle him to it.

National proceedings

Presumably, Mr Antonopoulos protested against the non-payment, as the Commissioner referred questions to the ECJ.

Question 1 broadly was whether (non-)payment of remuneration to a worker during leave of absence constitutes an "employment condition" within the meaning of Clause 4(1) of the Framework Agreement on

Fixed-Term Work annexed to Directive 1999/70 (the "Framework Agreement").

Question 2 was broadly whether a worker with a permanent private-law employment contract in the civil service is "comparable", within the meaning of Clauses 3(2) and 4(1) of the Framework Agreement, to a private-law worker with a fixed-term employment contract in the civil service who performs the same work but does not occupy an established post.

Question 3 was whether a distinction such as the one at issue (paid versus unpaid leave) constitutes less favourable treatment within the meaning of the Framework Agreement and, if so, whether it is objectively justified by the fact that the two categories of employment regime are distinct.

Question 4 raised the issue of non-discrimination in the pursuit of trade union rights, as provided in the Charter of Fundamental Rights of the EU.

Opinion

1. The Advocate-General begins by recalling that the Framework Agreement applies to all fixed-term workers, without distinction as between the public and private sectors (§ 66).
2. Question 1. The Treaty of Rome did not, and the TFEU does not, authorise the EC/EU to take action in the fields of, *inter alia*, pay or the right of association. However, that limitation concerns only direct intervention in those matters, and Clause 4(1) of the Framework Agreement does not purport to regulate pay or the right of association in any substantive way. It merely requires that whatever rules govern employment conditions in the Member States must be applied without discrimination as between fixed-term and permanent workers. Consequently, the treatment at issue must be regarded as falling within the concept of "employment conditions" in Clause 4(1) of the Framework Agreement (§ 67-71).
3. Question 2. Neither the fact that workers in one category of Greek employees in the civil service occupy permanent posts, while others do not, nor the fact that a specific employment regime is laid down for the former but not for the latter, are relevant to the determination of whether workers are comparable. What counts is the nature of the work, due regard being had to qualifications and skills. Therefore, if the *Elegktiko Sinedrio* considers that Mr Antonopoulos was engaged in the Ministry in work which was the same as, or similar to that carried out by employees with a permanent contract occupying a permanent post, due regard being had to the qualifications and skills of each, then it must conclude that the latter were "comparable" workers (§ 72-74).
4. Question 3. There can be no doubt that, where two categories of employees are entitled to leave on trade union business but one category is entitled to remuneration in respect of that leave while the other is not, the latter category is treated in a less favourable manner (§ 76).
5. A difference in treatment cannot be justified on the basis that it is provided for by a general, abstract norm such as a law or a collective agreement. There must, rather, be precise and specific factors characterizing the employment condition. Such factors may include the specific nature or inherent characteristics of the tasks performed, or the pursuit of a legitimate social policy objective. The fact that staff are recruited for a limited period in order to meet unforeseen and urgent needs – and that maximum use must therefore be made of their services during that period – might be

capable of justifying a rule which allowed them less leave on trade union business than permanent staff. Where, however, they are allowed the same leave as permanent staff on the same grounds, such a fact does not justify withdrawing their remuneration in respect of such leave, where permanent staff are paid (§ 77-78).

6. Question 4. There is no need to refer to the Charter given that EU law is already explicit on the matter (§ 79-80).

Proposed reply

1. The (non-)payment of remuneration during a worker's leave of absence on trade union business is [...] an employment condition within the meaning of Clause 4(1) of the Framework Agreement [...] and this does not regulate any exclusion relating to pay and/or the right of association contained in Article 137(5) EC (now Article 153(5) TFEU).
2. A worker with a private-law employment relationship of indefinite duration with the civil service who occupies a permanent post and a worker with a fixed-term private-law employment relationship, employed on the same work but not occupying a permanent post, are in principle comparable within the meaning of Clauses 3(2) and 4(1) of that Framework Agreement.
3. Where workers in the first category who are trade union officials receive paid leave for trade union business, while those in the second category who have the same trade union status receive unpaid leave for the same purpose, there is less favourable treatment of the second category within the meaning of Clause 4(1) of the Framework Agreement; the fact that the employment relationship is of limited duration for the second category of workers and that it is distinct in terms of the employment regime in general (terms of recruitment, promotion and termination of the employment relationship) do not constitute objective grounds that might justify such discrimination.
4. In the light of the answers to the first three questions, it is unnecessary to consider whether the treatment in question is prohibited by, or could be justified under, the provisions of the Charter of Fundamental Rights of the European Union.

Opinion of Advocate-General Kokott of 20 September 2012, case C-394/11 (Valeri H. Belov) ("Belov"), Bulgarian case (ETHNIC ORIGIN DISCRIMINATION)

Note: This is not an employment law case, but the opinion relating to the ECJ's jurisdiction is relevant to employment law.

Facts

Mr Belov is a Roma. He lived in an area inhabited predominantly by Roma. Normally, in Bulgaria, electricity meters are placed at a height of up to 1.7 meters. In "Roma districts" they are placed at a height of 7 meters, with the result that the inhabitants of those districts cannot make a visual check of their meters, except at additional cost or effort. Mr Belov found this to be discriminatory on the basis of his ethnic origin and filed a complaint with the Commission for Protection against Discrimination (the "KZD").

National proceedings

The KZD referred a large number of questions to the ECJ. Basically, it wished to know whether a situation similar to that outlined above falls within the scope of Directive 2000/43; whether a requirement for discrimination within the meaning of that Directive is that rights or interests defined in law are infringed; and who bears the burden of proof of discrimination and of the justification thereof.

