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2013 | 2

France: new collective redundancy rules 1 July

UK: can former employee claim victimisation?

Austria: Supreme Court rules on ETO burden of proof

Germany: is offer of employment relevant for transfer?

Czech Rep: who must ex-employee sue after transfer?

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INTRODUCTION

This edition of EELC contains some judgments of which every European lawyer specialising in employment law should be aware. Particular attention is drawn to:

- the ECJ's judgment in the Danish *Ring* case, in which the court clarified the concept of 'disability' in Directive 2000/78 and made some important observations on the type of accommodations that an employer may be obligated to adopt;
- a ruling by the highest Austrian court on the elusive concept of economic, technical or organisational (ETO) reasons in the Acquired Rights Directive;
- a judgment by the German *Bundesarbeitsgericht* on the relevance of a transferee's offer to employ transferor's staff for transfer of undertaking purposes;
- the new French rules for collective redundancies.

Peter Vas Nunes, editor

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2013/15

Which employer to sue in the event an invalid dismissal is followed by a transfer of undertaking? (CZ)

CONTRIBUTOR NATAŠA RANDLOVÁ*

Summary
A hotel employee was dismissed in 2001. Twelve days later the hotel was sold. The employee sued the former owner and the court declared the dismissal to have been invalid. The old owner then refused to pay salary because he was no longer the plaintiff's employer, given that the sale of the hotel constituted a transfer of undertaking. The new owner denied that he was bound by the judgment, as he was not a party to the proceedings. The plaintiff brought an action against both the old and new owner jointly. After almost twelve years of litigation the Supreme Court denied the claim, because the plaintiff sued the wrong party in 2001. However, both the old and the new owner may be liable after all, if they failed to inform the plaintiff adequately of the transfer of undertaking.

Facts
The plaintiff was employed in a hotel owned by 'Defendant 1'. On 4 June 2001 he was dismissed without notice. Twelve days later, on 16 June 2001, the hotel was sold. The sale qualified as a transfer of undertaking and all of the staff transferred into the employment of the new owner ('Defendant 2'), with the exception of the plaintiff.

Some time after the transfer, the plaintiff brought proceedings against Defendant 1 and the court of first instance ruled in his favour. For reasons that are not relevant here, Defendant 1 appealed and the proceedings regarding the status of the 2001 dismissal continued until 2006, when the Supreme Court finally confirmed that the dismissal was invalid.

The result appeared to be that on 16 June 2001 the plaintiff had become an employee of Defendant 2. He therefore brought proceedings against both defendants, seeking payment of salary for the period from 4 June 2001. He was successful in the court of first instance (2009) and again on appeal (2011). These courts ordered both defendants jointly to pay the plaintiff salary for said period. The defendants appealed to the Supreme Court. Defendant 1 argued that it had ceased to be the plaintiff's employer since 16 June 2001, and that it could therefore not be liable for salary from that date. Defendant 2 argued that it was not a party to the proceedings concerning the (in)validity of the dismissal, and that it therefore could not be said to be the plaintiff's employer.

Judgment
The Supreme Court began by noting that its 2006 ruling, in which it had held the 2001 dismissal to have been invalid, was irreversible. Czech law on civil procedure does not allow reconsideration of an irreversible judgment. Therefore, the invalidity of the dismissal was an established fact. This made the plaintiff conclude that he had transferred into the employment of Defendant 2 on 16 June 2001.

An employee who has been invalidly dismissed and who informs his employer that he insists on performing his contractual work may claim salary for a period in which he has not worked on account of the breach by his employer of its duty to provide the employee with work. In this case, the duty to provide the plaintiff with work had transferred to Defendant 2 before the plaintiff had raised any claim against Defendant 1. Therefore, given that this defendant had not breached any duty, the claim against Defendant 1 was dismissed (even for the period 4 -16 June 2001).

A court ruling is binding only on the parties to the proceedings. Therefore, the 2006 ruling that the dismissal by Defendant 1 was invalid was not binding on Defendant 2. In relation to Defendant 2, the dismissal must be deemed to have been valid and the claim against this defendant was also dismissed.

Thus, the plaintiff remained empty-handed. However, the Supreme Court did not close the door on him entirely. Both defendants had a duty to inform the hotel's staff, or their representatives, of the transfer of undertaking. In the event, the defendants failed to comply with this obligation and thus committed a tort against the plaintiff, giving rise to a claim for damages.

Commentary
This ruling is important for both employees and employers. Employees who want to challenge the termination of their employment must, according to this ruling, be aware which employer should be sued in relation to a transfer of rights and obligations. In this case, the plaintiff made the mistake of not claiming invalidity of his dismissal against Defendant 2. Employers, on the other hand, can find in this judgment a manual for an effective defence. Based on this decision, transferees need not fear that they may be sued in the future by former employees for lost wages based on rulings issued in court proceedings they were not party to.

Comments from other jurisdictions
Germany (Dagmar Hellenkemper): In Germany, the situation is slightly different but the conclusion would be similar. The German system differentiates between the invalidity of the dismissal (Defendant 1) and the continued employment and claim for salary (Defendant 1 for the period 4-16 June 2001 and Defendant 2 for the period after transfer of undertaking). Considering the dismissal, the defendant would be the one who terminated the employment relationship, in this case Defendant 1. The transfer of undertaking does not make Defendant 1 the wrong defendant, since the ruling on the dismissal would extend to the legal successor. By section 325(1) of the German Code of Civil Procedure: "A judgment that has entered into force shall take effect for and against the parties to the dispute and the persons who have become successors in title of the parties after the matter has become pending, or who have obtained possession of the disputed object such that one of the parties or its successor in title has become the constructive possessor."

However, the judgment concerning the (in)validity of the termination does not extend to determining whether or not a transfer of undertaking has taken place. In other words, the invalidity of the termination does not automatically make the plaintiff an employee of the transferee (i.e. Defendant 2). If the plaintiff wants to establish the continued employment with the transferee, he must sue him for a ruling that the employment relationship transferred to the transferee after the transfer of undertaking and that the transferee is therefore liable for payment of salary. Under German law the plaintiff can sue both the transferor and transferee, creating joint legal effect with regard to the continued employment relationship.

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The conclusion remains similar to the Czech one: Be careful whom you sue!

Ireland (Georgina Kabemba): Whilst the Transfer of Undertakings Regulations contain a provision confirming that liability (if any) to the dismissed employee transfers to the transferee, very often, in Ireland, the employee will choose to sue both parties. This is sometimes done as a 'belt and braces' approach and sometimes on the basis that there may be more interest in the transferor and transferee settling the claim if they are both going to have to spend time and money defending it. It is intriguing why the lawyer for the plaintiff did not bring a claim against Defendant 2.

The Netherlands (Peter Vas Nunes): What lessons can employers learn from this sad case? First, that they do well to perform a careful due diligence exercise before making an acquisition. Secondly, that transferors and transferees should inform not only their actively employed staff of the transfer, but should also inform any others who might later appear to be their employee. As for the lawyer who acted for the plaintiff in this case, is he liable for professional negligence? Why did he not bring a claim against Defendant 2 as soon as he knew about the transfer? Surely, that could not have been long after 16 June 2001.

Under Dutch law, if the plaintiff had informed Defendant 1 before 16 June 2001, not only that he contested his dismissal, but also that he was willing to continue to perform his work and that he wished to be paid salary (a standard response following a summary dismissal), he would have been awarded salary from the date of the dismissal.

Poland (Marek Wandzel): This case is interesting from a procedural point of view. I gather that the employee was demanding reinstatement. Irrespective of whether under Czech law the reinstatement has onward (*ex nunc*) or backward (*ex tunc*) effect, it was crucial for the plaintiff to identify who his employer was in the case of a transfer of the undertaking (i.e. Defendant 2). It is not clear if Defendant 1 told the plaintiff that Defendant 2 was his employer. If the employee thought so he should have asked Defendant 2 to be joined into the action so as to avoid the argument eventually raised, namely that Defendant 2 had not had the opportunity to defend himself.

One has to bear in mind that at that time (2001) the Czech Republic was not yet a member of the EU, but even so, the information obligations in cases of transfers may well have existed at that time - as they did in Poland.

Subject: Transfer of rights and obligations from an employment relationship
Parties: P.K. – v – JUDr. J.D. and Hotel Palace Praha s.r.o.
Court: The Supreme Court of the Czech Republic
Date: 26 March 2013
Case number: 21 Cdo 268/2012
Hard Copy publication: -
Internet publication: http://www.nsoud.cz/

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2013/16

Bundesarbeitsgericht, applying *Süzen*, holds that only actual takeover of staff, not an offer to do so, is relevant (GE)

CONTRIBUTORS PAUL SCHREINER AND KLAUS THÖNIßEN*

Summary
A security company lost its contract to a competitor. The competitor offered employment to all of the employees involved, albeit at a lower salary. Half of the employees accepted the offer and were hired by the competitor. One of the remaining employees claimed that the service provision change constituted a transfer of undertaking and that he had therefore become an employee of the competitor at his former salary level. The court found that the service provision change did not constitute a transfer of undertaking, given that the activity in question was labour-intensive and that only half of the employees involved in that activity went across to the competitor. Interestingly, the *Bundesarbeitsgericht* considered the fact that the competitor offered employment to all of the employees involved in the activity to be irrelevant.

Facts
The plaintiff was employed as a Supervisor by a company (the 'Employer') that provided security guards. His work consisted of supervising a team of guards at the premises of one of the Employer's clients (the 'Client'). The Client had several buildings, where a total of 28 of the Employer's staff worked, of which 23 were guards and five were supervisors. Of these 28 employees, seven worked in the building to which the plaintiff was assigned.

With effect from 1 April 2009, the Employer lost its contract with the Client, which entered into a similar contract with a competing security company (the 'Competitor'). The Employer dismissed the 28 employees, including the plaintiff. The plaintiff did not make (timely) use of his right to contest his termination.

The Competitor offered employment, albeit at a lower salary, to all or most of the 28 employees.[1] According to the plaintiff, 14 of them, one supervisor and 13 guards, accepted the offer.[2] Of these guards, four were employed at the building to which the plaintiff was assigned.

The plaintiff took the position that the Employer's replacement by the Competitor as the Client's security services provider constituted a transfer of undertaking within the meaning of the German transposition of the Acquired Rights Directive (i.e. section 613a 'BGB'), and that, therefore, he had become an employee of the competitor at his former salary level. He brought proceedings before the local Arbeitsgericht. Both this court and, on appeal to the *Landesarbeitsgericht*, his claim was turned down, following which he appealed to the highest court for labour matters, the *Bundesarbeitsgericht (BAG)*.

Judgment
It was common ground that the activity in question was labour-intensive, the few assets that the guards used, such as scanners and

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computers, having been provided by the Client. Referring to the ECJ's ruling in the *Süzen* case (ECJ 11 March 1997, case C-13/95), the BAG held that, in businesses that depend mainly on manpower, in order for the transfer of an economic entity that retains its identity to qualify as a transfer of undertaking, it is necessary not only that the entity's activity continues to be performed but also that "a major part of the workforce, in terms of their numbers and skills" crosses over to the transferee. The transfer of 14 out of 28 employees, including one out of five supervisors, was not a major part of the workforce.

The BAG added that it was irrelevant that the Competitor had - according to the plaintiff - offered employment to all 28 of the Employer's staff working for the Client, the only relevant factor being the number of employees that actually crossed over.

Commentary

There are two interesting aspects to this case:

1. How many employees in a labour-intensive entity must cross over to an (alleged) transferee in order to be able to hold that "a major part of the workforce, in terms of their numbers and skills" has transferred?
2. Is it relevant that the (alleged) transferee offers employment to employees of the (alleged) transferor, who decline to cross over?

As for the first aspect, this judgment is a consistent continuation of earlier judicial opinions rendered by the BAG. It shows that no clear line can be drawn when it comes to the determination of a transfer of undertaking, especially where the transfer of unskilled workers is concerned. In the end, a transfer of undertaking involving just a few assets, must be decided on an individual basis, taking into consideration the workforce's value to the business.

Previously, the BAG had held that a transfer of 60% of the unskilled workforce in a cleaning business was insufficient to trigger a transfer of undertaking (case no. 8 AZR 333/04) and that the transfer of 75% of the unskilled workforce in a pick-up and delivery business was similarly insufficient (case no. 8 AZR 676/97). In addition, in a case similar to the one at hand, the BAG found that a transfer of 61% of the unskilled workforce in a business providing security guards did not constitute a transfer of business (case no. 8 AZR 418/96). On the other hand, the BAG decided that the transfer of 85% of the unskilled workforce plus the only skilled worker in a cleaning business was sufficient to establish a transfer of undertaking (case no. 8 AZR 729/96).

As to the second aspect, the determination that a transfer of undertaking has taken place depends solely on the actual transfer of workers, as opposed to the number who have been made job offers. In other words, it does not matter how many workers of the former employer are offered jobs by the new employer. The BAG acknowledges that in 1994 the ECJ held that even unsuccessful job offers counted (case no. C-392/92, "*Christel Schmidt*"). However, the BAG also noted that since the ruling in "*Ayse Süzen*" (case C-13/95), the ECJ has consistently held that there needs to be an actual takeover of a major part of the workforce in terms of numbers and skills. That ruling was recently upheld by the ECJ in the *Clece* case (case no. C-463/09):

"*In particular, the identity of an economic entity, such as that forming the subject of the dispute in the main proceedings, which is essentially based on manpower, cannot be retained if the majority of its employees are not taken on by the alleged transferee.*"

Comments from other jurisdictions

United Kingdom (Hazel Oliver): The United Kingdom has chosen to implement the Directive on transfers of undertakings in a way that means the result in this case might be decided differently. As in Germany, the transfer of a labour-intensive activity may occur where there is an actual takeover of a major part of the workforce. However, under the Transfer of Undertakings (Protection of Employment) Regulations 2006 ('TUPE'), there are also separate provisions on 'service provision change' which may have applied in this situation.

A service provision change occurs where an organised grouping of employees has as its principal purpose the carrying out of an activity for a client, and this activity is then taken over by a new contractor. If the activity continues in a recognisable way after the change of contractor (involving the same type of service being provided in a similar way), TUPE will operate to transfer the employees to the new contractor. This applies irrespective of whether any actual employees or assets are taken on by the new contractor. It also applies where a service is contracted-out for the first time, or taken back in-house.

If this case had been decided in the UK, it is quite possible that the service provision change provisions in TUPE would have applied to transfer the employment of the security guards who worked at the client's premises to the new contractor. This would depend on the security guards being an organised grouping whose main purpose was carrying out this work for the client. However, it would not matter how many (if any) of those security guards were actually taken on by the new contractor – TUPE would still operate to transfer their employment.

The current UK government is considering whether to remove the rules on service provision change from the law, on the basis that this represents 'gold-plating' of the Directive and goes further than is actually required by EU law. We do not as yet have a proposed date for this change. However, if these provisions are removed, this would mean that the UK reverts to the basic position under the Directive in determining whether there has been a transfer – meaning that we will once again have to address arguments about how many assets and/or employees have actually been taken on by a new contractor.

Subject: Transfer of undertaking - retention of identity
Parties: Not identified
Court: *Bundesarbeitsgericht* (Federal Labour Court)
Date: 15 December 2011
Case number: 8 AZR 197/11
Hard copy publication: NZA-RR 2013, 179-185 and EzA § 613a BGB 2002 Nr 130
Internet publication: www.bundesarbeitsgericht→Entscheidungen →case number

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(Footnotes)

1. It was disputed whether the offer was made to all or only to some of the 28 employees.
2. The defendant alleged that only ten employees accepted the offer.

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2013/17

Presumption that dismissal was on account of transfer and not for an ETO reason not rebutted (AT)

CONTRIBUTOR MARTIN RISAK*

Summary
If a worker is dismissed shortly before or after the transfer of an enterprise this constitutes a strong indication that the dismissal was based solely on the transfer. The employer must then prove that there is an objective reason for the dismissal based on economic, technical or organisational grounds.

Facts
The plaintiff was employed by a town council. He was the manager of the municipal music school and also taught violin there.

On 29 June 2006 the town council decided to close down the municipal music school and join a regional association of music schools with effect from 1 September 2006. On paper, the school ceased to exist, its activities were taken over by the regional association and the business of teaching music was transferred to the association. However, in practice, not much changed. The pupils continued to be taught in the same building and with the same instruments, the teaching was given in most cases by the same teachers, those teachers having entered into new employment contracts with the regional association. Although this was initially disputed, it soon became common ground that the 'closing' of the municipal school and the transfer of its business to the regional association constituted a transfer of undertaking within the meaning of the Austrian legislation transposing the Acquired Rights Directive. Given that the regional association (the plaintiff's new employer) had no need for a manager, the plaintiff's management position became redundant.

In the course of June 2006, just before the town council had finalised its decision regarding the transfer of the music school, the regional association hired a new violin teacher with effect from 1 September 2006. As a result, a job vacancy that would have been available for the plaintiff disappeared. The regional association therefore dismissed him almost immediately after becoming his employer, effective 1 December 2006.

The plaintiff brought proceedings against the regional association, arguing that his dismissal was invalid, as it was directly as a result of the transfer of undertaking. In 2009, the *Landesgericht Wiener Neustadt* rejected the plaintiff's claim but, on appeal, in 2010, the *Oberlandesgericht Wien* upheld the claim. The regional association appealed to the Supreme Court.

Judgment
The Supreme Court began by noting that the Austrian legislature has failed to transpose the Acquired Rights Directly fully and that the Directive has direct effect in a situation such as the one at hand, where the transferor and the transferee are governmental organisations. Article 4(1) of the Directive provides that the transfer of an undertaking shall not in itself constitute grounds for dismissal, but that this provision shall not stand in the way of dismissals that may take place for economic, technical or organisational (ETO) reasons entailing changes in the workforce. The issue in this case was whether the plaintiff had been dismissed on the grounds of the transfer and, if so, whether it took place for ETO reasons.

The court observed that the regional association (the transferee) had dismissed the plaintiff "in close temporal proximity" (*in engen zeitlichen Naheverhältnis*) to the transfer. Although this proximity does not exclude the possibility that the dismissal was for ETO reasons, it is an indication (*Indiz*) to the contrary. In such a situation there is a presumption that the dismissal is connected to the transfer and the employer, in this case the transferee, bears the burden of rebutting this presumption. The regional association therefore needed to provide evidence that it did what it reasonably could to integrate the plaintiff into the new organisation, but that this was not possible. The arguments that the new violin teacher was unaware of the impending transfer of undertaking at the time he was hired and that at the time of the plaintiff's dismissal the position of violin teacher had already been filled, were insufficient to rebut the presumption. In an interim judgment dated 27 April 2011, the court remanded the case to the *Landesgericht* in order to allow the regional association the opportunity to present better arguments.

The lower court again found in favour of the regional association, but on appeal this judgment was overturned, following which the case returned to the Supreme Court for a second time. The Supreme Court began by addressing the regional association's argument that the plaintiff had made no effort to integrate himself into the new organisation. The court rejected this argument. As the plaintiff's new employer, the regional association had a duty to discuss his future career with him, before dismissing him, with which duty it failed to comply. The lack of integration of a worker into a new working environment constitutes an ETO reason only if a transferee undertakes efforts in this respect.
In addition, the transferee claimed that the dismissal was also based on uncertainty as to whether the violin teacher would be able to bring his existing pupils into the new amalgamated music school and, therefore, whether there would be enough work for him. The Court pointed out that circumstances that take effect only after a dismissal cannot be the objective basis for the dismissal. A transferee must await the relevant developments before dismissing a transferred employee. It did not do so in this case.

Having regard to these circumstances, the court, in its final judgment dated 21 February 2013, found that the regional association had failed to rebut the presumption that it had dismissed the plaintiff on account of the transfer of undertaking. Thus, the plaintiff won his case after over six years of litigation.

Commentary
This case is a good example of the problems parties face with dismissals in connection with transfers of enterprises, especially under Austrian law. The Austrian legislator has not explicitly transposed the prohibition of dismissals based on transfers for reasons other than ETO reasons. In my view, this is a breach of the duty to transpose Directive 2001/23. It means that the courts have had to find a way to resolve the lack of explicit protection of employees upon transfers of enterprises and so they have argued that dismissals in these circumstances are void as being *contra bones mores* under general notions of civil law. However, this puts the burden of proof on the worker and so the courts have tried to introduce some alleviation, in this case, that there is a presumption that a dismissal 'in close temporal proximity' to the transfer is

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connected to the transfer. The employer (transferor or transferee, depending on whether the employee was dismissed before or after the transfer) then bears the burden of rebutting this presumption with ETO reasons. The case at hand mainly deals with two arguments raised by the transferee (i.e. the lack of will of the employee to integrate and uncertainty about whether there would be enough work for the employee after the transfer). The reasoning of the Supreme Court is convincing and in line with Directive 2001/23 in preventing dismissals caused solely by the transfer of an undertaking.

Music schools seem to play an important role in Austrian jurisprudence, as this is the second decision by the Supreme Court dealing with this industry, the first one being the famous 1999 decision 8 Ob A 221/98b which dealt with the question of direct applicability of Directive 77/87/EEC to cases of insourcing of formerly private music schools into the (federal) state administration.

Comments from other jurisdictions

Germany (Dagmar Hellenkemper): Section 613a of the German Civil Code provides that the termination of an employment relationship by the previous employer or by the new owner because of the transfer of a business or a part of one, is ineffective. The right to terminate the employment relationship for other reasons is unaffected. In a similar way to this Austrian judgment, the German Courts have in the past found the fact that a termination happened in close temporal proximity to the transfer of business to be a reasonable indication of its connection to the transfer, although, in most cases, the dismissal took place before the transfer of business and not afterwards. There is, as yet, no ruling by the courts on what is considered to be 'close temporal proximity'. In this case, however, given that the employer had just filled a position the manager would have been able to do, it is likely that a German court would have rendered the same judgment.

Poland (Marek Wandzel): In my opinion, distinguishing between ETO dismissals and dismissals resulting from a transfer, is always extremely difficult. Quite often a transferee will have to dismiss employees for ETO reasons, but the dismissed employees will often assume their dismissals were a consequence of the transfer itself. In Poland the minimum timelapse between a transfer and ETO dismissal is, in practice, six months, although this does not guarantee rejection of an employee's claim. From this perspective the dismissal of the plaintiff in the case at hand was too quick.

Subject: Transfer of undertaking, dismissal
Parties: E**** S**** - v - **** Musikschulverband ****
Court: *Oberste Gerichtsho*f (Supreme Court)
Date: 21 February 2013
Case number: 9 ObA 96/12a
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2012/18

Retirement scheme that formerly yielded nothing for employees resigning before age 35 is neither unconstitutional nor sex-discriminatory (GE)

CONTRIBUTORS PAUL SCHREINER AND DAGMAR HELLENKEMPER*

Summary

A nurse was employed in a public hospital in the 1960s and 1970s. Until 1974 the law provided that, in order to qualify for retirement benefits, an employee needed to have been employed by the same employer without interruption for more than 20 years. This requirement was relaxed slightly in 1974, but even then an employee who resigned before the age of 35 remained empty-handed: no income following retirement and no vested interest. The *Bundesarbeitsgericht* found the service/age requirement to be constitutional and non-discriminatory.

Facts

The plaintiff was born in 1945. She was a nurse employed by the defendant in a public hospital. She was employed by the same hospital twice:

- first, from 1966 (age 21) to March 1971 (age 26), i.e. for a period of five years;
- then, from October 1972 (age 27) to 1979 (age 34), i.e. for a period of seven years.

The plaintiff's first contract ended when she resigned following the expiry of her maternity leave. Her second contract ended when she resigned for personal reasons.

During both periods of employment, the plaintiff was enrolled in the defendant's pension scheme. This provided old-age retirement benefits (as well as survivors' benefits) on top of the federal German State retirement benefits. The pension scheme was governed by statutory terms. Until 1974 these terms were set out in a provincial law called *Ruhegeldgesetz*. From 1974 onwards, they were governed by the federal *Betrieblichen Alterversorgungsgesetz* (the German Company Pensions Act, or 'BetrAVG') as it stood in the period 1974-1979. Both of these laws contained requirements that a former employee must satisfy in order to be eligible for retirement benefits. Until 1974 these requirements were that the retiree was employed without interruption by the same (public) employer for no less than 20 years and that the employment terminated on account of retirement or disability. From 1974 the requirements were that the employment terminated after the age of 35 (the 'age requirement') and that the retiree was either enrolled in the pension scheme for at least ten years or was employed for at least 12 years and enrolled in the pension scheme for at least three years (the 'service requirement').

Clearly, the plaintiff did not satisfy the requirements that were in force before 1974. As for the requirements that applied between 1974 and 1979, (i) the plaintiff did not satisfy the age requirement, given that her second contract ended when she was 34, and (ii) she would only satisfy the service requirement if her two periods of employment were added together.

On 1 May 2007, when the plaintiff turned 62, she was granted federal State retirement benefits to which every German is, in principle, entitled, but not additional benefits based on her employment with the defendant. She claimed € 37.39 per month from the defendant, arguing (i) that the age requirement was unconstitutional and sex-discriminatory and (ii) that her two periods of employment should be added together, both as a matter of principle and, in particular, because her first contract ended following maternity leave.

The courts of first and second instance ruled in favour of the defendant. The plaintiff appealed to the highest German court in employment matters, the *Bundesarbeitsgericht* (the Federal Labour Court, or 'BAG').

Judgment

In line with its settled case law, the BAG held that the plaintiff's first period of employment could not, as a matter of principle, be taken into account for the purpose of determining her entitlement under her second contract. The fact that the plaintiff's first contract ended following her maternity leave did not alter this conclusion. It is true that the Maternity Protection Act, which was already in force in 1974, provides that two or more periods of employment can be added together, but this is only the case where an employee resigns upon expiry of her 'maternity protection' period and is re-employed within one year. Given that the period between the plaintiff's two contracts exceeded one year (it was 19 months), the plaintiff did not satisfy this requirement.

As for the legality of the age requirement, the BAG examined it in the light of the German Constitution, which outlaws gender discrimination (and other forms of discrimination), and in the light of what is now Article 157 TFEU (formerly Article 119, then Article 141 EC). This involved analysing whether the age requirement was indirectly sex-discriminatory, as the plaintiff alleged. The court was willing to accept, by way of hypothesis, that the age requirement impacted women significantly more than men. The issue, therefore, was whether the requirement was objectively justified. The justification test involved, first of all, establishing the objective of the age requirement.

Historically, company retirement schemes only paid out to employees who worked for the company until retirement age (or until disability caused the employment to terminate). Anyone who left the company before that age was not eligible for any benefits and had no vested interest. The introduction of pension legislation marked a first step in increasing labour mobility. Initially, this mobility was limited to employees who had worked 20 years for the company. Later, this was reduced to ten years. The idea behind these requirements was partly to encourage and reward loyalty, but also that an employee who quits a company at an early age is likely to find another job with another pension scheme and is therefore less in need of protection. These aims were not related to gender and therefore passed the legitimacy test.

Given the Member States' wide margin of appreciation when deciding how to achieve a legitimate aim, the BAG found the age requirement to be objectively justified.

The BAG had already ruled in 2005 that the age and service requirements were not unconstitutional.

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Commentary
This decision is based on formerly applicable law. However, in practice, this judgment is relevant to all pension commitments given to employees before 1 January 2001. According to transitional law, section 1 of the German Company Pensions Act (BetrAVG, old version) remains applicable to these employees.

With the introduction of the Act on Equal Treatment (the German transposition of Directive 2000/78, the 'AGG') this judgment in itself might not be applicable for future claims, although the argumentation remains relevant to current cases. At the moment, there are at least three cases dealing with company pension entitlement based on discrimination on grounds of age pending with the BAG. The judgment at hand shows that not every requirement as to length of service in relation to the vesting of an employee´s entitlement necessarily also constitutes indirect discrimination on grounds of sex. The court did not need to answer the question of whether or not the provision in question had also to be considered age discriminatory, because service periods before and after reaching age 35 were treated differently. The plaintiff simply did not work for ten years continuously before or after the age of 35.

Comments from other jurisdictions
The Netherlands (Peter Vas Nunes): In these times, when the notion of solidarity has gone out of fashion, the idea of paying pension premiums (even if only by way of employer contributions) and not getting any pension or claim upon retirement, is difficult to accept. Since 1952 Dutch law has provided that an employee never loses the value of his or her accrued pension (vested interest).

Subject: Age discrimination and gender discrimination in pensions
Parties: Not published
Court: *Bundesarbeitsgericht* (Federal Labour Court)
Date: 9 October 2012
Case number: 3 AZR 477/10
Hardcopy publication: NZA-RR 2013, 150
Internetpublication: www.bundesarbeitsgericht.de → Entscheidungen → Aktenzeichen + case number

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2013/19

Employee with foreign disability certificate cannot claim Austrian disability dismissal protection (AT)

CONTRIBUTOR MARTIN RISAK*

Summary
A worker with a German disability certificate was unable to claim the dismissal protection he would have had under Austrian law had he had an Austrian certificate, even though the criteria for being awarded disability status are similar in both countries.

Facts
The Austrian Act on the Employment of Persons with Disabilities (*Behinderteneinstellungsgesetz*) grants employees with a rate of disability of at least of 50% the status of a 'privileged worker with disabilities'. Such persons enjoy, in particular, special protection against dismissal. This status is granted by an administrative decision of the Federal Social Authority (*Bundessozialamt*) if applied for by the employee. The administrative decision is confirmed in a certificate. The employer is not informed of the application, nor of the decision.

An Austrian national living in Germany but working in Austria had a German certificate stating that he was disabled with a rate of disability of 50% according to the German Social Code (*Sozialgesetzbuch*). He did not enjoy the status of a privileged worker with disabilities under Austrian law, as he had not applied for that status. When he was dismissed by his Austrian employer, he claimed compensation for unfair dismissal. His claim was based on the argument that, although he lacked an Austrian certificate, he was actually a worker with disabilities and the Austrian courts ought to accept the German certificate, given that he satisfied all the criteria for attaining that status and would have been awarded an Austrian certificate had he applied for one.

The lower courts rejected the claim. The *Landesgericht Wels* pointed out that the German decision could not substitute the necessary Austrian official status as a privileged worker. On appeal the *Oberlandesgericht Linz* upheld this decision and stated that the alleged direct binding effect of the German administrative decision had no legal basis under Austrian law. Additionally, the court saw no discrimination based on the worker's nationality, given that he was Austrian, nor an infringement of his freedom of movement as a worker within the EU. He appealed to the Supreme Court (*Oberste Gerichtshof*).

Judgment
The Supreme Court acknowledged that, as a cross-border worker, the plaintiff enjoyed all rights deriving from the freedom of movement of workers. However, it was not clear to the court how the Austrian provisions protecting privileged employees with disabilities against dismissal, which require an Austrian administrative decision, can hinder or prevent a worker from another member state to take up employment in Austria. The court pointed out that the procedure for obtaining an Austrian certificate is very low level, that foreign medical records are taken into account and that there is a public interest in treating all workers with disabilities who are employed in Austria in the same way.

The Supreme Court also commented that the status of a privileged worker entitles the employee to special benefits and to protection against dismissal, but that this status might also discourage employers from hiring such employees. The law therefore leaves it to the employee to decide whether to apply for this status. Additionally, it is possible to give up the status of privileged worker once it has been awarded. An automatic recognition of foreign status would strip the employee of the option not to apply for, or to give up this privileged status.

Commentary
In a way, this is a logical and straightforward decision. Yet it feels a bit unfair and the Supreme Court's reasoning does not feel convincing. The law providing disabled workers with extra dismissal protection is there for good reason. The plaintiff in this case was disabled, and if

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he had applied for an Austrian certificate, he would have got one. The plaintiff therefore deserved to be protected. He could be dismissed without extra protection, and he lost the case, solely because he neglected to have his German certificate 'converted' into an Austrian certificate. The Supreme Court's reasoning in accepting the harsh result of this omission may be correct but it is formalistic and to some may not appear persuasive.

It is true that job applicants often do not inform their prospective employers about their privileged status for fear of not being hired on account of the extra difficulty in dismissing them. It is also true that some employees elect not to apply for a certificate or, if they already have one, to have it withdrawn.

Theoretically, therefore, it is true that, if having a German certificate would automatically confer privileged status in Austria, that would make it impossible for an Austrian employee to have his privileged status in Austria withdrawn without simultaneous withdrawal of his German certificate. However, this fact does not strike me as a strong basis for an argument to decline privileged status on the basis of a foreign disability certificate.

A more convincing argument, that was only used indirectly in this case, would have been that, in giving up the need for a national disability certificate and accepting equivalent foreign certificates, the employer, the employee and the court would be confronted with the need to decide whether a foreign certificate is equivalent to an Austrian certificate. This might weigh more heavily than the burden on the employee of making a simple application for an Austrian certificate. A compromise might perhaps be to publish a list of foreign certificates that are equivalent to the certificate provided in the Austrian Act on the Employment of Workers with Disability.

Comments from other jurisdictions

Germany (Dagmar Hellenkemper): In Germany, as in Austria, disabled employees with a certain degree of disability are protected by special restrictions concerning the termination of their employment. In general, the decision as to whether an employee is disabled is based on factual findings and the certificate has a purely declaratory effect. Nevertheless, a disabled employee will only enjoy special protection if the disability is either proven by the national certificate or if the disability is obvious.

This raises the question of whether or not a disability proven by a foreign certificate can be deemed obvious, bearing in mind that under German Law the disability is seen as obvious if the employer can objectively determine that the disabled person suffers a disability of at least 50%. As there is no official list of what kind of disabilities equate to what degree of disability, it might be hard for the court to tell whether the disability was obvious to the employer. As to the foreign certificate, the court might be inclined to ask whether the national and foreign criteria for determining a disability are comparable. In conclusion, I suspect that a German court would have decided likewise - provided the disability was not so obvious that the employer would have been able to tell without doubt.

Subject: Employees with disabilities, recognition of foreign decisions, freedom of movement
Parties: Not identified
Court: *Oberste Gerichtshof* (Supreme Court)
Date: 5 April 2013
Case number: 8 ObA 50/12d
Hard copy publication: ARD 6321/7/2013
Internet publication: www.ris.bka.gv.at → Judikatur → Justiz → Geschäftszahl → case number

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2013/20

The principle of secularism does not apply to the private sector (FR)

CONTRIBUTORS CLAIRE TOUMIEUX AND SUSAN EKRAMI*

Summary

The principle of secularism - established by Article 1 of the French Constitution - does not apply to employees of private employers that do not provide a public service.

Facts

Back in 2008, an employee was dismissed from her job at the private *Baby Loup* nursery school in *Chanteloup-les-Vignes* for refusing to remove her headscarf. This refusal was in breach of the nursery school's internal regulations, which imposed strict compliance with "the principles of secularism and neutrality" within the premises of the establishment and its annexes as well as during outdoor activities with the children.

The employee brought a claim before the Industrial Tribunal of *Mantes-la-Jolie* for discrimination, seeking for her dismissal to be deemed void and for € 80,000 in damages. Her claim was dismissed by the Industrial Tribunal, which ruled that *Baby Loup's* internal regulations were perfectly lawful in light of Article 1 of the French Constitution and that by violating them the employee had committed serious misconduct justifying her dismissal.

The employee appealed the case. The Court of Appeals of Versailles upheld the decision of the Industrial Tribunal by ruling, in particular, that young children at the nursery school should not be confronted with ostentatious displays of religious affiliation.
The employee then brought the case before the French Supreme Court.

Judgment

The Supreme Court overturned the decision of the Court of Appeal of Versailles by holding that the employee's dismissal amounted to religious discrimination and was therefore void. The Supreme Court held that: "*the principle of secularism established by Article 1 of the Constitution does not apply to employees employed in the private sector who do not provide a public service; it cannot therefore be invoked to deprive those employees of the protection afforded by the provisions of the Labour Code. Pursuant to Articles L. 1121-1, L. 1132-1, L. 1133-1 and*

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L. 1321-3 of the Labour Code[1] *restrictions on religious freedom must be justified by the nature of the task or an essential professional requirement and be proportionate to the aim pursued. The internal rules of Baby Loup state that the principle of freedom of conscience and religion of each employee cannot interfere with the principles of secularism and neutrality which apply to all activities of Baby Loup, both within the nursery premises and its annexes and during outdoor activities with the children. Said provision of the internal rules is a general and imprecise restriction and does not meet the requirements of Article L. 1321-3 of the Labour Code. Thus the employee's dismissal, based on discriminatory grounds, is void*".