Opinion

1. Before going into the substance of the matter, the Advocate-General addresses the fact that the KZD lacks the status of a "court or tribunal of a Member State" within the meaning of Article 267 TFEU. Whether a body has that status depends on a number of factors, such as whether (i) it is established by law; (ii) it is permanent; (iii) its jurisdiction is compulsory; (iv) its procedure is between parties (*inter partes*); (v) it applies rules of law; and (vi) it is independent. The Advocate-General accepts that the KZD meets most of these criteria. The question is whether the following criteria are met: (iii) its jurisdiction is compulsory; (v) it applies rules of law; and (vi) it is independent (§ 2-28).
2. The Advocate-General distinguishes between external independence, i.e. protection against external intervention and pressure, and internal independence, i.e. the existence of a level playing field for the parties. The defendants in the main proceedings (two electricity companies) argued that the KZD is not internally independent because (i) it has an administrative section that, *inter alia*, provides legal assistance to people who claim to be victims of discrimination and (ii) it was established as a body whose aim is to foster equal treatment. The Advocate-General rejects these arguments (§ 29-36).
3. The said defendants argued that the KZD is an administrative authority and not an organ of the judiciary, pointing out that: (i) it performs certain administrative functions; (ii) it appears as a party in any subsequent appeal against its own decisions; (iii) it can take action against discrimination of its own motion; (iv) it can rescind its own decisions with the agreement of the parties; and (v) proceedings before civil courts have precedence over procedures before the KZD. The Advocate-General discusses and rejects each of these arguments (§ 37-45).
4. As for the issue of whether the complaints procedure before the KZD constitutes a "compulsory jurisdiction", the only relevant factor is whether the parties must comply with a decision delivered by the KZD, not whether there are alternative means of legal protection. Given that under Bulgarian law, the KZD's decisions are binding on the parties and that infringement can be punished by a fine, the "compulsory jurisdiction" requirement is also satisfied. Thus, the KZD's preliminary questions to the ECJ are admissible (§ 51-67).
5. Does a situation as summarised above under "Facts" fall within the scope of Directive 2000/43? Article 3(1)(h) of the Directive concerns access to and supply of goods and services. The parties are in dispute as to whether this includes, in addition to electricity supply, the provision of electricity meters. The Advocate-General answers this question affirmatively (§ 51-67).
6. Under Bulgarian law "less favourable treatment" exists only where rights or interests defined in law are infringed. Given that Bulgarian law does not explicitly entitle consumers to the installation of a free electricity meter, it can be argued that not installing an electricity meter free of charge cannot constitute discrimination. The Advocate-General rejects this argument. Directive 2000/43 deals with less favourable treatment, irrespective of whether rights or interests are infringed. The imposition by Bulgarian law of additional conditions is not compatible with the Directive (§ 68-74).
7. Should the Bulgarian courts conclude that it is not possible to interpret and apply their domestic law in conformity with the Directive, they should take into account that the prohibition of discrimination based on racial and ethnic origin is a general principle of EU law, similar to age discrimination (see *Mangold*, *Kücükdeveci* and *Römer*) (§ 75-83).
8. The Advocate-General addresses the issue of how precisely

someone who alleges discrimination must “establish facts from which it may be presumed that there has been discrimination” within the meaning of Article 8 of the Directive regarding the reversal of the burden of proof. What this part of his opinion comes down to, is that, although this is up to the KZD to determine, the electricity companies will probably need to justify the different height of the electricity meters (§ 85-94).

9. According to the information available to the Advocate-General, the practice of installing electricity meters at an inaccessible height exclusively in Roma districts is not directly linked to the inhabitants’ ethnic origin nor does it qualify as harassment on that basis. However, it clearly is indirectly discriminatory based on ethnic origin (§ 95-99).
10. The aim of the said practice, namely to combat fraud and abuse and to ensure the security and quality of the energy supply, is legitimate (§ 101-102).
11. Manipulation and unauthorized electricity extraction are made more difficult if electricity meters are placed at a height of 7 meters. Therefore the measure at issue meets the appropriateness test (§ 103-108).
12. It is up to the KZD to determine whether the measure is necessary to achieve said aim (§ 109-123).

Proposed reply

1. A situation such as that in the main proceedings falls within the scope of Directive 2000/43/EC.
2. The existence of direct or indirect discrimination within the meaning of Article 2(2) of Directive 2000/43 does not require an infringement of rights or interests defined in law. Rather, any form of behaviour in which one person is treated less favourably than another on grounds of racial or ethnic origin, or which could put persons of a specific racial or ethnic origin at a particular disadvantage compared with other persons is sufficient.
3. National rules which make the existence of discrimination dependent on the infringement of rights or interests defined in law are incompatible with Directive 2000/43. The national court must interpret domestic law in this regard in conformity with EU law and, if that is not possible, it must not apply any national legislation that is contrary to the prohibition of discrimination, established as a fundamental right. [the meaning of ‘established as a fundamental right’ at the end of this sentence is ambiguous – it could mean: ‘prohibition of any form of discrimination that has been established as a fundamental right’ or ‘prohibition of discrimination, as this has been established as a fundamental right’]
4. It is sufficient for a reversal of the burden of proof under Article 8(1) of Directive 2000/43 that persons who consider themselves wronged because the principle of equal treatment has not been applied should establish facts to substantiate a *prima facie* case of discrimination.
5. If consumers are normally provided with free electricity meters installed in or on buildings, such that they are accessible for visual checks, whilst in districts inhabited primarily by people belonging to the Roma community such electricity meters are attached to electricity poles at an inaccessible height of 7m, there is a *prima facie* case of indirect discrimination based on ethnic origin within the meaning of Article 2(2)(b) in conjunction with Article 8(1) of Directive 2000/43.
6. Such a measure may be justified if it prevents fraud and abuse and contributes to ensuring the quality of the electricity supply in the interest of all consumers, provided that:
 - no other, equally suitable measures can be taken to achieve those aims, at financially reasonable cost, which would have less

detrimental effects on the population in the districts, and

- the measure taken does not produce undue adverse effects on the inhabitants of the districts concerned, due account being taken of the risk of an ethnic group being stigmatised and of the consumers’ interest in monitoring their individual electricity consumption by means of a regular visual check of their electricity meters.

Opinion of Advocate-General Sharpston of 27 September 2012, case C-379/11 [*Caves Krier Frères -v- Directeur de l’administration de l’emploi*] (“Krier”), Luxembourg case (FREEDOM OF MOVEMENT)

Facts

Luxembourg law entitles employers who hire an unemployed person aged 45 or over to a subsidy, provided that person has been registered as a job-seeker in Luxembourg for no less than one month. Ms Krier was a Luxembourg citizen who formerly worked in Luxembourg but was made redundant there. She lived across the border, in Germany. Following a period of unemployment, at age 52, she was hired by the Luxembourg company, Krier Frères. This company applied for the subsidy. The application was turned down on the ground that Ms Krier was registered as a job-seeker in Germany but not (also) in Luxembourg. Krier Frères brought proceedings.

National proceedings

The court of first instance dismissed the claim. Krier Frères sought recourse to the Court of Appeal. Both courts held that only Luxembourg residents are able to register with ADEM, the Luxembourg national placement office. The Court of Appeal referred a question to the ECJ, essentially asking whether the condition of being registered with ADEM is compatible with the freedom of every EU citizen to move and reside freely within the EU (Article 21 TFEU) and freedom of movement for workers (Article 45 TFEU).