Commentary
France's tradition of religious neutrality known as *laïcité* is set by Article 1 of the French Constitution which provides that "*France is a secular, indivisible, democratic and social Republic*". This principle of secularism has, as a corollary, the principle of neutrality of 'public agents' (employees working in the public sector, no matter whether they are under private or public law contracts). In 2004, the Government took a further step towards secularism and banned the wearing of conspicuous signs of religion in public schools and in 2011 made it illegal to wear any face-covering garment in public.

In this regard, the French Supreme Court decision in the Baby Loup case draws a clear distinction between the public and private sectors. While secularism governs the former, in the private sector, religious freedom still prevails. Thus, any restriction on individual and collective freedoms of employees in the private sector must be, as required by Articles L.1121-1 and L.1321-3[2] of the French Labour Code: "*justified by the nature of the task to be carried out and proportionate to the aim pursued*" and respond to an "*essential and determining professional requirement*".

In another decision rendered on the same day[3], the French Supreme Court validated the dismissal of an employee working in the public sector (the French Primary Sickness Insurance Fund, or 'CPAM') - who had refused to take off her headscarf, thus violating the provisions of the CPAM's internal regulations, which specifically forbade this. The Supreme Court held that the principles of neutrality and secularism of the public service apply to all public services, including those carried out by private organisations such as the CPAM.

In both cases, the Supreme Court applied the same legal reasoning, but came to diametrically opposed decisions. It goes without saying that the Baby Loup decision has caused quite a stir in France. Manuel Valls, the current Interior Minister, even said "*I regret the court's decision in the Baby Loup case, which has called secularism into question*."

The Supreme Court's decision is open to criticism since the judges simply held that the restriction on the freedom of religion brought by Baby Loup's internal regulation was "*general and imprecise*" without verifying whether the restriction was justified "*by the nature of the task carried out*" by the employee and was "*proportionate to the aim pursued*", as provided in Articles L.1121-1 and L.1321-3 of the Labour Code.

According to French case law, a restriction on the freedom of religion can be 'justified' for example, by health and safety reasons, the need to avoid religious propaganda and above all, where there is direct contact with clients. In this case, staff were in contact with children and parents, who are their clients and who care about the religious neutrality of nursery staff.

The decision in the Baby Loup case appears to contradict the views of the European Court of Human Rights. In 2001, in Dahlab – v – Switzerland, the court considered that a measure prohibiting the applicant from wearing a headscarf while teaching, which derived from Swiss law and applied in state schools was "*necessary in a democratic society*" taking into account the fact that the applicant was a representative of the state, the tender age of the children and the fact that the wearing of a headscarf "*might have some kind of proselytising effect*"[4].

This case illustrates that there is often a fine line between public and private service. Public service generally refers to an activity in the public interest, performed by a public or private institution, under the control of a public authority. There are both public and private nursery schools and some private ones receive public subsidies, as here. Therefore, the tribunal ruled that the nursery, albeit a private institution, was performing a public service. (By contrast, the appellate court did not clearly address this issue).

It is also debatable why private institutions cannot choose to be secular in a secular country and why the principle of religious neutrality should stop at the doorstep of private institutions.
The legal framework might change soon as, in reaction to the Supreme Court decision, a Bill extending the principle of secularism to private institutions in the health, social and medical sectors has been submitted to Parliament.

In the meantime, employers in the private sector that do not provide a public service, are well-advised to go through their internal regulations and make sure they do not contain any 'general' restrictions on freedom of religion and if they do, that any such restriction can be "justified by the nature of the task and is proportionate to the aim pursued".

Comments from other jurisdictions
Germany (Klaus Thönißen): From a German point of view the Supreme Court's judgment deserves approval. Also in Germany a court has to make the distinction between a public and a private employer. It might not be understandable to everyone, but this distinction is in compliance with the German constitution.

In contrast to a private employer only the state as an employer is directly bound by the German constitution. Therefore the state is supposed to actively impose neutrality or secularism. In Germany for example, no public teacher is allowed to wear any kind of religious symbols and Christian crosses have been banned from every class room and from court rooms as well.

A private employer on the other hand is not directly bound by the German constitution. However, the constitutional rights of both the employer and the employee have to be recognized in an employment relationship. In 2002 the Federal Labour Court (the "BAG") found that the dismissal of an employee in a department store for wearing a headscarf was unlawful. In that case a female employee informed the employer that she would start wearing a headscarf after her maternal leave and the employer then terminated the employment relationship. The BAG held that even though an employer could demand a particular dress code in order to cover the customers' expectations and to maintain a "uniform" appearance of its employees, the employer did not show that wearing a headscarf actually affected its business. So the employee's constitutional right to free expression and practice of religion outweighed the employer's right to establish and operate a business.

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As long as this distinction between the public and the private sector is constitutionally anchored, a court cannot decide otherwise.

The Netherlands (Peter Vas Nunes): The facts in The Baby Loup case reported above are different from those in the ECtHR's *Eweida* decision (see EELC 2013-1 page 42). Whereas British Airways allowed Sikh and Muslim check-in staff to wear a turban and a hijab, respectively, *Baby Loup* prohibited **all** manifestations of religion. The facts in the *Baby Loup* case have a strong resemblance to those in the *Dahlab* case, in which the ECtHR, by a majority, declared an application by a head-scarf-wearing teacher based on religions and sex discrimination inadmissible.

United Kingdom (Madeleine Jephcott): There are fundamental differences in the approach of the UK and France to secularism. Firstly, the United Kingdom does not have a written constitution – its constitution is derived from a number of sources, principally laws passed by the UK Parliament and common law (legal precedents established by decisions of the courts). And secondly, secularism is not preserved in the UK in the same way as in France, as the Queen is both head of state and Supreme Governor of the Church of England, which is officially recognised by the state.

Statutory rules on religion or belief discrimination were introduced in the UK in 2003 and are now incorporated, along with other strands of discrimination legislation, in the Equality Act 2010 (the 'Act'). The provisions in the Act prohibiting discrimination on grounds of religion or belief do not make a distinction between the public and private sector, in contrast to the position in France.

The UK has seen similar challenges to employer rules as those brought in the Baby Loup and CPAM cases in France. Employees have relied on the indirect discrimination rules in the Act (prohibiting employers applying a provision, criterion or practice which disadvantages employees of a particular religion or belief) to challenge dress code rules which curtail their ability to manifest their religion or belief. A rule that employees should not wear a veil or headscarf in the workplace will give rise to potential claims for indirect religion or belief discrimination - female Muslim employees are placed at a particular disadvantage by such a rule. However, whether such a ban is lawful will depend on whether an employer can justify it (i.e. whether it is a proportionate means of achieving a legitimate aim).

On the one hand, the courts have found that an instruction to a Muslim teaching assistant to remove the veil (which covered all but her eyes) when carrying out her duties was not indirectly discriminatory. The instruction was a proportionate means of achieving the legitimate aim of providing the best quality education (in circumstances where face-to-face contact was necessary).
On the other hand, the recent cases of *Eweida v British Airways plc* and *Chaplin v Royal Devon & Exeter NHS Foundation Trust* (in which employees challenged a uniform policy preventing them from wearing a cross visibly at work) illustrate that whether or not such a ban can be justified will depend on the facts of each case. Employers will find it difficult to justify discrimination on the ground that the wearing of a headscarf does not fit the corporate image that the company wishes to project. However, evidence of an increase in health and safety risks are more likely to be accepted as providing justification for discriminatory treatment.

Subject: Religious discrimination
Parties: Baby Loup – v – Ms. Afif
Court: *Cour de cassation* (French Supreme Court)
Date: 19 March 2013
Case Number: N° 11-28.845
Hard copy publication: Official Journal
Internet publication: www.legifrance.gouv.fr → jurisprudence judiciaire → cour de cassation →case number

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(Footnotes)
1. Article L. 1121-1 of the Labour Code: "No one can limit individual or collective freedoms and rights in a way that would be neither justified by the nature of the task to be accomplished nor be proportionate to the intended goal". Article L. 1132-1 of the Labour Code: "No one can be excluded from a hiring, internship, or training process in a company. No employee can be sanctioned, fired or subjected to a discriminatory measure, whether direct or indirect [...] especially in terms of remuneration, [...] profit-sharing measures, measures relating to distribution of shares, training, redeployment, affectation, qualification, classification, professional promotions, mutations or renewal of contract and based on origin, sex, way of life, sexual orientation or identity, age, family situation or pregnancy, genetic characteristics, belonging or not, whether verified or assumed, to a race, nation, ethnicity, or on political opinions, union activities, religious convictions, physical appearance, last name or because of one's health or disability". Article L. 1133-1 of the Labour Code: "Article L.1132-1 does not constitute an obstacle to differences in treatment if said differences reflect an essential and determining professional requirement; and as long as the goal is legitimate and the requirement is proportionate".
2. "Internal regulations shall not contain: (1) provisions contrary to the laws and regulations as well as provisions of collective bargaining agreements applicable to the company/establishment; (2) provisions restricting the human rights and individual/collective freedoms which are not justified by the nature of the task and proportionate to the aim pursued; (3)provisions discriminating against employees because of their origin, gender, manners, sexual orientation, age, marital status, pregnancy, genetic characteristics, membership or non-membership of an ethnic group, nation or race, political opinions, trade union or mutual activities, religious beliefs, physical appearance, family, health, status or disability."
3. Cass. soc. 19 March 2013 n°12-11690.
4. ECtHR 15 February 2001 re Dahlab – v – Switzerland, appl. 42393/98 ECHR 2001- V p. 429.

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2013/21

Is post-employment victimisation unlawful? (UK)

CONTRIBUTOR ANNA SELLA*

Summary
Under the Equality Act 2010 (the "Act"), victimisation occurs where a person (A) subjects another person (B) to a detriment because either (i) B has done a protected act, or (ii) A believes that B has done, or may do, a protected act. A protected act includes bringing proceedings under the Act.

In two recent cases, the UK Employment Appeal Tribunal (EAT) has come to different conclusions about whether the Act also prohibits acts of victimisation which take place after an employment relationship has ended. A decision of the Court of Appeal is now needed to determine the correct approach.

The Act consolidates and replaces a number of older pieces of legislation which did protect former employees against victimisation by their previous employers (in accordance with EU law). The question now arises whether the Act altered the pre-existing law.

Facts
The events in *Rowstock - v - Jessemey* occurred at a time when retirement was still a potentially fair reason for dismissal under the law of England and Wales. The employer compulsorily retired the employee, Mr Jessemey, without following the correct procedure. Mr Jessemey brought claims for unfair dismissal and age discrimination. He was successful in his discrimination claim. His employer gave him a poor reference, referring to the fact that he had brought a claim. Mr Jessemey then brought a further claim of victimisation, alleging that his employer's poor reference was its 'revenge' for him having brought a claim of discrimination. He claimed monetary compensation.

In the later case of *Onu - v - Akwiwu*, Ms Onu was employed as a domestic servant for Mr and Mrs Akwiwu, following them from their native Nigeria to the UK. Eventually, she resigned and brought claims against her employers on the ground that she had been mistreated. Her claims for discrimination, harassment and failure to pay the minimum wage are not relevant here, but she also brought a claim for victimisation[1]. This was based on a call from her employer to her sister, some six months after Ms Onu's employment had ended, saying that Ms Onu had sued him, that "*if she thought things would end there she was wrong*" and that Ms Onu would "*suffer for it*". The employer later retracted his statement. The Tribunal rejected the victimisation claim based on the evidence.

Judgment
The relevant question for the EAT in each case was whether the Act provides a remedy for acts of victimisation which occur after the employment relationship has ended. In particular, the EAT had to consider the meaning and effect of section 108(7) of the Act.

Section 108 relates to "*relationships that have ended*" and extends the prohibition against discrimination and harassment to situations arising after a relationship has ended. Section 108(7) states: "*But conduct is not a contravention of this section insofar as it also amounts to victimisation of B by A.*" As both tribunals acknowledged, the meaning of these words, in context, is not clear.

In *Jessemey*, the Equality and Human Rights Commission (EHRC) intervened to support the view that the Equality Act did – and should be interpreted to – provide a remedy for post-termination acts of victimisation. The EHRC's arguments were as follows:

- The provision in section108(7) was apparently made in error, or is, at least, an instance of poor drafting;
- The Explanatory Notes to the 2010 Act do not refer to any intention to change the law, as would be expected if this had been the intention; the fact that section 108 is in a section of the Act entitled "*Ancillary*" is also inconsistent with this section being intended to effect a change in the law;
- The EHRC's Code of Practice, which was approved by Parliament, states that victimisation occurring after the end of the employment relationship is unlawful;
- If post-termination victimisation was not covered by the Equality Act, the UK would not be compliant with the requirements of EU Directives;
- Words could easily be read into the section (namely by a reference to "current and/or former" employment) to 'correct' the error, and to adopt the purposive interpretation required by EU Directives.

The EAT in *Jessemey*, however, refused to take such a "*bold*" approach. It was heavily influenced by the fact that the remit of section 108 extends to all post-relationship scenarios (not just employment relationships) and therefore by the potentially far-reaching implications of its decision. It was of the view that it was being asked to find a meaning for these words which was "*the exact reverse*" of what they said. The Tribunal accepted that its literal reading of the words in section 108(7) left a "*lacuna*" in the statutory scheme of protection from victimisation, which the UK is required by EU legislation to enact. It considered whether it was within its legitimate power to plug the gap – and decided that it was not. It did, however, give Mr Jessemey permission to appeal the point, given its general importance.

The EAT in Onu characterised the difficulty as follows: "*The Equality Act does not expressly provide that victimisation of a former employee by her erstwhile employer is compensable, whereas it does provide specifically that both discrimination and harassment occurring after termination of the employment relationship are.*" The EAT in *Onu* decided that section 108(7) does not expressly exclude post-termination victimisation claims, and that such claims are actionable. Its reasons were that: this conclusion was required under EU law; it was in accordance with previous statutes on discrimination and the EHRC Code of Practice; there was no Parliamentary material to suggest that it considered this section would be a dramatic shift in the law; there was no sensible purpose for section 108(7) if there was no right to sue for victimisation after the employment relationship has ended; and, drawing on previous discrimination case-law, given that the intention of the legislation is to protect employees from discrimination in respect of all benefits arising from the employment relationship, it would make no sense to draw an "*arbitrary line*" at the precise moment that relationship ends. According to the EAT in Onu, the purpose of section 108(7) was simply to prevent double recovery where there is also a discrimination and/or harassment claim arising out of the same facts. The EAT also gave leave to appeal.

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Commentary

The decision in *Jessemey* was widely regarded as wrong. Now, it seems that this is acknowledged by the decision-makers themselves. One of the members of the EAT in *Jessemey* was also a member of the panel in *Onu*, and was persuaded in the latter case that post-termination victimisation is actionable on a proper construction of the Equality Act. The decision regarding victimisation in *Onu* is clearly the better one, as it is in accordance with the EHRC Code of Practice, achieves compliance with the UK's EU obligations, corresponds with the Equality Act's general aim of preventing discrimination in all its forms and is most probably what Parliament intended. Further, many victimisation claims brought under the previous discrimination laws were acts which occurred after the end of the relationship – such as bad references being given. Post-termination acts are therefore at the heart of the prohibition of victimisation.

Although future tribunals are likely to follow the Onu decision, rather than relying on *Jessemey*, conflicting authorities at EAT-level exist. A Court of Appeal decision would therefore be welcome to confirm the common sense view that employees who are victimised by their former employers can bring a claim and expect a remedy.

We understand that Mr Jessemey has appealed the decision to the Court of Appeal, so binding authority in this matter is due to be available later this year or early next year.

Comments from other jurisdictions

Germany (Klaus Thönißen): From a German point of view both Mr Jessemy and Ms Onu would have had a valid claim under sec. 16 (1) – Prohibition of Victimisation – of the General Equal Treatment Act (the "AGG"). This section provides the following wording:

"The employer shall not be permitted to discriminate against employees who assert their rights under Part 2 or on account of their refusal to carry out instructions that constitute a violation of the provisions of Part 2."

The main issue in the cases at hand – whether post-employment victimisation is covered by the Act – would not be an issue within the rules of the AGG. The German lawmakers considered that issue and therefore incorporated sec. 6 (1) no. 3 into the AGG:

"Employee shall here also refer to those applying for an employment relationship and persons whose employment relationship has ended."

Since both plaintiffs did not suffer any economic loss, they could demand appropriate compensation in money by filing a complaint under sec. 15 (2) of the AGG with a Labour court.

Luxembourg (Michel Molitor): Under Luxembourg law, the above situations are unlikely to come to court. Concerning *Rowstock - v - Jessemey*, the employer would have no duty to deliver a reference letter to the employee. The employer would only be obliged to give a neutral work certificate, which lists the jobs that were carried out and their length. No ambiguous or negative comment of any kind is allowed, although there is no prohibition on making positive remarks in favour of the employee in the work certificate. As regards *Onu - v - Akwiwu*, it is unlikely that one call by the employer to the employee's sister alone would be considered as moral harassment, as this requires repeated acts, according to Luxembourg case law. It should be noted that the concept of moral harassment is restrictively construed in Luxembourg, which as yet has no laws on moral harassment.

The Netherlands (Peter Vas Nunes): In neither of the two cases reported above did the English court cite provisions of EU law. However, the court did accept that UK law would not be compliant with EU law if there was no remedy for post-employment victimisation. This must refer to Article 9 of the Race Directive 2000/43 and Article 11 in conjunction with Article 9 of the Framework Directive 2000/78. Article 9 of the Race Directive requires Member States to "introduce into their national legal systems such measures as are necessary to protect *individuals* from any adverse treatment or adverse consequence as a reaction to a complaint" [*emphasis added*]. Article 11 of the Framework Directive provides for a similar requirement "to protect *employees* against dismissal or other adverse treatment by the *employer* as a reaction to a complaint" [*emphasis added*]. This might seem as if the Framework Directive limits the prohibition of victimisation to situations where there is still an employment relationship. However, Article 11 forms part of Chapter II of the directive headed "Remedies and Enforcement", of which Article 9 also forms a part. Article 9(1) requires Member States to ensure that persons who consider themselves wronged can seek judicial redress "even after the relationship in which the discrimination is alleged to have occurred has ended". Arguably, therefore, the words "employees" and "employer" in Article 11 should be interpreted as including former employees and a former employer.

Subject: Discrimination - victimisation
Parties: 1. Rowstock Ltd - v - Jessemey (Equality and Human Rights Commission intervening);
2. Onu - v - Akwiwu and another
Court: *Employment Appeal Tribunal*
Date: 1. 5 March 2013;
2. 1 May 2013
Case numbers: 1. Rowstock Ltd and another - v - Jessemey UKEAT/0112/12;
2. Onu - v - Akwiwu and another UKEAT/0022/12
Publication: www.bailii.org

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(Footnotes)
1. It is not known what remedy Ms Onu sought, but most likely she claimed monetary compensation for injury to feelings.

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2013/22

Presumptive gender discrimination in rejecting job applicant disproved (NL)

CONTRIBUTOR PETER VAS NUNES*

Summary
A female job applicant was rejected for a university professorship, for reasons that she felt to be gender discriminatory. The fact that the search committee consisted entirely of men, combined with other circumstances, made the court accept that there was *prima facie* evidence of discrimination. However, the university provided sufficient evidence to rebut the presumption.

Facts
The plaintiff was employed by the University of Amsterdam, in the Economics Faculty. She earned a PhD in 2001 and in 2004-2007 she did research for a department of the Faculty called History and Methodology of Economics ("HME"). Her employment with the university ended on 1 February 2008.

On 18 March 2008 the university published a vacancy for the position of Assistant Professor ("UD") in the HME department. The publication included the following text:

"Requirements are a PhD in economics [...], the proven ability to initiate and implement research to international standards, the ability to stimulate and encourage the research of others, demonstrated teaching excellence, and the ability (or stated intention) to teach in both Dutch and English. Shortlisted candidates will be asked to present one of their papers at a seminar."

There were 25 applicants, of whom seven were women. One of those seven women was the 48 year-old plaintiff, who sent the search committee her CV and a letter of application that included the following text:
"My research in the field of history and philosophy of economics addresses the role of gender in the history and philosophy of economics; how gender has been constructed in economics in relation to its historical context, and how notions of gender have been structuring economic concepts and economics as a science. [...] As such this research can contain a valuable addition to the research conducted at the HME."

The search committee shortlisted four candidates, all men. Contrary to the original plan, these four candidates were not asked to present a paper at a seminar. This was because all of the members of the committee knew all four candidates and skipping this step in the procedure would save a great deal of time and money. In the end a 31-year old man was selected for the vacant position. The plaintiff was informed, *"Yours was a very good application, and the search committee regarded it very highly. But the competition was also very strong, and we were emphasizing experience in teaching history of economic thought* [...]".

The plaintiff requested a clarification as to why she was not selected for the vacant position. This resulted in extensive and detailed email correspondence, which included the following exchange:

"The information I am trying to get at is why I have not been selected and why this young man who has considerably less publications and experience than I, has been selected instead. That I was not the best is not enough of an answer. [...]

The criteria you put on the table (quality of publications, letter of reference, teaching experience and evidence of teaching performance) are not gender neutral, but not only that, they seem to change, they are not consistent with the advertisement and they do not cover the needs of the group. [...]

When feminist economics is not recognized as a field of research, but even stronger when feminist economists are being punished for their activities in the field or leave because of the unfriendly and uncooperative environment what else to expect than that feminist economists leave economics? (...) Are you not concerned that your whole group consists of men right now? How do you explain that? You have done the history of economics and feminist economics no favour by excluding me from the field of the history of philosophy of economics."

and:

"your publication list is not very strong in my view. (i) The UD position at Amsterdam is in history of economics. You have no publications in any of the leading history of economics journals. (...) (ii) You have no publications in any of the main methodology and philosophy of economics journals. (iii) Nine of your publications are in Dutch and German journals which are not widely read, not highly ranked, and not related to our fields. [...]

So basically from the point of view of the Amsterdam UD position your publication record is weak. You do not publish in our field, nor do you publish in competitive, refereed locations. [...]

I am not aware of your having teaching experience with respect to history of economics. [...] I also have no indication that you are familiar with most of the history of economics. [...] I had no reason to think you would be prepared to teach the course the new UD needs to teach in the field. [...]

Contrary to your belief we are well aware of the small number of women in science and in our field, and we all wish to promote women whenever we can. In my view, however, this does not imply that one should promote a woman over a more qualified candidate when that candidate is a man, and advance the woman only because she is a woman. [...]"

In November 2008, the plaintiff applied to the Equal Treatment Commission. In an Opinion dated 20 October 2009, following a detailed investigation, the Commission held that the plaintiff had presented a *prima facie* case of gender discrimination, which the university had not managed to rebut.

The plaintiff's next step was to hold the university liable for the loss she had sustained and to ask the university to explain what it was planning to do to prevent gender discriminatory hiring practices in future. The university declined liability, whereupon the plaintiff, supported by the *Clara Wichmann Foundation* (an organisation that supports and finances gender-based test cases) took the case to the District Court of Amsterdam.

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Judgment

The court began by assessing whether the plaintiff had established sufficient facts from which it may be presumed that there had been gender discrimination. The court referred to remarks the government had made in Parliament in 2000 regarding the Bill that led to the provision in question (Article 3(1) of the Act on Equal Treatment of Men and Women). The government had explained that a presumption of discrimination can be adduced from "*intermediary facts*". The burden of proving such intermediary facts rests on the plaintiff.

The court reviewed seven intermediary facts that the plaintiff had advanced:

1. the search committee consisted entirely of men;
2. it did not include any outsider, such as an HR manager;
3. the committee had changed and added to the requirements for the vacancy as it went along, meaning the procedure lacked transparency;
4. the committee did not play by its own rules, skipping the announced requirement of presenting a paper at a seminar, which fact indicated that the search committee's members' personal networks had played a role;
5. given that seven out of the 25 candidates, i.e. 28% of the candidates were female, statistically speaking at least one of the four shortlisted candidates should have been a woman;
6. the successful candidate was inferior to the plaintiff, since he had no teaching experience and was not able to lecture in English and Dutch;
7. women were underrepresented in academic positions in The Netherlands as a whole and in the Economic Faculty of the university in particular.

The university admitted points 1, 4, 5 and 7, denied points 2, 3, 4 and 6 and defended its position as follows.
Although the arguments it had used in the course of the correspondence with the plaintiff had not been identical, they were logically related to the requirements published in the job advertisement. The argument that the search committee had not asked the shortlisted candidates to present a paper at a seminar was irrelevant, seeing that this was something that occurred after the plaintiff's candidacy had been rejected. Furthermore, the university explained in detail how the plaintiff's expertise simply did not match what was needed for the job.

The court accepted that the plaintiff's arguments 1, 2, 4, 5 and 7, combined, were sufficient to find, *prima facie*, that the university had discriminated. As for point 4, although what happened after the plaintiff had not been shortlisted was strictly irrelevant, the fact that the search committee decided not to require presentation of a paper at a seminar could give credence to the impression that the procedure was not transparent and objective.

The next step was to determine whether the university had presented sufficient evidence to disprove the *prima facie* presumption. The court found that this was the case. Basically, it accepted that the plaintiff's academic credentials did not match the qualifications required according to the advertised vacancy. Among many other things, two things contributed to this finding. One was that all members of the search committee, independently of one another, had given each of the four shortlisted candidates, a "1" score, the highest score, which the plaintiff had not been given. Another was that the plaintiff had to admit that her specific field of expertise, feminist economics, was not part of the core of the MHE department's focus, given that in her letter of application she had written that "this research can contain a valuable **addition** to the research conducted at [MHE]" '[emphasis added].

Commentary

Article 19 of Directive 2006/54 (gender discrimination), Article 8 of Directive 2000/43 (race) and Article 10 of Directive 2000/78 (religion, belief, disability, age and sexual orientation) provide that "*Member States shall take all such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment*". I will refer to these provisions as the "reversal rule", although a more precise description of the provision would be the "partial reversal of the burden of proof rule".

The reversal rule already existed under the ECJ's case law prior to 1997. It was codified in that year by Directive 97/80 (initially, for gender discrimination only). As for the rationale behind the rule, the recitals to Directive 97/80 merely state that "plaintiffs could be deprived of any effective means of enforcing the principle of equal treatment before the national courts if the effect of introducing evidence of an apparent discrimination were not to impose on the respondent the burden of proving that his practice is not in fact discriminatory". The recitals are silent on the reason why the reversal rule is considered to be reasonable. Presumably the thinking is that the employer, not the employee, is the party making decisions (to hire, promote, fire, etc.) and therefore it is the employer that has, or should have, the information regarding the reason for the decision. Put a different way, it is as a rule easier for the respondent to prove non-discrimination than it is for the plaintiff to prove discrimination. That, at least, seems to be the theory. In practice, the reversal rule can be hard on employers.

Unfortunately, the ECJ has provided almost no guidance on the reversal rule. In 2008, in the *Feryn* case (C-54/-07), it dodged the issue. The Belgian referring court had asked the ECJ, *inter alia*, "What is to be understood by "facts from which it may be presumed that there has been direct or indirect discrimination" within the meaning of Article 8(1) of Directive 2000/43? How strict must a national court be in assessing facts which give rise to a presumption of discrimination?" and, "Is one fact sufficient in order to raise a presumption of discrimination?" and, "How strict must the national court be in assessing the evidence in rebuttals?" The ECJ merely held that the national court need only rely on "a simple finding that a presumption of discrimination has arisen on the basis of established facts" and that "it is for the national court to verify that the facts alleged against that employer are established and to assess the sufficiency of the evidence which the employer adduces in support of its contentions that it has not breached the principle of equal treatment". In the recent *Meister* case (C-415/10), the ECJ had another opportunity to provide guidance on the reversal rule, but again it passed up the opportunity, the relevant question 2 having become moot, given its reply to question 1.

In this Dutch case, the court addressed both aspects of the reversal rule head on:

a) how strong must *prima facie* evidence be to qualify as "facts from which it may be presumed that there has been direct or indirect discrimination"?

b) how strong must the respondent's rebuttal be to "prove that there has been no breach of the principle of equal treatment"?

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Re a

The court uses an expression I had not previously come across, namely "intermediary facts". These are facts, to be supported by *prima facie* evidence that the plaintiff needs to present in order for the reversal rule to kick in. Basically, "intermediary facts" are no more - but also no less - than what is commonly described as circumstantial evidence. The plaintiff in this case presented seven pieces of circumstantial evidence, of which the court accepted five as constituting a sufficiently strong presumption of gender discrimination: the search committee consisted entirely of men, it did not include any outsider, the committee did not play by its own rules, none of the female candidates (28% of the total) had been shortlisted and women were underrepresented. The combination of these five facts led to the establishment of a presumption. Interestingly, one of these arguments (not playing by its own rules) related to a fact that occurred after the plaintiff had been rejected. What happens after an allegedly discriminatory decision has been made can shed light on the reasoning behind the decision.

In this case, lack of transparency did not play a role. In discrimination cases it frequently does play a role. One example out of countless cases on which the Dutch Equal Treatment Commission has ruled, and in which lack of transparency played a crucial role, concerns an advertisement for a taxi driver. The Commission considered the lack of transparency in the way the candidates were selected, in combination with the fact that during the interview the plaintiff – a female candidate – had been asked whether she had children, to be sufficient to establish a presumption of discrimination. Transparency was found to be lacking because (i) there was no written profile for the position of taxi driver; (ii) there was no list of requirements for the position; (iii) the interviewers based their decision on subjective impressions; and (iv) the interviewers had not made and retained for future reference notes on each candidate, making comparisons between the candidates difficult. The Commission referred to the ECJ's requirement that procedures (for selecting candidates, promoting employees, determining salary, terminating staff, etc.) must be "transparent, verifiable and systematic". The taxi company could not prove that its decision to reject the plaintiff's application was not discriminatory, something that is almost impossible to prove.

In the case reported above, statistics played only a minor role, perhaps because the plaintiff alleged direct discrimination. The plaintiff's argument that the university's reasoning changed as it went along (see for comparison, the German case in EELC 2012/46) also played no role.

Re b

Directive 2006/54 provides that, where there is presumptive discrimination, it is for the respondent to prove that there has been no discrimination. The court in this case was fairly lenient in accepting the university's rebuttal of the presumption of discrimination, particularly given the fact that Dutch case law does not accept the "mixed motive" defence (i.e. if there is one discriminatory reason and there are many non-discriminatory reasons for a decision, the decision is discriminatory). The fact that all members of the search committee had given the shortlisted candidates a better score than the plaintiff, combined with the fact that her specific expertise was not part of the relevant department's focus, were sufficient to consider discrimination disproved.

Subject: Discrimination, gender, hiring
Parties: X - v - University of Amsterdam
Court: *Rechtbank* (District Court) *of Amsterdam*
Date: 13 March 2013
Case number: C/13/517266/HA ZA 12-612
Hardcopy publication: JAR 2013/102
Internet publication: www.rechtspraak.nl → LJN: BZ 4174

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2013/23

When does an employer have "imputed knowledge" of an employee's disability? (UK)

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Summary

The UK Employment Appeal Tribunal (the "EAT") has determined that an employer can have "imputed" knowledge of an employee's disability, even if the wrong medical diagnosis was attached to the Claimant's condition at the time.

The EAT went on to hold that, despite such knowledge, it was not a reasonable adjustment in this case for the employer to exempt the employee from its absence management policy, even though the cause of the employee's intermittent absences was his underlying disability.

Facts

The Claimant, Mr Jennings, worked for the Respondent NHS Trust (the "Trust") as an IT support engineer, one of a team of ten people providing support services for the personal computer equipment used by other Trust employees.

Mr Jennings had held the role for nearly nine years at the time of his dismissal. Throughout his employment, he was intermittently absent due to recurrent short-term illness. Some of his absences in earlier years related to back problems, but the majority in the last two to three years of his employment were apparently caused by angina, and a stress-related psychiatric condition allegedly arising from a road traffic accident in February 2006. His condition had an initial diagnosis of post-traumatic stress disorder (PTSD), with symptoms including anxiety, panic attacks and sleep disorders. In early 2007 Mr Jennings was absent from work for forty-four days. He then returned to work but in July 2007 he was again absent, for four days with stress, followed by a further five days off in August, also due to stress.

The Trust had two procedures to be used in the event of an employee's absence for medical reasons: a short-term absence policy to address cases where the employee has an unacceptable number of short-term absences, and a long-term absence policy to address cases where the employee is off work for an extended period of time. Both policies involved a series of formal meetings.

Following Mr Jennings' absence in August 2007, the Trust commenced short-term absence proceedings, doing so in a rather rigorous way.

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Mr Jennings went off sick again in September with stress and did not return to work. A series of meetings was arranged, the majority of which were postponed or conducted in Mr Jennings' absence following his failure to attend.

Following a hearing on 10 October 2007, Mr Jennings was given a first written warning under the Trust's short-term absence policy. The hearing was also used to commence the Trust's long-term absence procedure. It did this in breach of its own long-term absence policy by holding a formal meeting under that policy without prior notice to Mr Jennings informing him that the long-term absence policy was now being implemented.

In November 2007, the Trust's internal Occupational Health (OH) department recommended that Mr Jennings begin a phased return to work in four to six weeks. This was later delayed to March 2008 by a subsequent OH report. In preparation for his return, Mr Jennings was asked to complete a "stress at work" questionnaire. He never completed the questionnaire, despite a reminder to do so.

On 23 January 2008, at a final stage hearing, it was held that there was no clear evidence that Mr Jennings would in fact return to work within the proposed timeframe, and he was dismissed under the Trust's long-term absence procedure.

Employment Tribunal ("ET") Judgment

Mr Jennings brought a claim for monetary compensation in the Employment Tribunal. The claim was based on unfair dismissal and disability discrimination on the grounds of his employer's failure to make reasonable adjustments.

The ET had a number of issues to consider:

1. Did the Trust have actual or imputed knowledge of Mr Jennings disability?

Medical evidence before the tribunal confirmed that Mr Jennings suffered from a paranoid personality disorder and major depression, amounting to a disability under the Disability Discrimination Act 1995 (DDA 1995) (as replaced on 1 October 2010 by the Equality Act 2010 (EqA 2010)).

The Trust accepted that Mr Jennings suffered from a disability, however it denied that it had known (or could reasonably be expected to have known) that he was disabled. Although the Trust knew about the diagnosis of PTSD, it argued that that diagnosis did not indicate that Mr Jennings was disabled, and that, therefore, the Trust had no duty to make reasonable adjustments.

It was held by the ET that the Trust had sufficient information to have "imputed knowledge" of Mr Jennings's disability i.e. that he had a mental impairment that had a 'substantial' and 'long-term' negative effect on his ability to perform normal daily activities.

2. Was there therefore a failure to make reasonable adjustments?

It was determined that the alleged failure to make reasonable adjustments related to the application of the Trust's sickness management policy, which would have a greater impact on disabled than non-disabled workers. The particular disadvantage to Mr Jennings was clear. The erratic and recurrent nature of his condition meant that if he returned to work and then had to be absent again, as was more likely to be the case than with a non-disabled person, he would be disciplined under the policy. In other words, the policy was 'a provision, criterion or practice' which put Mr Jennings at a substantial disadvantage in comparison to an employee who was not disabled and therefore the duty to make reasonable adjustments arose. It would have been a reasonable adjustment, Mr Jennings argued, to have disapplied the Trust's current sickness absence procedure.

The ET disagreed. Noting that the Trust would be required to operate a new sickness absence policy that applied uniquely to Mr Jennings, and the extent of the "clear operational problems" caused to the Trust by Mr Jennings' continued absence, it was held that excusing Mr Jennings from the Trust's absence procedure did not fall within the scope of reasonable adjustments.

3. Was Mr Jennings unfairly dismissed?

In line with its reasoning above, the ET held that Mr Jennings had not been unfairly dismissed. The ET commented that Mr Jennings' attendance record was extremely poor (100 days' absence in an eight month period), and that this was therefore not a "borderline" case.

EAT Judgment

The EAT upheld the Tribunal's decision on all counts.

On the question of "imputed knowledge", the EAT commented that if a wrong label is attached to a mental impairment, a later re-labelling of the condition is not diagnosing a mental impairment for the first time using the benefit of hindsight, it is giving the same mental impairment a different name. Given that, whether or not an employer knows or should have known there is a disability, is essentially a question of fact. On these grounds, there was sufficient factual material for the Tribunal to conclude that the Trust knew, or should have known, that Mr Jennings suffered from a disability (although there was a suggestion that the EAT themselves may have reached a different decision on the facts).