Opinion

1. It is sufficient to rule on the interpretation of Article 45 TFEU, which is a specific expression of Article 21 (§ 30).
2. The Luxembourg government denies the finding of the courts of first and second instance that only Luxembourg residents can register with ADEM as a job-seeker. Any EU citizen can do this, according to the government. This difference of view obligates the Advocate-General to deliver two alternative opinions, one based on the assumption that only local residents can register with ADEM, the other based on the assumption that any EU citizen may register (§ 31-36 and § 48).
3. Insofar as residence in Luxembourg is a condition for registration with ADEM and registration with ADEM is a condition for availability of the recruitment subsidy, a Luxembourg employer wishing to recruit an unemployed worker over the age of 45 is more likely to recruit a worker resident in Luxembourg than a frontier worker. Thus, it is likely to be more difficult for older unemployed workers residing outside Luxembourg to obtain employment in that State. Such a condition is therefore likely to discourage such persons from moving to reside in a neighbouring State. Accordingly, the Advocate-General views a residence requirement such as that at issue as a restriction on freedom of movement for workers as guaranteed by Article 45 TFEU (§ 37-39).
4. It is for the national courts to assess whether the residence requirement is justified. However, a residence condition such as that at issue has such a sweeping effect that it is unlikely to be proportionate (§ 40-47).
5. Assuming that residence in Luxembourg is not a condition for

registration with ADEM, as the Luxembourg government contends, the Advocate-General makes the following observations. Ms Krier seems to be a “frontier worker” as defined in Regulation 1408/71. Given that unemployed frontier workers are obliged to register in their country of residence (in this case, Germany), the question is whether an additional requirement to register also within the State of last employment (in this case, Luxembourg) constitutes a restriction for the purposes of Article 45 TFEU. The Advocate-General answers this question in the negative (§ 48-61).

Proposed reply

Article 45 TFEU precludes national measures such as [that at issue], insofar as unemployed workers must satisfy a residence requirement in order to register with the competent national authorities and the grant of a recruitment subsidy to an employer that recruits a category of unemployed workers is conditional on such registration.

PENDING CASES

Case C-167/12 (*C.D. - v - S.T.*), reference lodged by the UK *Employment Tribunal Newcastle upon Tyne* on 3 April 2012 (MATERNITY LEAVE)

- 1/2. Does Directive 92/85 provide a right to maternity leave to an intended mother who has a baby through a surrogacy arrangement (a) in general and (b) in circumstances where she may or does breastfeed?
- 3/4. Is it a (potential) breach of Directive 2006/54 for an employer to refuse to provide maternity leave to an intended mother who has a baby through a surrogacy arrangement or for it to subject her to less favourable treatment (a) in general and (b) by reason of the employee's (or the intended mother's) association with the surrogate mother?
5. If so, is the intended mother's status as intended mother sufficient to entitle her to maternity leave on the basis of her association with the surrogate mother?
6. Are Directives 92/85 and 2006/54 directly effective?

Case C-178/12 (*R.R. Montes - v - Instituto Municipal de Deportes de Córdoba*), reference lodged by the Spanish *Juzgado de lo Social No 1 de Córdoba* on 17 April 2012 (GENERAL DISCRIMINATION)

Is it consistent with the Community principle of equality for a public authority, for the purpose of calculating its *civil servants'* length of service salary increments to take account of all service performed in any part of the public services, while in contrast, in the case of staff engaged under *employment* contracts the same public authority it takes account only of the service previously provided to itself? If not, should the restoration of the principle of equality be carried out through levelling-up?

Case C-184/12 (*United Antwerp Maritime Agencies - v - Navigation Maritime Bulgare*), reference lodged by the Belgian *Hof van Cassatie* on 20 April 2012 (CONFLICT OF LAWS)

Must Articles 3 and 7(2) of the Rome Convention on the law applicable to contractual obligations, read in conjunction with Directive 86/653 on self-employed commercial agents, be interpreted as meaning that special mandatory rules of the forum that offer wider protection than Directive 86/653 may be applied to the contract, even if the law applicable to the contract is that of another Member State in which the minimum protection provided by Directive 86/653 has also been implemented?

Case C-194/12 (*C.M. García - v - Centros Comerciales Carrefour*), reference lodged by the Spanish *Juzgado de lo Social No 1 de Benidorm* on 26 April 2012 (PAID LEAVE)

Does Directive 2003/88 preclude national legislation that (i) does not allow interruption of a leave period, (ii) permits an undertaking unilaterally to schedule a leave period which coincides with a period of temporary incapacity and (iii) permits payment in lieu of leave not taken as a result of temporary incapacity if there are business reasons which preclude the leave from actually being taken, even though the employment has not been terminated?

Cases C-216/12 and C-217/12 (*Caisse nationale des prestations familiales - v - respectively, Fjola HLIDDAL and Pierre-Louis Bornand*), reference lodged by the Luxembourg *Cour de Cassation* on 8 May 2012 (FREE MOVEMENT)

Does a parental leave allowance under Luxembourg law constitute a “family benefit” within the meaning of Regulation 1408/71?

Case C-220/12 (*A.I.T. Meneses - v - Region Hannover*), reference lodged by the German *Verwaltungsgericht Hannover* on 11 May 2012 (FREE MOVEMENT)

Does the right to freedom of movement and freedom of residence (Articles 20 and 21 TFEU) preclude a German regulatory system under which German nationals permanently living abroad may be awarded an education grant to attend an education establishment in another Member State only if (i) that establishment is in the student's country of permanent residence or a neighboring country and (ii) special circumstances of the individual case justify the grant?

Case C-233/12 (*Simone Gardella - v - INPS*), reference lodged by the Italian *Tribunale della Spezia* on 14 May 2012 (FREE MOVEMENT)

Do the TFEU and the Charter of Fundamental Rights of the EU preclude national legislation which does not permit a worker who is an EU national to transfer the pension contributions credited to the social security scheme of his own State, where he was previously insured, to the pension scheme of an international body situated in another Member State, where he works and is now insured?

Case C-247/12 (*Meliha Veli Mustafa - v - Direktor na fond “Garantirani vzemania na rabotnitsite i sluzhitelnite” kam Natsionalnia osiguriteln institut*), reference lodged by the Bulgarian *Varhoven administrativen sad* on 21 May 2012 (INSOLVENCY)

Is Directive 80/987 as amended by Directive 2002/74 on the protection of employees in the event of the insolvency of their employer to be interpreted as requiring Member States to provide guarantees at every stage of insolvency proceedings and not only at the commencement of those proceedings? Is that directive infringed by a provision of national law which enables the guarantee institution to satisfy employees' outstanding claims only insofar as they arose before the decision to commence insolvency proceedings, in situations where the employer continues to operate and is not declared insolvent?

Case C-264/12 (*Sindicato Nacional dos Profissionais de Seguros e Afins - v - Fidelidade Mundial- Companhia de Seguros*), reference lodged by the Portuguese *Tribunal do Trabalho do Porto* on 29 May 2012 (GENERAL DISCRIMINATION)

These questions relate to a law, the *Lei do Orçamento de Estado para 2012*, that deprives public servants of their right to holiday and Christmas allowances and provides that the rules governing suspension of those allowances cannot be derogated from by collective agreements. Is this law discriminatory on the basis of the public nature of the employment relationship? Does it violate Article 31(1) of the Charter of Fundamental Rights of the EU (working conditions which respect dignity)?

Case C-267/12 (*Frédéric Hay - v - Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres*), reference lodged by the French *Cour de cassation* on 30 May 2012 (SEX DISCRIMINATION)

Can the choice of a national legislature to limit marriage to persons of different sexes, thereby excluding same-sex couples from certain advantages under a collective agreement, be justified?

Case C-290/12 (*Oreste Della Rocca - v - Poste Italiane*), reference lodged by the Italian *Tribunale di Napoli* on 11 June 2012 (FIXED-TERM EMPLOYMENT)

Does the Framework Agreement annexed to Directive 1999/70 also refer to the fixed-term employment relationship between a worker and temporary employment agency or between a worker and user and does that directive regulate those relationships accordingly?

Is a provision that permits the contract between a temporary employment agency and a temp to specify its end date on the basis of general reasons relating to the worker, unconnected with the specific employment relationship, compatible with Directive 1999/70 (objective reasons) or can it constitute a circumvention of the directive?

Does the Framework Agreement preclude the consequences of abuse from being made the responsibility of the user?

Case C-309/12 (*Maria Novo and 17 others - v - Fundo de Garantia Salarial, IP*), reference lodged by the Portuguese *Tribunal Central Administrativo Norte* on 27 June 2012 (INSOLVENCY)

Does Directive 80/987 preclude provisions of national law which guarantee only claims falling due in the six months preceding the initiation of insolvency proceedings, even where the employees have brought an action with a view to obtaining a judicial termination of the amount outstanding and an enforcement order to recover those sums?

Case C-311/12 (*Heinz Kassner - v - Mittelweser-Tiefbau*), reference lodged by the German *Arbeitsgericht Nienburg* on 27 June 2012 (PAID LEAVE)

Do Article 31 of the Charter of Fundamental Rights and Article 7(1) of Directive 2003/88 preclude national legislation under which, in certain sectors, (i) the period of annual leave is reduced to below four weeks and/or (ii) the employees receive less than full pay during their four-week paid leave on account of reduced earnings as a result of short-time work? If so, what is the maximum reduction?

Do said provisions preclude a provision in a collective agreement under which a leave entitlement does not accrue during periods in which a sick worker received no remuneration insofar as this reduces the entitlement to below four weeks?

Do those provisions preclude a provision in a collective agreement under which entitlements to leave expire at the end of the calendar year following the year in which they accrued, thereby limiting the possibility for a worker who is unfit for work for several consecutive reference periods to accumulate paid annual leave? If so, is EU law applied more effectively by disapplying the said provision entirely or by applying a longer expiry period than one year?

If one or more of the above questions are answered in the affirmative, does EU allow the ECJ's ruling to be limited in time, given that the highest national courts have ruled that the national and collectively agreed rules are not amenable to an interpretation in conformity with EU law?

Case C-312/12 (*Agim Ajdini - v - Belgian State*), reference lodged by the Belgian *Tribunal du travail de Huy* on 28 June 2012 (NATIONALITY DISCRIMINATION)

Is the Belgian law on disability benefits compatible with EU law, in particular the Charter of Fundamental Rights, insofar as it excludes from entitlement, solely on grounds of nationality, a foreign national (of a country that is a candidate for accession to the EU) who resides legally in Belgium, having lived there with his family for 12 years?

Case C-342/12 (*Worten-Equipamentos para o Lar - v - Autoridade para a Condições de Trabalho*), reference lodged by the Portuguese *Tribunal do Trabalho de Viseu* on 18 July 2012 (DATA PROTECTION)

Is a record of working time (i.e. the beginning and end of working hours and breaks, specified for each individual worker) covered by the concept of personal data in Directive 95/46? If so, is a Member State obliged to provide for appropriate technical and organisational measures to protect personal data against destruction, loss, alteration and unauthorised disclosure or access? If so, when the Member State fails to adopt such measures, may the employer restrict access to the data by the national authority responsible for inspecting working conditions?

Case C-361/12 (*Carmela Carratù - v - Poste Italiana*), reference lodged by the Italian *Tribunale di Napoli* on 31 July 2012 (FIXED-TERM WORK)

These questions concern Italian legislation in respect of fixed-term contracts that have the practical effect of rewarding employers for acting wrongfully and reducing the effectiveness of reinstatement.

Does the notion of employment conditions in Clause 4 of the Framework Agreement on fixed-term work include the consequences of an unlawful interruption of an employment relationship? Is the difference between the consequences normally provided in Italian law for such interruption in respect of fixed-term contracts, as compared with permanent contracts, justifiable? Does the ECHR preclude the adoption of said legislation? Is *Poste Italiana* a State body for the purpose of the direct vertical effect of Directives?

Case 364/12 (*M.F. Torredemer and others – v – Corporación Uniland*), reference lodged by the Spanish *Audiencia Provincial de Barcelona* on 1 August 2012 (FREEDOM OF SERVICE PROVISION)

These questions relate to statutory minimum fees for *procuradores* (lawyers). Does Article 6 of the ECHR, enshrining the right to a fair trial, include the right to defend oneself properly in a situation where the figure at which the fees of a *procurador* are set is disproportionately high and does not correspond to the work actually carried out? If so, are the provisions of the Spanish Law on civil procedure, which prevent the party ordered to pay costs from challenging the amount of the fees of the *procurador*, compatible with Article 6 ECHR?

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TRANSFER OF UNDERTAKINGS

Status of Directive 2001/23

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

Is there a transfer?

2009/5 (MT)	contracting out cleaning is a transfer despite no assets or staff going across
2009/22 (BE)	collective agreement cannot create transfer where there is none by law
2009/41 (GE)	BAG follows <i>Klarenberg</i>
2009/42 (UK)	EAT clarifies "service provision change" concept
2010/1 (FR)	Supreme Court drops "autonomy" requirement
2010/4 (SP)	Supreme Court follows <i>Abler</i> , applying assets/staff mix
2010/5 (LU)	court applies <i>Abler</i> despite changes in catering system
2010/6 (IT)	Supreme Court disapplies national law
2010/27 (NL)	assigned staff not an economic entity
2010/40 (NO)	Supreme Court applies comprehensive mix of all <i>Spjikers</i> criteria
2010/73 (CZ)	Supreme Court accepts broad transfer definition
2011/34 (BU)	Bulgarian law lists transfer-triggering events exhaustively
2011/37 (CY)	Cypriot court applies directive
2012/14 (NO)	Airline catering company capital-intensive
2012/15 (GE)	No TOU unless activity pre-transfer independent entity
2012/17 (LI)	Lithuanian courts follow Directive
2012/31 (AT)	TOU despite <i>ex tunc</i> cancellation of contract

Cross-border transfer

2009/3 (NL)	move from NL to BE is transfer
2011/3 (UK)	TUPE applies to move from UK to Israel
2012/1 (GE)	move from GE to Switzerland is transfer

Which employees cross over?