On the issue of reasonable adjustments, the ET provided an adequate explanation of why it did not think it was reasonable for the Trust to have to tailor its procedures to suit Mr Jennings's situation, providing no reason for the EAT to overturn this ruling or the decision on unfair dismissal.

Commentary

In the UK, it is possible for employers to take disciplinary action for absences where the absence rate presents an unacceptable level of disruption to the business or organisation, regardless of whether the employee is to blame for his absence. Action can consist of issuing written warnings, and ultimately it can mean dismissal. The procedure is somewhat like a disciplinary procedure in that it provides for a series of warnings about the possibility of dismissal. This is why it is sometimes called a "disciplinary" procedure, even though no question of misconduct arises.

Contrary to some European jurisdictions, in the UK a dismissal for being absent due to sickness is perfectly valid. However, there are two important issues for the employer to be aware of: (i) the risk of an unfair dismissal claim and (ii) the obligation not to discriminate on the grounds of disability, which obligation includes the duty to make reasonable adjustments where appropriate. The case reported here deals with that duty.

The decision of the EAT clarifies the right of employers to take action against an employee who has excessive absences, even if these arise from the employee's disability. Nevertheless, employers must consider each case on its own facts. Mr Jennings' absences were extreme and protracted, and he himself had failed to engage in the absence

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procedure. This failure appears to relate to the fact that Mr Jennings did not take positive steps to explain his needs to the Trust or to discuss a meaningful phased return to work. As part of this general criticism, there was particular emphasis on his failure to complete the "stress at work" questionnaire.

Depending on the circumstances, it may still be appropriate to make some adjustment to the terms of an absence policy amongst any other reasonable adjustments that could be made.

One important lesson for UK employers is the danger of blindly relying on an employee's medical diagnosis, if the evidence before them suggests that the employee is in fact disabled under the Equality Act. If the employee's mental or physical impairment is long-lasting and has a substantial effect on day-to-day activities, relying on a medical diagnosis will not provide a defence to a claim of failure to make reasonable adjustments.

Comments from other jurisdictions
Luxembourg (Michel Molitor): Under Luxembourg law, Mr Jennings would have probably been reclassified internally or externally or declared as a handicapped employee, but the employer would not have been allowed to dismiss him.

In fact, when a Luxembourg employer is informed about the sickness of his employee, he is not allowed to dismiss him, even for serious misconduct, nor to call him for interview prior to the dismissal. Besides the automatic termination of the contract after 52 weeks of sickness on a reference period of 102 weeks, an employer is then only entitled to dismiss a sick employee after a period of 26 weeks. In the matter in question, these timescales are not relevant and even if this had been the case, the employer would have had to justify the dismissal.

As regards the regular absence of the employee due to sickness, Luxembourg case law is rigorous in assessing the right to dismiss. Absenteeism is accepted as an objective and serious ground for dismissal only if the absences seriously disrupt the functioning of the company, without any certainty of future improvement. The employer has to show the disruption of the company as the ground for dismissal giving precise explanations of the organisational problems that have been caused by the employee's absence.

However, it is not possible to dismiss the employee where a procedure of professional reclassification has been launched. This happens in general in Luxembourg after six weeks of sickness. From that moment on, where the procedure has been filed with the Commission for Reclassification, the employee cannot be dismissed until the Commission has decided not to reclassify him. Where, on the other hand, the Commission considers that the employee is not likely to return to his former position, unless there is some adaptation of his working conditions, or that there is a possibility that his employer can find another position for him, the Commission will decide to reclassify him internally. In that case, the protection against dismissal is extended until one year after the Commission's decision. Finally, if the Commission considers that the employee is unable to return in his former position, that there is no other job available with his employer, but that he could be able to find a position on the job market, the Commission will decide to reclassify externally. If the Commission considers that the employee is totally unable to return to work, it will declare him disabled.

Subject: Disability discrimination and duty to make reasonable adjustments
Parties: Jennings - v - Barts and The London NHS Trust UKEAT/0056/12
Court: *Employment Appeal Tribunal*
Date: 5 February 2013
Case Number: [2012] UKEAT 0056
Internet publication: www.bailii.org/uk/cases/UKEAT/2013/0056_12_0502.html

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2013/24

A requirement for a Christian employee to work on Sundays was not discriminatory (UK)

CONTRIBUTOR RHIAN HALL*

Summary
The Employment Appeal Tribunal has decided that a requirement that a care worker work on Sundays was a provision, criterion or practice ("PCP") that could put Christians at a particular disadvantage but that it could be objectively justified and was therefore legitimate in the circumstances of the case. This meant that the requirement for the employee to work on Sundays was not an act of unlawful indirect religious discrimination.

Facts
Ms Mba was recruited to work for the London Borough of Merton ("Merton") at one of its children's homes in Brightwell in July 2007. The home provided short residential breaks for children with disabilities and complex care needs.

The home was open seven days a week, 24 hours a day and was required by a national minimum standard to ensure that staff working at any given time were of both genders and with substantial experience for the role, a requirement which at times could be challenging.

Staff worked according to a three-week rota, which included two weekends in each three-week period. When Ms Mba was recruited she became the fifth employee at the home. Merton supplemented the employees' work with that of temporary agency staff and casual workers ("bank staff"). However, such staff cost more over the weekend period.

Ms Mba understood that she had been offered the job on the basis that she would not have to work Sunday shifts, given that she was a Christian. Merton, for nearly two years of Ms Mba's employment, accommodated her desire not to work on Sunday shifts. It had, however, denied that it promised Ms Mba that she would never be required to work on Sundays throughout her employment.

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By June 2009, Ms Mba had raised a grievance about the approach of Merton (which by this point, was indicating that it would not be possible to accommodate her desire not to work Sunday shifts indefinitely). Shortly afterwards, the grievance was rejected and Ms Mba was scheduled to work on a Sunday, for the first time since she had commenced employment with Merton. However, Merton was prepared to arrange Ms Mba's shifts in a way which enabled her to attend church on Sundays.

Ms Mba did not work the Sunday shifts for which she was rostered. Merton instigated disciplinary proceedings against Ms Mba, who received a final written warning in early 2010. Ms Mba appealed the written warning but was unsuccessful. Five days later, Ms Mba resigned claiming that she had been indirectly unlawfully discriminated against on the grounds of her religion and that, therefore, she had been "constructively" dismissed.[1] Ms Mba claimed that Merton, rather than requiring her to work on Sundays, should have taken steps such as using bank or agency workers; recruiting an additional female employee; or scheduling other female employees to work her Sunday shifts. Merton argued that it was 'justified' in requiring her to work on Sundays, in other words, that this requirement was a proportionate means of achieving a legitimate aim and therefore not discriminatory.

Ms Mba relied upon the Employment Equality (Religion or Belief) Regulations 2003 because the Equality Act 2010 had not at that point come into force.

Tribunal decision

The Employment Tribunal rejected Ms Mba's claim, finding that Merton's requirement for all care workers to work on Sundays when rostered to do so, was a justified practice.[2]

The Tribunal considered that Merton's aims were legitimate. The aims were to ensure: a mixture of genders on each shift; a mix of seniority levels; a cost effective service; fair treatment of other staff (who had to cover a disproportionately high level of Sunday shifts) and continuity of care for service users.

The Tribunal then considered whether requiring staff to work Sunday shifts when rostered to do so was a proportionate means of achieving Merton's aims. The Tribunal considered the impact of this on the Claimant as against the reasonable business needs of Merton.
The Tribunal, in considering the disadvantage caused to Ms Mba by the practice of requiring staff to work Sunday shifts, noted that Merton had made efforts to accommodate her wishes for two years and had offered to allow her to attend church on Sundays, when rostered to work. The Tribunal also noted that Ms Mba's "belief that Sunday should be a day of rest and worship upon which no paid employment was undertaken, whilst deeply held, is not a core component of the Christian faith". Taking this into account, the Tribunal decided that the requirement to work Sunday shifts was proportionate and, therefore, Ms Mba's claim of indirect discrimination failed.

Ms Mba appealed to the Employment Appeal Tribunal.

Appeal

There were three strands to Ms Mba's appeal, namely that the Tribunal:

1. had been wrong to hold that not working on Sundays was not a "core" component of the Christian faith;
2. had failed to subject the employer's proportionality argument to sufficient scrutiny; and;
3. did not place the onus on Merton to justify its requirement to work on Sundays when rostered to do so, and instead placed it on Ms Mba to show that it was not justified.

On the first point, Ms Mba argued that it was not for the Tribunal to make an evaluative judgment as to the tenets of faith. Ms Mba argued that the Tribunal should have considered the fact that abstaining from work on a Sunday was critical to *her* religious beliefs and not whether the Tribunal viewed this particular belief as a core component of the Christian faith.

The EAT said that the Tribunal did not express itself elegantly on this point and its phraseology could have suggested that the Tribunal was judging the tenets of faith, which would have been a misdirection of law. However, having considered the context of the Tribunal judgment and the legal principles referred to, the EAT held that the Tribunal was not adjudicating on the qualitative importance of Ms Mba's belief, but rather considering how many Christians shared that belief.

The EAT said that such a consideration is relevant to assessing proportionality because "the weight to be given to the degree of interference with religious belief of a certain kind will inevitably differ depending upon the numbers of believers who will be affected by the particular PCP concerned". The EAT thought that a PCP which affects virtually every Christian will have a greater discriminatory impact than a PCP affecting only a small number of Christians. Accordingly, the EAT thought that the Tribunal was entitled to take into account the fact that many Christians work on Sundays when applying the proportionality test.

On the second point, the EAT held that there was nothing to suggest that the Tribunal failed to apply proper scrutiny to the issue of proportionality and no reason to regard Merton's justifications as lacking cogency.

On the third point, the EAT did not accept that the Tribunal had misdirected itself by placing the onus on the employee to show that the PCP was not justified. The Tribunal had placed the burden on the employer.

The EAT noted generally that on a correct reading of UK law, the issue to consider was the discriminatory impact of a PCP on a group and not on the particular claimant (although the individual must also be disadvantaged as falling within that group). The tribunal had therefore been wrong to focus solely on the impact on the claimant. However, in doing so it was adopting a test which was likely to be more favourable to the claimant than the correct test and so nothing turned on its mistake.

The EAT dismissed the Claimant's appeal. Ms Mba's appeal to the Court of Appeal is outstanding.

Commentary

Whilst this case has been heralded as an attack on Christians' rights in some articles in the mainstream press, this is not accurately reflecting the position. Mr Justice Langstaff who handed down the EAT judgment was at pains to stress that "anyone who expects the conclusion to amount either to a ringing endorsement of an individual's right not to be required to work on a Sunday on the one hand, or an employer's freedom to require it on the other... will both be disappointed. No such general broad issue arises. The questions must be determined in the specific circumstances of this particular case alone."

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It is clear that a PCP of requiring Sunday work will put those sharing Ms Mba's belief at a particular disadvantage and within the scope of the indirect discrimination provisions. Whilst Merton was able to justify its Sunday working requirement in the circumstances of this particular case, not all employers will be able to do the same.

The EAT considered how the proportionality test should be applied in these circumstances, noting that a group disadvantage is necessary when seeking protection under UK legislation. The legitimacy of the requirement to show a group disadvantage under domestic legislation has been called into question in light of the subsequent European Court of Human Rights ("ECHR") decision in *Eweida and Others - v - United Kingdom*. In that case, the ECHR upheld Ms Eweida's complaint about being prevented from wearing a cross visibly at work, notwithstanding the fact that the UK courts thought that she had failed to show a "group "disadvantage. The ECHR focused on the right to a personal expression of faith which it said was a matter of "individual thought and conscience".

Following *Eweida*, it will be interesting to see how the Court of Appeal deals with Ms Mba's appeal in relation to the group disadvantage point which has thus far underpinned domestic indirect discrimination legislation in religious belief cases. Arguably, in light of *Eweida*, Ms Mba may succeed in her indirect discrimination claim on the basis that her individual thought and conscience in relation to abstaining from Sunday work should be protected.

Comments from other jurisdictions

Austria (Martin Risak): It is interesting that up to now no employee in Austria ever came up with a similar argument in order not to be scheduled to work on a Sunday. This may have to do with the legal requirements on the allocation of working time. Under Austrian law, working times must be agreed on in the contract of employment, in a "works agreement" or in a collective agreement. The employer may only change previously agreed working times unilaterally in the event the right to do so has been stipulated expressly in writing and the interests of the worker opposing this change are less substantial than the employer's interests justifying the change. It is very likely that a case like the one at hand would have been dealt with under Austrian law using this argument and that an employee would not take recourse to the anti-discrimination legislation.

Germany (Klaus Thönißen): From a German point of view this case raises two interesting issues: indirect (religious) discrimination on the one hand and an employee's right to practice his or her religion during working hours on the other hand.

The "discrimination part" of this case is fairly easy. I don't think that a German court could determine an indirect discrimination at all under the German Equality Act (the "AGG").

Firstly, both Directive 2000/78 and the AGG require that "*an apparently neutral provision, criterion or practice would put persons having a particular religion or belief [...] at a particular disadvantage compared with other persons unless...*". In the case at hand, every employee – based on a three week rota – has to work on every day of the week. Therefore, Ms Mba cannot be indirectly discriminated **particularly** as a Christian, because the employer's practice would affect **every** member of **every** religion equally (a Jew had to work on a Saturday, a Muslim on a Friday etc.).

Secondly, under the "AGG" – which is similar to the EU/UK provisions – the criterion "justification" as part of the definition of indirect discrimination had to be considered as satisfied. Here, the employer had the legitimate aim to save costs in order to keep the children's home going 24/7. Therefore the employer needed its five regular employees. In 2011, the Federal Labour Court (the "BAG") found that an employer did not indirectly discriminate a Muslim employee, who worked in a supermarket, by firing him when the employee refused to touch any can or bottle that contained alcohol. In that case the BAG held that it was the employer's legitimate aim to terminate an employment relationship, where an employee is unwilling to perform his duties under his employment contract for subjective reasons.

However, the case at hand also addresses another question which is getting more and more important: what must an employer do in order to support its employees in practicing religion during working hours? Basically, an employer in Germany has to recognize its employees' religious needs as long as there is no negative effect on its business. In the BAG case mentioned above the court also found that the employer did not sufficiently show that there was no way to put the Muslim employee in another department of the supermarket (e.g. bakery, non-food etc.). So the BAG found that the termination would be considered unlawful if the employer did not show that there was no alternative position for the Muslim employee. Therefore the BAG referred the case back to the Regional Labour Court. A final judgment has not been rendered yet.

In addition, some of our clients are confronted with their (Muslim) employees' demand to establish prayer rooms on their premises. So far, no court decision has been made on that very issue. But a Regional Labour Court found, in 2002, that an employer needs to grant its employees breaks for prayers. Based on that ruling, the employee's right derives from the constitutional right to free expression and practice of religion and an employer has to recognize it in an employment relationship. This raises the question of whether an employer also has to provide its employees with a prayer room. I don't think that an employer has a legal duty to install such a prayer room as long as every member of a religion is able to perform his or her prayers in a clean spot. But it might be practical or useful for an employer to have a multi-religious prayer room. An employer with hundreds or thousands of employees might be better off with one prayer room rather than having employees spread out all over his premises.

The Netherlands (Peter Vas Nunes):

1. Does it make a difference describing the practice (PCP) at issue as "requiring Sunday work" or as "requiring work on all days of the week"? Probably not, but if I had been the employer I would have preferred the latter wording.
2. The definition of discrimination in the UK Equality Act 2010 differs from that in Directives 2000/43, 2000/78 and 2006/54, but the UK definition of indirect discrimination does follow the system of those directives in that a practice is only indirectly discriminatory if is not objectively justified. The Dutch statutes on discrimination avoid the use of the term "discriminate", referring instead to "distinguish". A practice that distinguishes between, for example, Christians and others, can be indirectly distinguishing, in which case it is unlawful unless it is objectively justified. Thus, the element of justification is not a part of the definition. Although this difference between EU/UK and Dutch law is no more than a terminological one, it can create confusion. A Dutch court, if it followed the same reasoning as the EAT in

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the case reported above, would have held that the London Borough of Merton did "discriminate" (in the neutral meaning of "distinguish") indirectly, but that it was justified in doing so.

3. The issue of whether an employee may require an employee to work on Sundays has a long and contentious history in The Netherlands, despite the fact that no more than a small percentage of all employees attends church services. Basically, an employee may not be compelled to work on Sundays (or, if he or she has another religion, on that religion's holy day), unless (i) the nature of the work requires such work and (ii) the parties have explicitly agreed to work on Sundays, for example, in their contract of employment. Re (i): the nature of, for example, a police officer's work requires work on Sundays, the nature of a shop assistant's work as a rule does not. Re (ii): an exception is possible with the works council's consent, but even then the employee may refuse. A dismissal on the ground that the employee has refused to work on a Sunday is invalid.

Subject: Religious discrimination
Parties: Mba – v - The Mayor and Burgesses of the London Borough of Merton
Court: *Employment Appeal Tribunal*
Date: 13 December 2012
Case Number: UKEAT/0332/12/SM
Internet publication: www.bailii.org

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(Footnotes)
1. Constructive dismissal is where an employee resigns on account of a fundamental breach by his or her employer of a term of the contract of employment (e.g. discriminatory conduct). In such a situation, the employee is considered as having been dismissed by the employer. Had Ms Mba's claim of discrimination been upheld, she could have claimed damages.
2. The Equality Act 2010 covers situations where a "provision, criterion or practice" (a "PCP") is discriminatory. The case of Ms Mba dealt with a practice.

2013/25

How the *Kelly* case ended in an anti-climax (IR)

CONTRIBUTOR PAUL GLENFIELD*

Summary

The Irish High Court dismissed Patrick Kelly's demand to be provided with information on the successful (female) candidates for the vocational training course he was denied. The court held that the right of the course applicants to confidentiality outweighed Kelly's right to disclosure.

Facts

On 21 July 2011 the ECJ delivered its judgment in the *Kelly* case (C-104/10, summarised in EELC 2011-3).

Readers may recall that Patrick Kelly was a teacher in Dublin. He applied to University College Dublin (UCD) for admission to a course for a Master's degree in social science. His application was unsuccessful. Several female applicants did get admitted to the course. Kelly brought proceedings before the Equality Tribunal against UCD. He claimed that he had been discriminated on the basis of his gender, arguing that he was better qualified than the least qualified female applicant to be offered a place on the course.

While he was proceeding before the Equality Tribunal, Kelly applied to the Circuit Court, seeking from UCD copies of the applications of the other candidates as well as their 'scoring sheets'. UCD offered to provide Kelly with part but not all of the information he had requested.[1] Kelly's application eventually led to the Irish High Court asking the ECJ questions on the interpretation of Directives 76/207 (equal treatment of men and women in employment), 97/80 (burden of proof) and 2002/73 (amending Directive 76/207).

Briefly stated, the ECJ replied that said directives do not entitle an applicant for vocational training, who believes his application was unsuccessful for discriminatory reasons, to information held by the course provider on the qualifications of the other applicants. The ECJ added two things:
a) "Nevertheless, it cannot be ruled out that a refusal of disclosure by the defendant, in the context of establishing [facts from which it may be presumed that there has been discrimination], could risk compromising the achievement of the objective pursued by [Directive 97/80] and thus depriving Article 4(1) thereof in particular of its effectiveness. It is for the national court to ascertain whether that is the case in the main proceedings."
b) "Where an applicant for vocational training can rely on Directive 97/80 in order to obtain access to information held by the course provider on the qualifications of the other applicants for the course in question, that entitlement to access can be affected by rules of European Union law relating to confidentiality".

Judgment

Following the ECJ's ruling, the Irish High Court was called on to apply that ruling to the facts of the case. It did so in a judgment dated 9 May 2012, of which the most relevant part is paragraph 9, which reads:
"It is quite clear that each finding of the European Court of Justice is unfavourable to the applicant's case. The one exception is the Court's finding that it cannot be ruled out that a refusal of disclosure by the defendant, in the context of establishing facts (from which it may be presumed that there has been direct or indirect discrimination) could risk compromising the achievement of the objective pursued by Article 4(1) of Council Directive 97/80 of its effectiveness. However, it is for the national court to determine this matter in accordance with national law. The answer to the first question states that in assessing this, the national court must take into account the rules governing confidentiality. The High Court judge, McKechnie J, made a provisional finding that, pursuant to national law, UCD did not have to disclose the documents in question in unredacted form. In deciding this he took into consideration the right of confidentiality of the other candidates. This provisional finding was subject to the ruling of the European Court of Justice. I am satisfied that there is nothing in the ruling of the European Court of Justice that could give grounds for changing the provisional decision of McKechnie J. His decision is exactly in accordance with it. The right of the course applicants to confidentiality outweighs the plaintiff's right to disclosure of the documents in unredacted form. I do not therefore propose to interfere with the provisional decision of McKechnie J. It is thus no longer provisional but has become his final decision in this matter."

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Commentary
It is clear from Directive 97/80 that it is for the person who considers him or herself to have been wronged because the principle of equal treatment has not been applied to him or her, who must initially establish the facts from which it may be presumed that there has been direct or indirect discrimination. It is only where that person has established such facts that it is then for the defendant to prove that there has been no breach of the principle of non-discrimination.
The judgment of the Court of Justice clearly outlines that it is a matter for the national court to determine whether refusal of disclosure may frustrate the objective of the Directive. However, in considering whether disclosure should be made, the national court must take into account principles of confidentiality and the protection of personal data.
So in effect, this case confirms that in situations where an unsuccessful applicant for a course claims that he or she has been the victim of discrimination, there is no express right under European law to disclosure of unredacted information relating to successful applicants.

Subject: Discrimination, right to information on others
Parties: Patrick Kelly – v – National University of Ireland
Court: *High Court of Ireland* (Hedigan J.)
Date: 9 May 2012
Case number: 2012 [IEHC] 169
Publication: www.bailii.org/ie/cases/IEHC/2012/H169.html

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(Footnote)
1. The judgment reported here suggests that Kelly was offered information on the other candidates “in redacted form”.

2013/26

What happened to *Georgiev* following the ECJ’s ruling? (BU)

CONTRIBUTOR KALINA TCHAKAROVA*

Summary
Bulgarian law allows for employment agreements with university professors who have reached the retirement age of 65 to be prolonged, subject to certain decisions of the academic authority, for a term between one and three years. Thus, in practice university professors may work up to the age of 68.

In 2010, the ECJ ruled that this statutory provision could be regarded as age discriminatory, but could be justifiable if the law pursues a legitimate aim and makes it possible to achieve that aim by appropriate and necessary means. The ECJ further noted that the Bulgarian courts have to determine whether those conditions are satisfied. In particular, the courts needed to address Mr Georgiev’s argument that there are insufficient young academics to replace retiring professors.

Facts
Readers may recall that in 2010 the ECJ delivered a ruling in the case of Vasil Georgiev.
Georgiev was a lecturer, later a professor in Engineering Technology, at Sofia Technical University. In 2006, when he reached the age of 65, his contract of employment was terminated by mutual consent. Following this termination Georgiev entered into a one-year employment contract, which was further extended twice for additional one year periods until Georgiev reached the age of 68. In 2009 Georgiev brought two actions before the regional court in the city of Plovdiv. One action sought to reclassify his fixed-term contract as a contract of indefinite duration, the other challenged the decision to terminate his employment contract at the age of 68.

In rulings dated June and July 2009, the court referred three questions to the ECJ. Among other matters, the regional court in the city of Plovdiv inquired whether Framework Directive 2000/78 (the ‘Directive’) precludes application of national legislation under which university professors who have reached the age of 68 should retire. The other question posed was whether the Directive precludes application of national law requirements providing that university professors who have reached the age of 65 are prohibited to enter into indefinite employment contracts, and, if so, whether such national legislation could be disregarded.

The ECJ delivered its judgment on 18 November 2010 (joined cases 250 and 268/09). It established that compulsory retirement at the age of 68 and the imposition of a fixed-term contract beyond the age of 65 both cause employees to be treated less favourably on the grounds of age, as defined in Article 2 of the Directive. The question to be addressed, therefore, was whether that differential treatment was objectively justified as allowed by Article 6 of the Directive. That question broke down into two sub-questions: (i) did the difference of treatment have a legitimate aim and, if so, (ii) were the means of achieving that aim appropriate and necessary?

It was not clear from the facts at the ECJ’s disposal what the Bulgarian legislator’s aim was at the time it introduced the provisions regarding compulsory retirement of professors at the age of 68 or the special treatment of their employment beyond the age of 65 (Paragraph 11 of the transitional and concluding provisions of the Law on Higher Education, hereafter ‘Paragraph 11’). The ECJ stated that it was up to the Bulgarian courts to determine the legislator’s aim. However, the ECJ did state that if the aim was to allocate the posts for professors in the best possible way between the generations, in particular by appointing young professors, or if it was to achieve a mix of generations to promote an exchange of experiences and innovation with a view to enhancing the quality of teaching and research, then that was a legitimate aim. On the other hand, if it was true, as submitted by Georgiev, that the average age of university professors in Bulgaria was 58 because young people were not interested in pursuing careers as professors, then such aims would not be aligned to the reality of the job market.

The ECJ held:
“Directive 2000/78 must be interpreted as meaning that it does not preclude national legislation [...] under which university professors are compulsorily retired when they reach the age of 68 and may continue working beyond the age of 65 only by means of fixed-term one-year contracts renewable at most twice, provided that that legislation pursues a legitimate aim linked *inter alia* to employment and job market policy, such as the delivery of quality teaching and the best possible allocation of posts for professors between the generations, and that it makes it **possible to achieve that aim** by appropriate and

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necessary means, it is for the national court to determine whether those conditions are satisfied." [*emphasis added*]

Judgment
Following the ECJ's ruling, the court in Plovdiv resumed its hearing of the case. One of the issues it addressed was related to Georgiev's argument that there was a lack of interest from young academics in careers as professors and that, therefore, the aim of creating professorships for young academics could not be achieved by forcing older professors to retire. This argument was diminished by the fact that there were four lecturers in Georgiev's department, all aged around 40, who were being groomed for a professorship. The court further elaborated that the acquisition of a professorship should not be confused with the employment relationships with professors. While academic rank and knowledge are for life, the working abilities of an individual must be measured against the requirements of the labour market and as well as with the promotion of young researchers. Next, the court established that nobody had been appointed to replace Mr Georgiev. After his employment relationship with the university terminated, the university decided to reduce the number of personnel in the department, which reflected the needs of the university in its capacity as an employer. In addition, the court found that within Bulgaria there was currently no one who had reached the age of 68 and held the academic rank of a professor who was continuing to work on the basis of either a fixed or indefinite term employment contract.

In consideration of these arguments, the court concluded that the aim pursued by Paragraph 11 was legitimate and that the means to achieve that aim were proportionate. The court therefore dismissed Georgiev's claim. Georgiev brought appeal proceedings that are currently pending.

Comments from other jurisdictions
United Kingdom (Hazel Oliver): In the UK, we have recently had a similar situation, where an important age discrimination case was sent back to the original Employment Tribunal to consider justification of a particular retirement age. Under the Equality Act 2010, direct age discrimination can be justified if it is a proportionate means of achieving a legitimate aim.

The long-running case of *Seldon v Clarkson Wright and Jakes* concerned a partner in a law firm who was compulsorily retired at the age of 65 under the firm's partnership deed. The firm accepted that this was direct age discrimination but argued that it could be justified as a proportionate means of achieving various legitimate aims. The aims accepted as legitimate by the employment tribunal were:

- ensuring associates were given the opportunity of partnership after a reasonable period;
- facilitating planning of the partnership and workforce across individual departments by having a realistic long-term expectation as to when vacancies would arise; and
- limiting the need to expel partners by way of performance management, thus contributing to the congenial and supportive culture in the firm.

The case was then appealed by Mr Seldon all the way to the Supreme Court, which ultimately concluded that Mr Seldon's appeal should be dismissed. It agreed with the decisions of the tribunal and the lower appeal courts that the law firm had identified legitimate aims which were capable of justifying compulsory retirement for partners. However, the case was then sent back to the original tribunal for it to consider whether a fixed age of 65 was a proportionate means of achieving these aims.

The tribunal has now reached its decision, and determined on the facts that a fixed retirement age of 65 was a proportionate means of achieving the aims of retention (by ensuring that associates had the opportunity of partnership), and facilitating planning. The firm had dropped the third aim of collegiality by this point.

In relation to retention, the tribunal noted that there was evidence that solicitors would not join firms if older partners had no definite retirement date, ambitious associates would see no retirement provision for partners as limiting their opportunities for advancement, and it was unlikely that associates simply threatening to leave would improve their prospects of promotion if there was no partner retirement age. These arguments are quite similar to those in the above case, where the issues relate to prospects for younger academics. The tribunal also accepted that the retirement age was needed to enable the firm to plan when and where vacancies would arise.

The *Seldon* case is an interesting example of an organisation being able to justify a directly discriminatory retirement age. However, it does turn on its own facts. It also arose at a time when it was lawful to have a mandatory default retirement age of 65 for employees (which did not apply to partners). This default retirement age of 65 has now been abolished, and retirement of employees as well as partners at any age will be direct age discrimination. This may well make it more difficult for all organisations to show that retirement at a fixed age is proportionate, because the government no longer thinks it appropriate to set a default retirement age.

Subject: Age discrimination, justification
Parties: Vasil Ivanov Georgiev - v - Technicheski universitet, Sofia, filial Plovdiv
Court: *Rayonen sad Plovdiv* (District Court of Plovdiv)
Date: 8 June 2012
Case number: 131/2009, decision 2356
Publication: -

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2013/27

No pay discrimination where comparator's income derives from different source (PL)

CONTRIBUTOR MAREK WANDZEL*

Summary
A fully qualified doctor was paid a lower basic salary than a more junior doctor in the same hospital. He brought a discrimination claim based on law prohibiting pay discrimination on any grounds. His claim was rejected at first and second instance and then by the Supreme Court. The Supreme Court held that the two doctors could not be compared because the fully qualified doctor was paid out of the national health

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insurance scheme, whereas the more junior doctor was paid directly by the state.

Facts
Polish labour law prohibits pay discrimination between employees - on whatever grounds - if their work is equal or of equal value and their situations are comparable. This means that, for example, a pay discrimination claim may be raised by a male employee performing work that is equal or of equal value to the work performed by another man, even where none of the 'classical' strands of discrimination (gender, race, age, etc.) are involved, provided there is no relevant difference in the two employees' situations.

The plaintiff in this case was employed by a university hospital as a doctor with a first degree of specialisation. He was also a professor's assistant. His basic salary was PLN 3,743 per month. This was slightly lower than the basic monthly salary of a more junior doctor employed in the same hospital, who had no more than two years' seniority and was enrolled in a programme leading to first degree specialisation (a so-called 'resident' doctor). The salary of the 'resident' - PLN 3,890 – was determined by the Ministry of Health. The reason for the pay differential between the plaintiff and the resident was that the plaintiff's source of income was the health insurance system, which is administered by the National Health Fund, whereas the resident doctor was paid directly out of the Ministry of Health's budget. Although the financial situation of the hospital was difficult, the plaintiff asked to be compensated for the pay differential, which he considered to be discriminatory.

The court of first instance was of the opinion that the plaintiff's work had a higher value than that of the resident. However, if one compared total remuneration rather than basic salary, the plaintiff earned more on account of bonuses, seniority benefits and on-call pay. The court therefore dismissed the plaintiff's claim. He appealed.

The court of second instance dismissed the appeal. In its opinion, the sources of financing were different and therefore the pay differentiation was acceptable.

The plaintiff challenged the appellate court's decision, pointing out that, although the remuneration of the residents could not be influenced by the hospital because it was regulated by the Ministry of Health, the hospital had an obligation not to discriminate against its employees by underpaying them. The plaintiff also argued that comparing total remuneration is not correct, since being on call is an extra effort and should therefore be rewarded additionally.

Judgment
The Supreme Court held that it is possible to treat and remunerate employees differently. However, a difference in treatment must be based on a legitimate need. Employment and pay policy of the state aimed at improving access to the labour market and raising the qualifications of young doctors may constitute such a legitimate need for differentiation. The employment of residents is financed by the Ministry of Health from the Labour Fund, a state fund aimed at combatting unemployment and financed from contributions paid by employers. The aim of the law introducing this system of financing was to stimulate the national health care system and to attract and retain highly qualified medical staff in key medical specialisations. Therefore such economical/financial reasons may justify a preferential treatment of residents.

The Court avoided the issue of whether the plaintiff's and the resident's work was equal or of equal value and it did not wish to go into the issue of whether remuneration for being on call should be included in the comparison. According to the Court, the employer justified clearly and logically, by invoking the state employment policy towards graduate students of medical schools, why residents are remunerated differently. Therefore, there was no discrimination. In addition, the Court pointed out that discrimination in remuneration may only be claimed where an individual's remuneration differs significantly from that of others performing equal work or work of equal value. Otherwise – where differences are small - the courts would have to shape employers' pay structure, which is not their role.

Commentary
The Supreme Court cited several classical judgments of the ECJ (now CJEU) that seem to lack direct relevance to the case, namely *Bilka Kaufhaus* (170/84), *Jenkins* (96/80), that dealt with indirect gender discrimination, and *Katarina Abrahamsson* (C-407/98), that dealt with positive action. It also cited *Palacios de la Villa* (C-411/05), which could perhaps be relevant here. The Court failed to recall the *Wiener Gebietskrankenkasse* (C-309/97) or *Lawrence* (C-320/00) cases. In *Wiener Gebietskrankenkasse* the ECJ held that there is no 'same work' situation where the same activities are performed by persons with incomparable professional qualifications. In *Lawrence*, the ECJ held that where differences in pay conditions cannot be attributed to a single source, they do not come within the scope of Article 141(1) EC. In this Polish case however, the Supreme Court rather intuitively but - in my opinion - correctly based its judgment, not on the differences between the Labour Fund (which aims to combat unemployment) and the National Health Fund (which aims to finance the health care system), but on general principles of equality.
It is worth pointing out that at the very beginning of its reasoning the judges recalled Article14 of the European Convention on Human Rights and the ECtHR's case law on discrimination, as well as Article 141 of the EC Treaty. The Court pointed out that there is no infringement of the principle of equal treatment if the measures taken pursue justifiable social policy aims and are adequate and necessary for those aims. The Supreme Court cited the view of the Polish Constitutional Tribunal that it is admissible to treat different situations differently.

In my view one has to refer here to Aristotle's definition of equality: similar situations should be treated similarly and different ones differently, in proportion to their difference. The crucial question in all discrimination cases is: are the compared persons in the same situation? The situation of doctors such as the plaintiff and residents, was not identical. The big difference lay in the source of financing, which in turn was based on state employment policy. Although the plaintiff's work was of higher value than work of a resident - as the court of first instance correctly pointed out – the employer could not be blamed for inequality since the resident's pay had little to do with the 'market value' of his work. The state's decision to pay resident doctors a certain salary was justified by objective aims of state policy, namely to give relatively high pay to doctors beginning their careers and to ensure specialisation was obtained in fields desired by the state. It may be noted that the proportionality test was not really performed. One has to bear in mind that the state was not the defendant in this case – at least, not directly.

Academic commentary (Professor A.M. Swiatkowski)**
The title chosen by the author of this case report: "No pay discrimination where comparator's income derives from different source" is both

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acceptable and yet contrary to the fundamental principles of European employment law. It is acceptable in that a resident M.D., employed by the hospital where he or she receives an additional education and practical training, cannot be compared with a fully qualified M.D. possessing a medical specialisation. The latter ought to earn more than an 'apprentice'. What was not mentioned in the case is the field specialty of the medical doctors in question and therefore no proper comparison is made here. Obviously, the state cannot maintain preferential treatment of resident doctors in place of individuals who are already employed, are more highly qualified and are more experienced within the same category of medical specialisation. The Polish Supreme Court did not pay attention to this particular issue. Therefore, we do not know whether the two doctors compared by the Polish judiciary were in a comparable situation.

The thesis presented in the headline of this particular case is also contrary to Article 14 of the European Convention on Human Rights, which provides that the enjoyment of the rights and freedoms set forth in that Convention shall be secured without discrimination on any grounds (such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status). This essentially means that the source of financing of an employee's salary ought to have been included, regardless of the state employment policy, as one of the grounds prohibited by the Convention.