2009/2 (NL)	do assigned staff cross over? <i>Albron</i> case before ECJ
2010/24 (NL)	temporarily assigned staff do not cross over
2011/1 (FR)	partial transfer?
2011/2 (FR)	partial transfer?
2011/20 (NL)	activity transferred to A (80%) and B (20%): employee transfers to A
2011/21 (HU)	pregnancy protection in transfer-situation

2011/35 (UK)	resignation does not prevent employee's transfer
2011/52 (NL)	do assigned staff go across? <i>Albron</i> case after ECJ
2012/30 (NL)	Supreme Court on public transport concessions

Employee who refuses to transfer

2009/20 (IR)	no redundancy pay for employee refusing to transfer
2009/21 (FI)	transferee liable to employee refusing to transfer on inferior terms
2009/23 (NL)	agreement to remain with transferor effective
2011/18 (AT)	no general <i>Widerspruch</i> right in Austria
2012/2 (CZ)	employers cannot transfer staff without their consent unless there is a TOU

Termination

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

Which terms go across?

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

Duty to inform

2009/43 (NL)	transferor must inform staff fully
2010/42 (FR)	no duty to inform because directive not transposed fully
2011/4 (GE)	<i>Widerspruch</i> deadline begins after accurate information given
2011/36 (NL)	Dutch court sets bar high

Miscellaneous

2009/1 (IT)	transfer with sole aim of easing staff reduction is abuse
2010/23 (AT)	transferee may recover from transferor cost of annual leave accrued before transfer
2010/26 (GE)	purchaser of insolvent company may offer transferred staff inferior terms
2011/19 (AT)	employee claims following transferor's insolvency
2012/16 (NL)	ETO defence fails

DISCRIMINATION**General**

2009/29 (PL)	court must apply to discriminated group provision designed for benefit of privileged group
2010/9 (UK)	associative discrimination (<i>Coleman</i> part II)
2010/11 (GE)	attending annual salary review meeting is term of employment
2010/12 (BE)	<i>Feryn</i> , part II
2010/32 (CZ)	Czech court applies reversal of burden of proof doctrine for first time
2010/62 (GE)	court asks ECJ to assess compatibility of time-bar rule with EU law
2010/78 (IR)	rules re direct discrimination may be applied to claim based solely on indirect discrimination
2010/83 (UK)	employee barred from using information provided “without prejudice”
2011/26 (GE)	statistics alone insufficient to establish presumption of “glass ceiling”
2011/65 (GE)	dismissal for marrying Chinese woman unfair
2012/24 (FR)	<i>Cour de cassation</i> applies indirect gender discrimination for first time
2012/32 (UK)	illegal alien cannot bring race discrimination claim

Job application

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

Gender, termination

2009/6 (SP)	dismissal of pregnant worker void even if employer unaware of pregnancy
2009/10 (PL)	lower retirement age for women indirectly discriminatory
2010/33 (HU)	dismissal unlawful even though employee unaware she was pregnant
2010/44 (DK)	dismissal of pregnant worker allowed despite no “exceptional case”
2010/46 (GR)	dismissal prohibition also applies after having stillborn baby
2010/60 (DK)	dismissal following notice of undergoing fertility treatment not presumptively discriminatory
2010/82 (AT)	dismissed pregnant worker cannot claim in absence of work permit
2011/22 (UK)	redundancy selection should not favour employee on maternity leave
2011/41 (DK)	mother’s inflexibility justifies dismissal
2012/20 (DK)	when does fertility treatment begin?

Gender, terms of employment

2009/13 (SE)	bonus scheme may penalise maternity leave absence
2009/49 (SP)	dress requirement for nurses lawful
2010/47 (IR)	employer to provide meaningful work and pay compensation for discriminatory treatment
2010/48 (NL)	bonus scheme may pro-rate for maternity leave absence
2010/65 (UK)	court reverses “same establishment” doctrine re pay equality
2011/5 (NL)	time-bar rules re exclusion from pension scheme
2012/5 (FR)	prohibition of earnings discriminatory

Age, termination

2009/8 (GE)	court asks ECJ to rule on mandatory retirement of cabin attendant at age 55/60
2009/46 (UK)	<i>Age Concern</i> , part II: court rejects challenge to mandatory retirement
2010/61 (GE)	voluntary exit scheme may exclude older staff
2010/63 (LU)	dismissal for poor productivity not indirectly age-discriminatory
2010/64 (IR)	termination at age 65 implied term, compatible with Directive 2000/78
2010/76 (UK)	mandatory retirement law firm partner lawful
2010/80 (FR)	Supreme Court disapplies mandatory retirement provision
2011/40 (GR)	37 too old to become a judge
2011/56 (GE)	severance payment may be age-related
2011/58 (NO)	termination at age 67 legal
2012/25 (UK)	Supreme Court rules on compulsory retirement at 65
2012/36 (GE)	forced retirement of pilots at 60 already unlawful before 2006

Age, terms of employment

2009/20 (UK)	length of service valid criterion for redundancy selection
2009/45 (GE)	social plan may relate redundancy payments to length of service and reduce payments to older staff
2010/29 (DK)	non-transparent method to select staff for relocation presumptively discriminatory
2010/59 (UK)	conditioning promotion on university degree not (indirectly) discriminatory
2010/66 (NL)	employer may “level down” discriminatory benefits
2010/79 (DK)	employer may discriminate against under 18s
2011/23 (UK)	replacement of 51-year-old TV presenter discriminatory
2012/33 (NL)	no standard severance compensation for older staff is discriminatory
2012/37 (GE)	extra leave for seniors discriminatory, levelling up

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Age, vacancies

2012/3 (DK)	no discrimination despite mention of age
2012/26 (UK)	academic qualification requirement not age discriminatory

Disability

2009/7 (P)	HIV-infection justifies dismissal
2009/26 (GR)	HIV-infection justifies dismissal
2009/30 (CZ)	dismissal in trial period can be invalid
2009/31 (BE)	pay in lieu of notice related to last-earned salary discriminatory
2010/58 (UK)	dismissal on grounds of perceived disability not (yet) illegal
2011/54 (UK)	no duty to offer career break
2011/55 (UK)	must adjustment have "good prospect"?
2012/4 (UK)	adjustment too expensive
2012/18 (GE)	dismissal for being HIV-positive justified
2012/23 (NL)	stairlift costing € 6,000 reasonable accommodation
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2009/47 (IT)	nationality requirement for public position not illegal
2010/12 (BE)	<i>Feryn</i> , part II
2010/45 (GE)	employer not liable for racist graffiti on toilet walls
2011/7 (GE)	termination during probation

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2009/25 (NL)	refusal to shake hands with opposite sex valid ground for dismissal
2009/48 (AT)	Supreme Court interprets "belief"
2010/7 (UK)	environmental opinion is "belief"
2010/13 (GE)	BAG clarifies "genuine and determining occupational requirement"
2010/28 (UK)	religious freedom versus non-discrimination; employees not free to manifest religion in any way they choose
2010/43 (UK)	"no visible jewellery" policy lawful
2010/57 (NL)	"no visible jewellery" policy lawful
2010/81 (DK)	employee compensated for manager's remark

Sexual orientation

2010/77 (UK)	no claim for manager's revealing sexual orientation
2011/24 (UK)	rebranding of pub discriminated against gay employee
2011/53 (UK)	disclosing employer's sexual orientation not discriminatory in this case

Part-time, fixed-term

2010/30 (IT)	law requiring registration of part-time contracts not binding
2011/8 (IR)	different redundancy package for fixed-term staff not justified by cost
2012/35 (AT)	overtime premiums for part-time workers
2012/44 (IR)	fixed-termers to get same redundancy pay as permanent staff

Harassment, victimisation

2010/10 (AT)	harassed worker can sue co-workers
2010/49 (P)	a single act can constitute harassment
2011/6 (UK)	victimisation by ex-employer
2011/57 (FR)	harassment outside working hours
2012/21 (FR)	sexual harassment no longer criminal offence

Unequal treatment other than on expressly prohibited grounds

2009/50 (FR)	"equal pay for equal work" doctrine applies to discretionary bonus
2010/8 (NL)	employer may pay union members (slightly) more
2010/10 (FR)	superior benefits for clerical staff require justification
2010/50 (HU)	superior benefits in head office allowed
2010/51 (FR)	superior benefits for workers in senior positions must be justifiable
2011/59 (SP)	not adjusting shift pattern discriminates family man
2012/19 (CZ)	inviting for job interview by email not discriminatory
2012/22 (UK)	disadvantage for being married to a particular person: no marital status discrimination

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2011/25 (GE)	how much compensation for lost income?
2011/38 (UK)	liability is joint and several
2011/39 (AT)	no damages for discriminatory dismissal
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2009/15 (HU)	confidentiality clause may not gag works council member entirely
2009/16 (FR)	Chairman foreign parent criminally liable for violating French works council's rights
2009/53 (PL)	law giving unions right to appoint works council unconstitutional
2010/18 (GR)	unions lose case on information/consultation re change of control over company
2010/19 (GE)	works council has limited rights re establishment of complaints committee

2010/38 (BE)	EWC member retains protection after losing membership of domestic works council	2010/55 (UK)	Working Time Regulations to be construed in line with <i>Pereda</i>
2010/52 (FI)	Finnish company penalised for failure by Dutch parent to apply Finnish rules	2011/13 (SP)	Supreme Court follows <i>Schultz-Hoff</i>
2010/72 (FR)	management may not close down plant for failure to consult with works council	2011/43 (LU)	paid leave lost if not taken on time
2011/16 (FR)	works council to be informed on foreign parent's merger plan	2011/61 (GE)	forfeiture clause valid
2011/33 (NL)	reimbursement of experts' costs (article)	2011/62 (DK)	injury during holiday, right to replacement leave
2012/7 (GE)	<i>lex loci labori</i> overrides German works council rules	2012/10 (LU)	<i>Schultz-Hoff</i> with a twist
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Individual termination		Working time	
2010/15 (HU)	consensual terminations count towards collective redundancy threshold	2010/71 (FR)	Working Time Directive has direct effect
2010/20 (IR)	first case on what constitutes "exceptional" collective redundancy	2010/85 (CZ)	worker in 24/24 plant capable of taking (unpaid) rest breaks
2010/39 (SP)	how to define "establishment"	2010/87 (BE)	"standby" time is not (paid) "work"
2010/68 (FI)	selection of redundant workers may be at group level	2011/28 (FR)	no derogation from daily 11-hour rest period rule
2011/12 (GR)	employee may rely on directive	2011/45 (CZ)	no unilateral change of working times
2012/13 (P)	clarification of "closure of section"	2011/48 (BE)	compensation of standby periods
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2009/17 (CZ)	foreign governing law clause with "at will" provision valid	2009/40 (P)	private email sent from work cannot be used as evidence
2009/54 (P)	disloyalty valid ground for dismissal	2010/37 (PL)	use of biometric data to monitor employees' presence disproportionate
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2009/35 (UK)	paid leave continues to accrue during sickness	2010/67 (DK)	failure to provide statement of employment particulars can be costly
2009/36 (GE)	sick workers do not lose all rights to paid leave	2011/10 (DK)	Supreme Court reduces compensation level for failure to inform
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2010/69 (NL)	when is a strike so “purely political” that a court can outlaw it?		
Free movement			
2010/36 (IR)	Member States need not open labour markets to Romanian workers		
Conflict of laws			
2010/53 (IT)	“secondary insolvency” can protect assets against foreign receiver		
2011/63 (IT)	American “employer” cannot be sued in Italy		
2012/8 (BE)	posted workers benefit from Belgian law		
2012/9 (NL)	to which country was contract more closely connected?		
201228 (AT)	choice of law clause in temp’s contract unenforceable		
Miscellaneous			
2009/19 (FI)	employer may amend terms unilaterally		
2009/37 (FR)	participants in TV show deemed “employees”		
2009/38 (SP)	harassed worker cannot sue only employer, must also sue harassing colleague personally		
2009/39 (LU)	court defines “moral harassment”		
2010/17 (DK)	Football Association’s rules trump collective agreement		
2010/52 (NL)	employer liable for bicycle accident		
2010/54 (AT)	seniority-based pay scheme must reward prior foreign service		
2010/88 (HU)	employer not fully liable for traffic fine caused by irresponsible employee		
2011/9 (NL)	collective fixing of self-employed fees violates anti-trust law		
2011/11 (FI)	no bonus denial for joining strike		
2011/30 (IT)	visiting Facebook at work no reason for termination		
2011/44 (UK)	dismissal for using social media		
2011/47 (PL)	reduction of former secret service members’ pensions		

RUNNING INDEX OF ECJ RULINGS SUMMARISED IN EELC

1. Transfer of undertakings

29 July 2010, C-151/09 (*UGT-v-La Línea*): retention of identity to (determine whether there is a TOU) is to be assessed at the time of the transfer, whereas preservation of autonomy (to determine whether an employee representation continues to exist) is to be assessed afterwards (EELC 2010-4).

15 September 2010, C-386/09 (*Briot*): non-renewal of fixed-term contract in light of impending TOU not covered by Directive; non-renewal not a "dismissal" (EELC 2010-5).

21 October 2010, C-242/09 (*Albron*): ECJ distinguishes between "contractual employer" and "non-contractual employer" where the employee actually works. Where the latter's activities are transferred to a third party, the contractual and non-contractual employers are group companies and the employee is assigned permanently, there is a TOU (EELC 2010-4).

20 January 2011, C-463/09 (*Clece*): contracting-in of cleaning not a TOU given that neither assets nor workers transferred (EELC 2011-1).

6 September 2011, C-108/10 (*Scattolon*): does seniority go across? (EELC 2011-3).

2. Gender discrimination, maternity

29 October 2009, C-63/08 (*Pontin*): Luxembourg procedural rules for bringing a claim that a dismissal is invalid by reason of pregnancy are unduly restrictive (EELC 2010-1).

1 July 2010, C-471/08 (*Parviainen*): to which benefits is a stewardess entitled who may not fly because of pregnancy? (EELC 2010-4).