As the remuneration paid by the state to a resident doctor was more favourable than the remuneration of a better qualified and better educated doctor employed by the university hospital run by the state, the Polish Supreme Court judgment ought to be reversed.

Subject: Pay discrimination
Parties: Not published
Court: *Sad Najwyzszy* (Supreme Court)
Date: 7 April 2011
Case number: I PK 232/10
Internet publication: www.sn.pl → Orzecznictwo → Baza orzecze → Sygnatura → "I PK 232/10"

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2013/28

Discrimination via television? (DK)

CONTRIBUTOR MARIANN NORRBOM*

Summary
The Danish Gender Equality Act prohibits discrimination on grounds of gender. This principle of non-discrimination – which concerns both direct and indirect discrimination – implements article 4 of Directive 2004/113. However, it does not imply an obligation to give the same amount of airtime to sports involving female athletes as to sports involving male athletes, according to the Danish Board of Equal Treatment.

Facts
A female viewer complained to the Danish Board of Equal Treatment that a public service television station was giving more airtime to sports involving male athletes than to sports involving female athletes.

The viewer argued that the television station's sports coverage discriminated against women, claiming that the unequal amount of airtime was a disincentive to women's desire to participate in sports and adversely affected women's possibilities of excelling at sports and, additionally, that the failure to show female athletes greatly affected the Danish population's gender perception. Consequently, the complainant claimed, the television station should be ordered to give the same amount of airtime to sports involving female athletes as to sports involving male athletes. The complainant believed that since the television station was financed by governmental funds, it had a special obligation to give the same amount of airtime to male and female athletes.

The television station argued primarily that the Board of Equal Treatment was not competent to hear the complaint since the Board did not have the power to order the television station to give the same amount of airtime to female and male athletes. It is clear from the Danish Board of Equal Treatment Act that the Board can award compensation only. The television station receives its funds from the government based on a so-called public service agreement. And the television station did not believe that the Board had authority to change this agreement – which would be a necessary consequence of ordering the television station to give the same amount of airtime to both male and female athletes.

That aside, the television station argued that the complainant had not succeeded in proving the existence of circumstances giving reason to believe that the principle of equal treatment had been breached, and for that reason the Board should find in favour of the television station.

Furthermore, the television station believed that it was guilty of neither direct nor indirect discrimination, as female athletes were not placed in a particularly disadvantageous position because of the television station's sports programmes. Whether or not any difference in airtime is a disincentive for women to participate in sports is a subjective matter, but there is no proof that any such disincentive is caused by the sports coverage of this particular television station.

It should be mentioned that the Board of Equal Treatment is an administrative body with the jurisdiction to hear discrimination-related complaints. The purpose of having such a body is to ensure effective legal protection of the groups that are legally protected against discrimination. Anybody who believes that he or she has been discriminated against can file a complaint at no cost. The Board's decisions may be appealed before the civil courts.

Decision
First and foremost, the Board disallowed the television station's plea for dismissal of the complaint for lack of jurisdiction. In the Board's opinion, it has authority to decide complaints concerning the principle of non-discrimination and whether it has been breached.

The Board then decided in favour of the television station, stating that the principle of equal treatment of men and women does not imply an obligation to show equal amounts of sports involving male and female athletes.

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Accordingly, the television station did not discriminate in its sports coverage.

Commentary

Firstly, the decision shows that the Board of Equal Treatment applies a very broad interpretation of its jurisdiction *ratione materiae*. The television station had brought forward a number of reasons why the Board lacked jurisdiction in this matter, but the Board set aside all those arguments.

Secondly, the decision also shows that the principle of non-discrimination cannot serve to require television stations – and probably other electronic media as well – to make sure that sports involving female athletes are given the same coverage as sports involving male athletes. The Board does not elaborate on how it came to this conclusion, and it seems that the right conclusion would have been for the Board to state that the complainant had failed to prove the existence of circumstances giving reason to believe that the principle of equal treatment had been breached. The complainant only gave her subjective perception on the television station's sports coverage and showed no statistics to prove that the television station did in fact give more airtime to male athletes than to female athletes.

The Board's decision also indicates what some people believe to be the problem with the Board of Equal Treatment – that anybody can file a complaint without cost. This system causes unmeritorious complaints and – most importantly – complaints that shift the focus away from the real issues deriving from unequal treatment, both in and outside the labour market. There is no doubt that the Board serves an important purpose, but it may be time to reconsider the organisation of the Board when we read about complaints concerning sports coverage on TV and the different prices of female and male haircuts.

Subject: Gender Equality
Parties: Person A - v – Television station B
Court: *The Danish Board of Equal Treatment*
Date: 6 March 2013
Case number: 7100312-12
Hard Copy publication: Not yet available
Internet publication: Available from info@norrbomvinding.com

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2013/29

Obligation to wear uniform during breaks does not disqualify those breaks as unpaid "rest breaks" (CZ)

CONTRIBUTOR ROMANA NÁHLÍKOVÁ KALETOVÁ*

Summary

This case turns on the distinction (existing also under EU law) between a regular break and a period, not being a regular break ("a reasonable period of time for food and rest"), during which the employee does not work. The distinction was relevant in this case concerning police officers, because, in accordance with Czech law, employees are not entitled to pay during regular breaks but are entitled to pay during "reasonable periods for food and rest", and the police officers considered their breaks to be such reasonable periods. Was the fact that they continued to wear their uniforms and weapons during breaks relevant? The Supreme Court replied in the negative.

Facts

The plaintiffs in this case were three police officers employed by the municipality of Hradec Králové.

In 2006-2008 the plaintiffs worked 12-hour shifts including two unpaid breaks of 30 minutes each. Thus, they were paid for 11 hours per shift. They claimed payment for the full 12 hours, basing their claim on the distinction under Czech law between, on the one hand, a regular break (for food and rest) and, on the other hand, a "reasonable period of time for rest and food". Czech law in this respect is essentially a transposition of Directive 93/104 as amended by Directive 2000/34 (for the period through 2006) and Directive 2003/88 (for the period from 2 August 2004). The latter Directive provides in Article 4:

"Member States shall take the measures necessary to ensure that, where the working day is longer than six hours, every worker is entitled to a rest break, the details of which, including duration and the terms on which it is granted, shall be laid down [...]"

Articles 17 and 18 allow Member States to derogate from Article 4 in certain situations "on account of the specific characteristics of the activity concerned":

"[...] provided that the workers concerned are afforded equivalent periods of compensatory rest [...]"

The distinction under Czech law between regular breaks and "reasonable periods" for rest and food is basically similar to that between Article 4 "rest breaks" and Article 17/18 "equivalent periods" under EU law. In accordance with the Directive, Czech law provides that an employee may only be granted "reasonable periods for rest and food" instead of regular breaks where the work cannot be interrupted. Moreover such reasonable periods are "included" into work time and thus employees are paid during such periods.

The plaintiffs argued that their two daily breaks could not be seen as regular breaks because they were not allowed to remove their uniforms or their weapons during the break. They brought a claim for back pay.

The court of first instance and the court of appeal rejected their claim, reasoning that the plaintiffs' work did not qualify as work that cannot be interrupted by a regular rest break, even though they continued to wear their uniforms. The plaintiffs appealed to the Supreme Court. Among other things, they argued that the law prohibited them from carrying arms whilst off duty. In other words, given that they had to continue wearing their weapon during breaks, they must have been deemed to be on duty during that time.

Judgment

The Supreme Court affirmed the lower courts' judgments. Although it agreed with the plaintiffs that an employer may not restrict an employee's freedom during breaks, except in certain specific cases regulated by statute (in case of municipal police officers, the obligation to act in specified cases even outside working hours), this merely means that the employee need not perform work during breaks. The fact that the plaintiffs wore their uniforms and weapons during those periods was insufficient to mean they were "reasonable periods", rather than regular breaks. The fact that the plaintiffs had to be prepared to interrupt their breaks in an emergency did not play a role in the Supreme Court's reasoning.

Commentary

This Supreme Court ruling clarifies the conditions under which a break may qualify as a regular rest break rather than as a "reasonable period of time for rest and food". Neither the mere theoretical possibility of an interruption of the break, nor the fact that an employee is under an obligation to wear his uniform during breaks, are such major restrictions on the employee's freedom to enjoy breaks in any manner he sees fit, that they mean the breaks should not be defined as regular breaks. The only case where the break may be considered a "reasonable period" and thus be paid, is where the work complies with the criterion of "work that cannot be interrupted". For any other type of work, the employees are provided with regular breaks.
The court's ruling protects employers of uniformed staff against overtime claims.

Comments from other jurisdictions

Germany (Klaus Thönissen): Under German law the outcome of this case would most likely be the same. The distinction whether a break is a regular "rest break" or just "a reasonable period for food and rest" cannot be made on the basis of what the employee is wearing.
Within the meaning of the German Working Hours Act a "rest break" requires a predetermined particular period of time, in which the employee does not have any duty to work, to be on call or whatsoever. When these requirements are satisfied, that break is considered a rest break and not working time, therefore the employee is not getting paid, unless it was agreed otherwise in either an individual employment contract or a collective bargaining agreement. Besides that, there are no other criteria in order to determine a rest break.
In 2009, the Regional Labour Court of Berlin-Brandenburg pointed out the aforementioned requirements and held that bearing arms during a break – in that case a security guard had no chance to lock up his gun during his rest break – does not preclude the purpose of a rest break and therefore the security guard was not entitled to back pay.

Luxembourg (Michel Molitor): Under Luxembourg law, the difference between a "rest break" and an "equivalent period of compensatory rest" is clearly regulated. As a matter of fact, an "equivalent period of compensatory rest" only concerns a certain kind of employee.
A "rest break" applies to all employees and must be granted after six

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hours of work. The "rest break" may or may not be remunerated and its duration depends on and should be adapted to the nature of the employee's activity. During such breaks, the employee does not have any obligation to work or to stay at the workplace and the law does not provide for any exceptions. On the other hand, an "equivalent period of compensatory rest" is only applicable to "mobile employees", i.e. employees who are travelling or flying personnel employed by an undertaking carrying out transport services of passengers or goods by road, air or sea. These kinds of employees are entitled to a "rest break" in the same way as any other employee, and, in certain specific cases, also to an "equivalent period of compensatory rest". But for this latter kind of rest, the employee must remain at the employer's disposal in case of emergency.
By contrast with Czech law, Luxembourg law makes a clear difference between "rest break" and "equivalent period of compensatory rest", so that even if an employee has the benefit of an "equivalent period of compensatory rest", they are also entitled to a "rest break". Thus, Luxembourg law places clearly defined borders between "working time", "rest breaks" and "equivalent periods of compensatory rest".

The Netherlands (Peter Vas Nunes): The ECJ has ruled several times on issues regarding employees who are on call following their normal working day: see *Simap* (2000, case C-303/98), *CIG* (2001, case C-241/99), *Jaeger* (2003, case C-151/02) and *Pfeiffer* (2004, case C-397/01). To my knowledge it has not yet ruled on the difference between a "rest break" and an "equivalent period of compensatory rest". However, the ECJ did rule that "working time" and "rest period" are mutually exclusive. In other words, if any period qualifies as working time within the meaning of Directive 2003/88, that period cannot be a rest period and vice-versa. Perhaps the same applies to breaks.
It may be noted that Article 4 of Directive 2003/88 leaves it up to Member States to determine "duration and terms" of rest breaks. Dutch law provides that a worker is entitled to a rest break lasting no less than 30 minutes after 5.5 hours of work, a rest break being defined as a period during which the worker "has no obligation to work at all". However, the law does allow a worker to be on call for unforeseen events during breaks, even when this obligates the employee to be in or near the place of work during breaks. I am not certain how this relates to Directive 2003/88.

Subject: Working time - breaks
Parties: Three plaintiffs - v - City of Hradec Králové
Court: *Nejvyšši soud Ceské republiky* (Supreme Court of the Czech Republic)
Date: 26 February 2013
Case number: 21 Cdo 4446/2011
Publication: http://www.nsoud.cz/Judikatura/judikatura_ns.nsf/WebSearch/35A97543905 A8F58C1257B25004522FE?openDocument&Highlight=0,

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2013/30

Before which court(s) must a union bring a collective claim? (RO)

CONTRIBUTOR ANDREEA SUCIU*

Summary
Romanian law allows employees to bring a claim against their employer in the court of the employees' place of residence or work. Until recently, some courts held that, where a trade union brings a claim on behalf of several members, it must do so in the courts where each of those members resides or works. Other courts allowed a trade union in such a situation to proceed before one single court, namely that of the union's own registered office. The Supreme Court has ruled in favour of the latter doctrine.

Facts
In order to ensure consistent interpretation and application of the law by all courts, the General Prosecutor in Civil Matters in the Supreme Court ('High Court of Cassation and Justice') asked the Supreme Court to rule on a question of law which has been applied in different ways by the courts. In relation to which court has jurisdiction in actions brought by a trade union on behalf of its members, some courts have said that the competent court is the one where the plaintiff (employee) re-sides, while others have held that the competent court is the one where the trade union is registered.
The right of a trade union to take court action on behalf of its members was formerly regulated by Trade Union Act No. 54/2003 and is currently regulated by the Act on Social Dialogue No. 62/2011, which stipulates in Article 28(2) that "trade unions shall be entitled to take actions under the law, including actions in courts on behalf of their members, under a written mandate from the members". Neither the former nor the current law is clear on which court has jurisdiction when such action is taken.
By the Romanian Labour Code, claims on labour law issues must be filed before the courts that are competent, based on the place of residence or registered office of the claimant. Thereby it differs, in favour of the plaintiff (usually the employee), both from the system of Regulation 44/2001 ('Brussels I') and from the general rules of Romanian civil procedure, which stipulate that the competent courts are those of the place of residence or the registered office of the defendant. Alternatively, an employment-related claim may be filed, according to the Act on Social Dialogue, before the court which is competent, based on the workplace of the claimant (i.e. the employee), but this is rarely done.

Some courts hold that the registered address of the trade union must be taken into account when determining which court has competence, including cases where some members of the trade union reside within the area of competence of one court, whilst others reside within another. Other courts hold that where a trade union participates in a court case, it does so in its capacity as representative of its members, on behalf and in the name of the relevant individual. In the view of these courts, the legal provisions concerning jurisdiction in such cases refer to the members of the trade union and holders of the rights claimed, not to their representative. Therefore, the competent court is the court where the employee resides, and not the court with jurisdiction where the trade union has its registered address.

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The response to this question is of practical relevance. According to the first opinion (i.e. where the competent court is the one with jurisdiction over the trade union's address), the employer need defend itself before one court only. Pursuant to the second opinion, the claim could be split into many proceedings before different courts in different counties, depending on the addresses of the plaintiffs. This would generate considerably higher costs, because if many employees make claims, there would be a large number of actions for the employer to defend . In addition, every county has its own tribunal and it is common for employees to work in a different county than the one where they live. This might entail different courts deciding on the same claim, as it would be brought by a number of different employees in different places. This could result in the courts making different decisions on identical circumstances and evidence.

Judgment

At the request of the Court of Appeal in Brasov, the General Prosecutor in Civil Matters filed before the Supreme Court an "appeal in the name of the law" in order to obtain a determination about jurisdiction in such matters. According to the explanatory statement of the Advocate-General, the first interpretation (i.e. that the trade union's address should determine which court the matter was allocated to) is consistent with the text, sense and scope of the law.

The Supreme Court ruled on 21 January 2013, holding that henceforth Article 28(2) of the Act on Social Dialogue should be interpreted to the effect that the competent court for labour law claims filed by a trade union in the name and on behalf of its members shall be the court in whose territorial competence the headquarters of the trade union is located.

This decision became mandatory on all the courts after being published in the Official Gazette.

Commentary

The "appeal in the name of the law" was aimed, on the one hand, at unburdening the courts and on the other at ensuring identical decisions on identical facts.

In our opinion, this joint jurisdiction serves both the interests of employers and employees and will ensure situations where different employees obtain different rulings in different counties are avoid-ed.

This rule has been applied only since the date of publication in the Official Gazette. Claims filed up to that moment and allocated according to claimants' addresses will remain before the courts allocated. However, it may be that claims filed before several courts as a result of previous practice may be merged upon the parties' request.

It should be noted that it is relatively rare in Romania for trade unions to bring proceedings on be-half of their members. Employees usually turn to a lawyer to file a collective complaint on their be-half.

Subject: Jurisdiction
Parties: Advocate-General "in the name of the law"
Court: *Inalta Curte de Casatie si Justitie* (Supreme Court)
Date: 21 January 2013
Case number: 19/2012
Hard copy publication: Official Gazette No. 118 of 1 March 2013
Internet publication: http://www.dsclex.ro/legislatie/2013/martie2013/mo2013_118.htm#d1

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2013/31

Supreme Court rules on duration, continuity and burden of proof in respect of daily rest breaks (FR)

CONTRIBUTOR GUILLAUME DESMOULIN*

Summary

Every employee who has worked at least six hours on one day (even discontinuously) is entitled to take a continuous break of 20 minutes, which cannot be replaced by two separate shorter paid breaks. The employer is responsible for bringing forward the evidence that he has provided this rest break.

Facts

This report concerns three groups of cases. The first case concerns a cashier in a Lidl supermarket. She was dismissed after she became medically unfit for her job. She brought a claim for unfair dismissal. One of her arguments was that Lidl had breached Article L. 3121-33 of the French Labour Code (*Code du travail*), which provides that after six hours of work in one day, workers are eligible for a rest break lasting no less than 20 minutes, or longer if a more favourable collective agreement so provides. The collective agreement in question provided that employees were eligible for a paid break of seven minutes for every half day of six hours or less. As a result, the plaintiff had been given shorter breaks than provided by law. She alleged that this had contributed to her medical condition.

Lidl argued (i) that it had no need to provide the plaintiff with statutory 20-minute breaks, given that the seven-minute break interrupted the six hour period referenced in Article L. 3121-33, i.e. that after the break, the calculation of the statutory six hours started anew, and (ii) that the majority of the staff found a seven-minute paid break more favourable than a 20-minute unpaid break. The courts of first and second instance dismissed the plaintiff's claim, reasoning that the six-hour period referred to in Article L. 3121-33 had been interrupted. The plaintiff appealed to the Supreme Court (*Cour de cassation*).