1 July 2010, C-194/08 (*Grassmayr*): to which benefits is a university lecturer entitled who may not perform all of her duties? (EELC 2010-4).

11 November 2010, C-232/09 (*Danosa*): removal of pregnant Board member incompatible with Directive 92/85 (EELC 2010-5).

18 November 2010, C-356/09 (*Kleist*): Directive 76/207 prohibits dismissing employees upon entitlement to pension if women acquire that entitlement sooner than men (EELC 2010-5).

1 March 2011, C-236/09 (*Test-Achats*): Article 5(2) of Directive 2004/113 re unisex insurance premiums invalid (EELC 2011-1).

21 July 2011, C-104/10 (*Kelly*): Directive 97/80 does not entitle job applicant who claims his rejection was discriminatory to information on other applicants, but refusal to disclose relevant information compromises Directive's effectiveness (EELC 2011-3).

20 October 2011, C-123/10 (*Brachner*): indirect sex discrimination by raising pensions by different percentages depending on income, where the lower increases predominantly affected women (EELC 2012-2).

19 April 2012, C-415/10 (*Meister*): Directives 2006/54, 2000/43 and 2000/78 do not entitle a rejected job applicant to information on the successful applicant (EELC 2012-2).

3. Age discrimination

12 January 2010, C-229/08 (*Wolf*): German rule limiting applications for a job as fireman to individuals aged under 30 justified (EELC 2010-2).

12 January 2010, C-341/08 (*Petersen*): German age limit of 68 to work as a publicly funded dentist discriminatory but possibly justified (EELC 2010-2).

19 January 2010, C-555/07 (*Kücükdeveci*): principle of equal treatment regardless of age is a "general principle of EU law", to which Directive 2000/78 merely gives expression; German law disregarding service before age 25 for calculating notice period is illegal (EELC 2010-2 and 3).

8 July 2010, C-246/09 (*Bulicke*): German two-month time limit for bringing age discrimination claim probably not incompatible with principles of equivalency and effectiveness; no breach of non-regression clause (EELC 2010-4).

12 October 2010, C-499/08 (*Andersen*): Danish rule exempting early retirees from severance compensation incompatible with Directive 2000/78 (EELC 2010-4).

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

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

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

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

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

19 April 2012, C-415/10 (*Meister*): Directives 2000/78, 2000/43 and 2006/54 do not entitle rejected job applicant to information on the successful applicant (EELC 2012-2).

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 (EELC 2012-2).

5 July 2012, C-141/11 (*Hörrfeldt*): Directive 2000/78 allows contractual forced retirement at age 67 regardless of pension level (EELC 2012-3).

4. Other forms of discrimination

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

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

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 (EELC 2012-2).

28 June 2012, C-172/11 (*Erny*): re differential tax treatment of pre-retirement benefits (EELC 2012-2).

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 (*Kückük*): permanent replacement of absent staff does not preclude existence of an objective reason as provided in Clause 5(1)(a) of the Framework Agreement (EELC 2012-1).

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

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

6. Part-time work

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

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

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

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

7. Information and consultation

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

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

8. Paid leave

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

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

22 November 2011, C-214/10 (*Schulte*): Member States may limit carry-over period for long-term disablement to 15 months (EELC 2011-4).

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

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 (EELC 2012-2).

21 June 2012, C-78/11 (*ANGED*): worker who becomes unfit for work during leave entitled to leave in lieu (EELC 2012-2).

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).

7 April 2011, C-305/10 (*Commission - v - Luxembourg*): re failure to transpose Directive 2005/47 on railway services (EELC 2011-4).

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

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 (*Pe la*): dealing with German rule requiring foreign legal trainees to have same level of legal knowledge as German nationals (EELC 2010-3).

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

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

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

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

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

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

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

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

15 September 2011, C-240/10 (*Schultz*): re tax rate in relation to free movement (EELC 2011-4).

20 October 2011, C-225/10 (*Perez*): re Articles 77 and 78 of Regulation 1408/71 (pension and family allowances for disabled children) (EELC 2012-2).

15 November 2011, C-256/11 (*Dereci*): re the right of third country nationals married to an EU citizen to reside in the EU (EELC 2011-4).

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

7 June 2012, C-106/11 (*Bakker*): Reg. 1408/71 allows exclusion of non-resident working on dredger outside EU (EELC 2012-3).

4 October 2012, C-115/11 (*Format*): a person who according to his contract works in several EU States but in fact worked in one State at a time not covered by Article 14(2)(b) of Reg. 1408/71 (EELC 2012-3).

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 (*Rodríguez 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 Ardenne*): Dutch law obligating employees of insolvent employer to register as job seekers not compatible with Directive 80/987 (EELC 2011-4).

13. Applicable law, forum

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

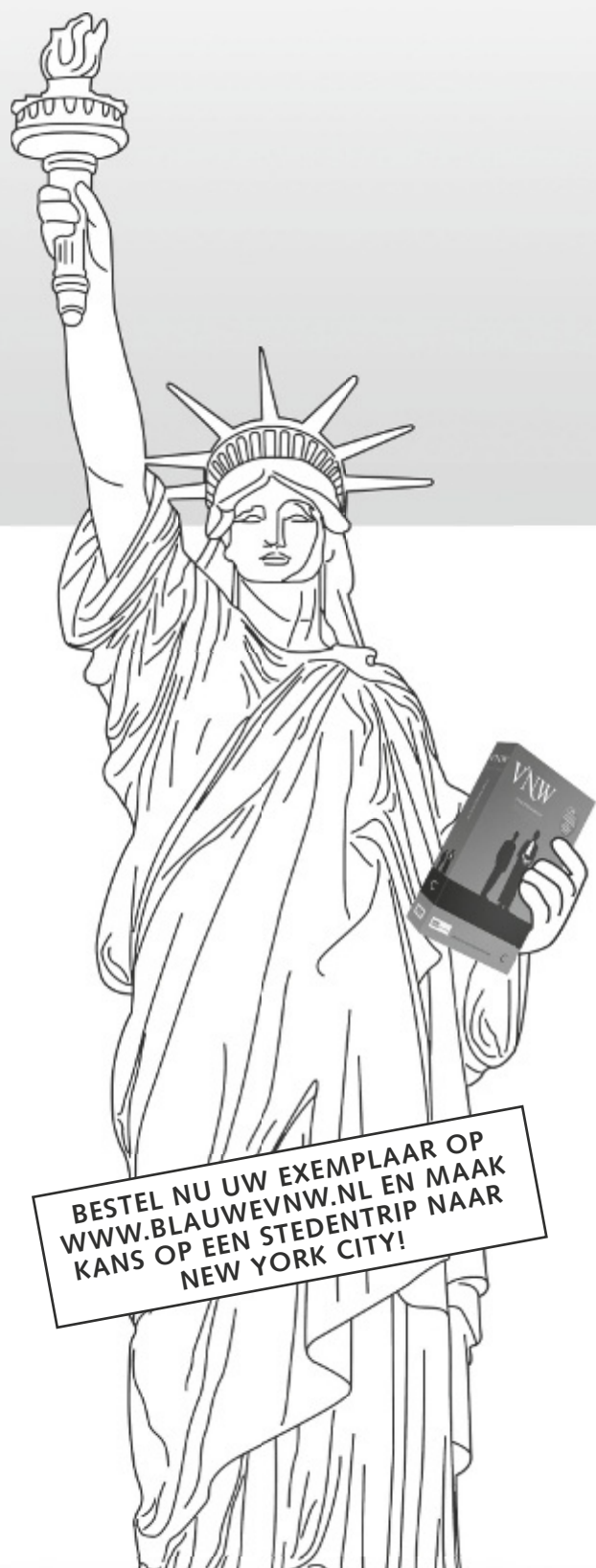
15 March 2011, C-29/10 (*Koelzsch*): where worker works in more than one Member State, the State in which he “habitually” works is that in which he performs the greater part of his duties (EELC 2011-1).

15 December 2011, C-384/10 (*Voogsgeerd*): where does an employee “habitually” carry out his work and what is the place of business through which the employee was engaged? (EELC 2011-4).

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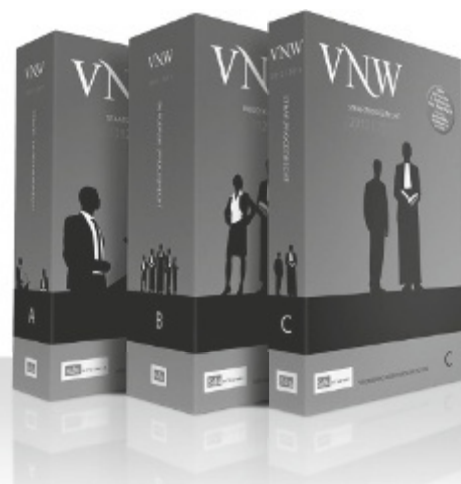
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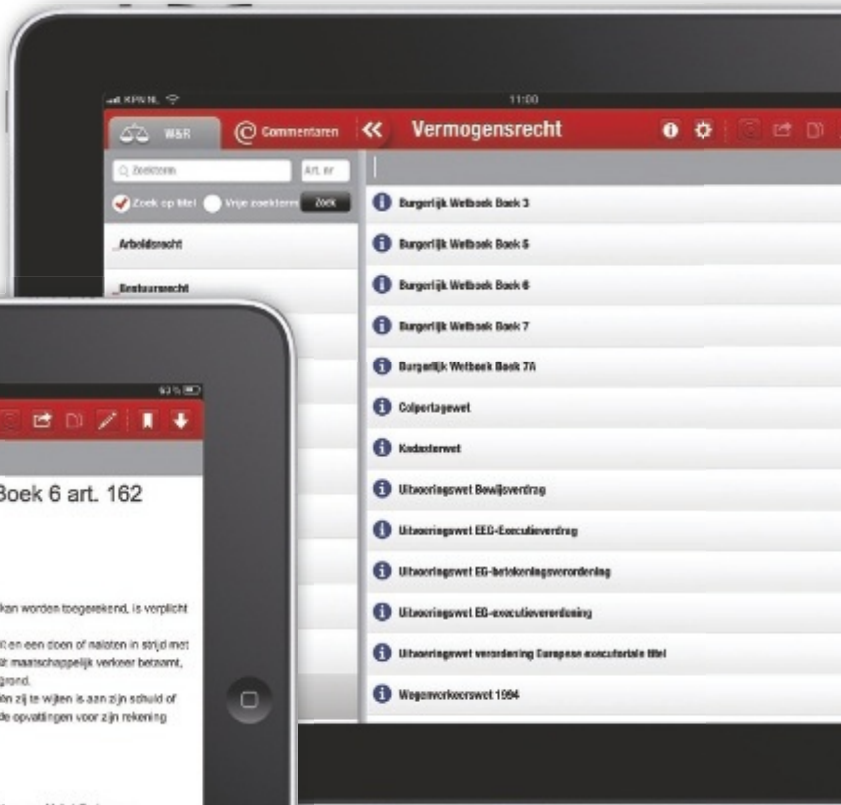
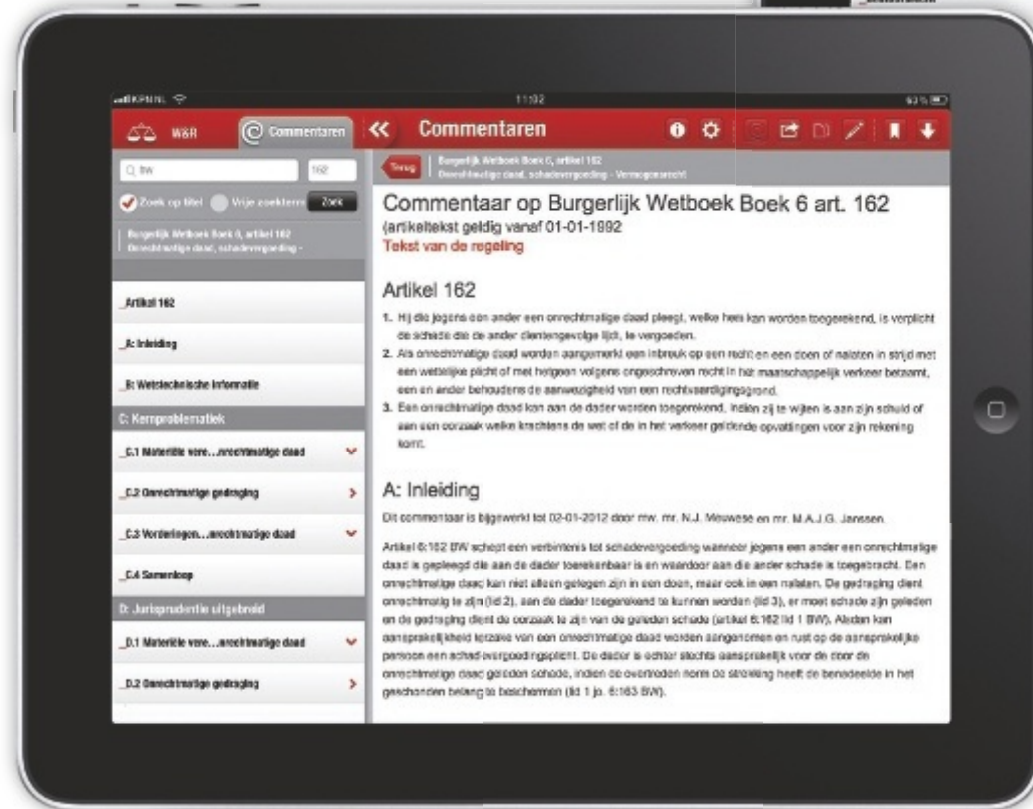
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