The second group of cases concerned six employees employed by the metallurgical company FAUN. They worked seven hour shifts. After 3½ hours they were given a paid rest break of 15 minutes and at the end of the day they were given a second paid 15-minute break. Thus, they worked a total of 6½ hours but were given paid breaks totalling 30 minutes. This was pursuant to the relevant collective agreement. The six plaintiffs and their union brought a claim based on the contention that FAUN was in breach of Article L.3121-33. The court of first instance dismissed the claim, but the Cour de cassation overturned this judgment, ruling that the relevant provision in the collective agreement was invalid because it violated Article L. 3121-33, as well as Directive 2003/88, Article 4 of which provides:

"Member States shall take the measures necessary to ensure that, where the working day is longer than six hours, every worker is entitled to a rest break, the details of which, including duration and the terms on which it is granted, shall be laid down in collective agreements [...] or, failing that, by national legislation."

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The third case again deals with a Lidl employee. She claimed that Lidl had failed to grant her the rest breaks to which she was entitled by law. Lidl denied this, pointing out that the plaintiff had provided no evidence for her claim. The courts of first and second instance upheld the claim, holding that the burden of proof that the plaintiff had been given daily 20-minute breaks was on Lidl and that Lidl had not been able to demonstrate that it had granted such breaks. The courts took into account Article L.3171-4 of the *Code du travail*, which provides that, in a dispute regarding the number of hours worked, the employer bears the burden of proof. Lidl appealed to the Cour de cassation.

Judgments

The *Cour de cassation* held:

- in the first case: that an interruption of the six hour period referenced in Article L. 3121-33 by a seven-minute break does not exempt the employer from the requirement to provide the employee with a daily uninterrupted 20-minute break;
- in the second case: that any employee who has worked more then six hours in any day, whether or not continuously, is entitled to a 20-minute uninterrupted break that cannot be replaced by two 15-minute breaks;
- in the third case: that although Article L.3171-4 regarding the burden of proof does not apply where the dispute concerns the issue of whether the employee had been able to taken sufficient breaks, the burden of proof of that issue is nevertheless on the employer.

Commentary

The right to a minimum daily rest break results from Article 4 of Directive 2003/88/EC on the organisation of working time. According to this provision, every employee who has worked six hours on one day (even discontinuously) is entitled to take a rest break.

The provision has been transposed in France through Article L. 3121-33 of the *Code du Travail*, according to which "*when his daily working time has reached six hours, every employee is entitled to take a minimum 20-minute break*". Collective agreements can depart from this legal provision, but only in a more favourable way for employees.

Many issues remained unresolved on this topic. For example, must the six-hour working period be worked without interruption? Can the 20-minute break be split in shorter breaks?

The Supreme Court addressed these issues by interpreting the provisions of the Code du Travail in the light of the EU Directive's objectives.

In the first decision reported above, the Supreme Court ruled that an interruption of the six-hour working period by a seven-minute paid break does not exempt the employer from providing the employee with the compulsory continuous break of 20 minutes.

In other words, neither the interruption of the six-hour working period by breaks shorter than 20-minutes, nor the payment of the rest break, exempt the employer from providing employees with an uninterrupted minimum 20-minute break once they have worked for six hours in one day.

The abovementioned Supreme Court's decisions appear to be logical. Indeed, any other solutions would allow the minimum daily rest break to be bypassed by short intervals during the day, which is likely to be less favourable to employees. Nevertheless, it is, of course, permitted and even recommended that employees should benefit from a 20-minute break before they reach six-hours.

In its second decision, the Supreme Court stated, for the first time, the principle of temporal uniqueness of the 20 minute break, ruling that every employee who has effectively worked more than six-hours a day is entitled to take a continuous 20-minute break that cannot be replaced by two separate 15-minute breaks. The fact that the total duration of the daily rests in this case (2 x 15 = 30 minutes) exceeds the statutory minimum of 20 minutes does not alter the view of the Court.

Beyond the literal text's interpretation ("*every employee is entitled to a rest break*"), it is clear that the division of the break does not accord with the purpose of the rest period, as provided by Directive 2003/88/EC - which is to ensure the effectiveness of workers' rights to health and safety at work.

Even if this is debatable, it is generally considered that four five-minute breaks, for example, do not produce the same rest benefits for workers as one continuous 20-minute break.

Finally, in its last decision, the Cour de cassation considered that the Code du Travail's provisions in relation to the burden of proof of time worked, do not apply in cases where the issue to be proved is the effectiveness of the minimum daily rest break. Indeed, where this is a matter of evidencing that working time thresholds and limits provided by French and EU law have been fulfilled, the burden of proof is always on the employer.

From a legal standpoint, these decisions provide a good example of national judges' role in interpreting and transposing EC regulations.

Comments from other jurisdictions

Austria (Martin Risak): The Austrian Working Time Act provides for 30 minutes minimum (unpaid) rest break if the working day lasts longer than six hours – but it also makes it possible to split up the break either into two times 15 minutes or three times 20 minutes if it is in the interest of the worker or justified by operational reasons. The break may also be split up into different portions (one part at least lasting 10 minutes), but only with the consent of the works council or the labour inspectorate. Under Austrian law the employer has to document the rest breaks and may be fined if it is unable to present proper documentation to the labour inspectorate.

Subject: Working time – rest breaks
Parties: (1) X – v – Lidl
(2) X and 5 others – v – FAUN
(3) X – v – Lidl
Court: *Cour de cassation* (Supreme Court)
Date: 20 February 2013
Case numbers: (1) 11-26793
(2) 11-28612 to 28617
(3) 11-21848
Publication: www.legifrance.gouv.fr → jurisprudence judiciaire → cour de cassation → case number

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2013/32

Employee not liable to employer for insulting Facebook post (FR)

CONTRIBUTOR CAROLINE FROGER-MICHON*

Summary
French law distinguishes between public and non-public insults. A company can only seek damages for being insulted publicly. An insulting post on Facebook or MSN is not necessarily public.

Facts
A French law on press freedom dating from 1881 distinguishes between two types of insult: a severe insult (*diffamation*) and a milder insult (*injure*). Both types of insult can be committed either publicly or privately. The 1881 law deals only with publicly committed insults. Such insults are criminal offences (*délits*). Insulting in a manner that is not in the public domain is a lesser type of criminal offence (*contravention*) under the Criminal Code.

The defendant in this case was Maria-Rosa Veca. She was employed by a company called the *Agence du Palais*, that was managed by Ms Duputel.

Shortly before being dismissed, Ms Veca posted the following text on her MSN page: "Sarko [= *Sarkozy, the former French President*] should adopt a law exterminating pain-in-the-ass ('*chieuses*') managers like mine". Around the same time she posted some extremely crude and insulting texts about her boss on her Facebook account. When her employer found out about these texts, the company and Ms Duputel (joint plaintiffs) brought proceedings against Ms Veca, claiming damages on account of public insult.

Ms Veca denied that the comments she had made about her boss were made publicly, given that those comments were only accessible for her Facebook and MSN 'friends'. The plaintiffs argued that Facebook and MSN posts are necessarily public, as anyone the person doing the posting accepts as a 'friend' can access the postings.

The court of first instance and the appellate court dismissed the claim. The claim on behalf of the company was declared to be outside the scope of the proceedings (*irrecevable*), as the insulting posts were aimed at Ms Duputel only. Ms Duputel's claim was rejected on the grounds that the posts were not made public. The plaintiffs appealed to the Civil Chamber of the Supreme Court (*Cour de cassation, chambre civile*).

Judgment
The Supreme Court confirmed both the dismissal of the company's claim and Ms Duputel's claim, inasmuch as it was based on the 1881 law. It noted that the messages posted on MSN and Facebook "were accessible only to a restricted number of persons authorised by the author", those persons constituting a closed community (*communauté d'interêts*).

However, the Supreme Court did criticise the appellate court for not investigating whether the posts constituted a non-public insult, in which case Ms Duputel could perhaps have claimed damages for injury to feelings.

Commentary
If there is no public insult when the audience is restricted, it follows that if the employee had chosen to send the messages to all her 'friends' and the 'friends' of those 'friends', the court would have taken into account the fact that the messages were made public. As a result, the messages would have been sent in breach of the law. Therefore, Internet users should be cautious about the publication criteria used when sending messages and be aware that in absence of specific criteria, a message is always considered public.

However, the judgment is not clear about the meaning of a "restricted number of persons authorised by the author". How many people does that add up to? It seems the average internet user has 210 'friends' on Facebook.

Further, even if there is no public insult because the message is posted to a limited number of people, an employee still may be convicted of a non-public insult, which is punishable by a fine.

Finally, insults posted by an employee may constitute an abuse of his or her freedom of speech and expose the employee to disciplinary sanctions.

The judgment was handed down by the Civil Chamber of the Supreme Court. So far, the Social Chamber of the Supreme Court has not ruled on the validity of disciplinary sanctions or dismissals based on messages published by an employee on Facebook. But many Courts of Appeal have had the occasion to rule on this subject and show themselves to be somewhat unfavourable towards employees.

Thus, with the exception of one Court of Appeal, the majority of courts consider that criticisms or offensive remarks published on social networks by an employee about employers may constitute a real and serious cause for dismissal. According to the judges, by posting a message on a 'friend's wall', the employee runs the risk of his message going viral. The 'friend' may have hundreds of 'friends' or may not have blocked access to his profile. Anyone belonging to Facebook could thus have access to the message. Therefore, even though the Social Chamber of the Supreme Court has not yet ruled, it seems quite clear that employees should use moderation and never forget that they have a legal obligation of loyalty to their employer.

If the employee wants to send a message privately, he or she has the option of using the individual mailbox on Facebook or the filters on the site to ensure the conversation remains strictly private.

As for organisations, prevention and information are more important than ever. Many employees are unaware that their comments on Facebook and their tweets could be read by anyone and everyone. For this reason, more and more organisations are putting in place internal codes governing the use of social media – and so reminding everyone of the boundaries between public and private space.

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Subject: Freedom of speech
Parties: Ms Veca – v – Ms Duputel and Agence du Palais
Court: *Cour de Cassation* (Supreme Court)
Date: 10 April 2013
Case number: 11-19530
Internet publication: http://www.legisfrance.fr → jurisprudence judiciaire → 11-19530

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2013/33

New French collective redundancy legislation (Article)

AUTHOR SÉBASTIEN LE COEUR*

Introduction
During his presidential campaign, François Hollande promised to "secure employment", so that every employee can either continue being employed by his or her current employer or pursue a career with another employer. As part of this promise, Hollande pledged to introduce legislation aimed at dissuading what are known in France as "stock exchange layoffs" (*licenciements boursiers*). A stock exchange layoff is a collective redundancy implemented with the primary purpose of improving a company's profitability (or the profitability of a group of companies to which the company belongs), with a view to increasing the value of its (or its parent company's) shares on the stock market.

Following his election, President Hollande launched negotiations between the social partners (employers' representatives and trade unions). On 11 January 2013 those negotiations yielded what is known as the "National Agreement" (*Accord National Interprofessionnel pour un nouveau modèle économique et social au service de la compétitivité des entreprises et de la sécurisation de l'emploi*, the National Interprofessional Agreement for a new economic and social model for business competitiveness and job security). In this agreement, the employers and the unions pledged to support legislation that would (i) speed up the consultation process that employers must engage in with their works council and with the trade unions before being able to carry out a collective redundancy (something employers wanted) and at the same time (ii) discourage "stock exchange layoffs".

The government introduced a Bill in Parliament implementing the National Agreement just a few weeks after it was concluded, on 6 March. The Bill moved through Parliament with record speed, and on 14 May 2013 the *Loi relative à la sécurisation de l'emploi* (Law on job security) was adopted. It took effect on 1 July 2013.

Situation before 1 July 2013
Until 1986, an employer wishing to lay off staff for business reasons[1] had to ask the Labour Administration (*Inspection du Travail*) for authorisation to do so. The Labour Administration could withhold its authorisation, for example if it took the view that the layoff was unfair.

In 1986, the authorisation requirement was abolished. This gave employers freedom to carry out collective redundancies more or less at will. The only remaining requirement was that, in the event of a collective redundancy involving ten or more employees over a 30-day period (hereafter, a "10+ redundancy"), the employer was required to consult with its works council in relation to a social plan. This was to comply with Article 2 of the Collective Redundancy Directive 98/59. However, both the works council and the unions were powerless to prevent the 10+ redundancy, and although individual employees could bring unfair dismissal proceedings, the court never ordered reinstatement.

The new legislation basically brings two changes:
- the procedure for consulting the works council prior to implementing a 10+ redundancy has been streamlined; and
- social plans must be approved by the Labour Administration.

The new rules apply only to redundancies where the works council consultation was initiated on or after 1 July 2013, and are described in detail below.

New rules on consultation with works council and health and safety council
In France, employers who are minded to lay off staff must, generally, deal with three (groups of) bodies:
- the works council
- the health and safety council
- the relevant trade union(s).

An employer wishing to implement a collective redundancy must consult with its works council (on the economic rationale for the restructuring) and with its health and safety council (on the restructuring's anticipated impact on health and safety and on employees' working conditions, both of those to be laid off and those to be retained). Before 1 July, the works council could hold back on its opinion until it had received the health and safety council's view and there was no firm time-limit within which the two councils had to conclude their consultations, which sometimes resulted in lengthy procrastination. This is no longer possible. Both councils must now respect deadlines within which they have to deliver their opinions. Depending on the number of dismissals planned, the councils now have a maximum of two to four months to deliver their opinions. The procedure is essentially as follows:

step 1: management submits a memorandum to the works council and to the health and safety council, setting out what the plans are and providing all relevant information;
step 2: management meets with the works council and, separately, with the health and safety council;
step 3: immediately after these meetings, the councils may appoint experts, the works council usually hiring a chartered accountant and the health and safety council usually hiring a health and safety expert, both experts' costs being for the employer's account;
step 4: the experts have a maximum of ten days to request any further information from management (e.g. to better understand the business case) and/or to interview key staff such as the CEO or the CFO;
step 5: management has eight days within which to provide the requested information; in the event the information is incomplete or inadequate, the said maximum consultation period of two to four months can be extended; and the experts

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may submit one or more further requests for information;

step 6: the experts must submit their final reports no later than 15 days prior to the end of the two to four month consultation period;

step 7: the councils give their opinions before the expiry of the two to four month period, failing which they are deemed to have given negative opinions.

New rules on consultation with trade unions

As a rule, management's consultations with the trade unions run parallel with its consultations with the two councils. The objective of the consultations with the unions is to reach agreement on a social plan.

To be valid, a social plan must be negotiated with the union(s) that have (together) obtained at least 50% of the votes in the first round of the most recent works council election[2] and agreement must be reached on at least the following "core" topics[3]:

- how to redeploy redundant employees within the company or the group of companies to which it belongs;
- how to limit the number of dismissals to the extent possible;
- the creation of new activities by the company;
- an outplacement scheme, in particular with a view to revitalising the local labour market;
- initiatives aimed at creating new businesses or at allowing redundant employees to take over existing businesses;
- vocational (re-)training;
- reductions in working time.

Additionally, the social plan may include agreement on 'optional' topics such as the works council procedure, the number of redundancies in each position, the criteria to be applied in selecting employees for redundancy, the timeline for the dismissals and relocation measures to facilitate the redeployment of the redundant employees elsewhere within the company or group, either in France or abroad. These topics are optional in the sense that it is not a requirement that agreement is reached on these subjects. However, management must present the union(s) with a proposal on each of them.

If no agreement is reached with the union(s) on all of the core subjects, the employer must go through the approval process outlined below.

Although there is no deadline for concluding the negotiations with the unions, it is common to time them in such a manner that agreement is reached (or that the negotiations end without agreement) shortly before the works council and the health and safety council deliver their opinions.

Role of Labour Administration

The Labour Administration is a governmental body composed of civil servants, under the supervision of the Labour Minister. In 10+ redundancies it essentially has three responsibilities:

1. to intervene in disputes regarding the provision of information;
2. to 'validate' social plan agreements;
3. to approve social plans on which no (full) agreement has been reached.

Before 1 July, if a works council, or a health and safety council, was not satisfied with the information provided by management, it could apply to the Superior Court (*Tribunal de Grande Instance*). For most works councils, this was an extreme step they seldom took. It was easier for the works council to simply withhold its opinion until it was provided with the missing information. Now that the works council's consultation ends after a certain time, regardless of whether or not the works council has given its opinion, it has lost this possibility. Under the new law, however, a works council may ask the Labour Administration to order management to provide certain additional information or documentation within a certain period of time. This new power of the Labour Administration is meant to prevent 'empty' consultations, where management gives insufficient information, knowing that the consultation period will expire anyway after two, three or four months.

In addition to ordering management to provide additional information, the Labour Administration may make recommendations on how to improve a proposed social plan. Although this is not a new power, it is more effective than under the former legislation, given the Labour Administration's power to approve or disapprove a social plan.

Where management and the trade union(s) have reached agreement on the core subjects and the consultation with the works council and the health and safety council is complete, the next step is for management to submit the social plan to the Labour Administration for 'validation'. The validation process - a straightforward exercise consists of the Labour Administration verifying that:

- agreement has been reached with the majority union(s);
- agreement has been reached on all of the core subjects;
- the employer has, if required, implemented a 'redeployment leave' scheme. This is an obligation for any French employer with 1,000 or more employees[4] to (i) keep dismissed employees on its payroll at no less than 65% of their last-earned salary for a certain number of months (from now on, most likely 12 months or longer) and (ii) provide them with outplacement services.

The Labour Administration must decide whether or not to validate the social plan within 15 days, failing which the social plan is deemed to have been validated.

In the event management and the trade union(s) have failed to reach agreement on the core subjects, the employer must request the Labour Administration to approve its unilaterally drafted social plan, which in that case, must include provisions on both the core and optional subjects.

In the event management and the union(s) have reached agreement on the core subjects but not on the optional subjects, the employer must request the Labour Administration to approve its proposal with respect to those optional items.

In its review, the Labour Administration applies the following test: **is the content of the social plan proportionate to the employer's financial means** (or, where applicable, to the financial means of the group to which the employer belongs)?

The Labour Administration must render its decision within three weeks, failing which the social plan or the optional items in the social plan, as the case may be, will be deemed to have been approved.

As long as the Labour Administration has not validated or approved the social plan (as the case may be) the employer may not and, in fact, cannot validly dismiss any of the redundant employees.

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Conclusion

The new power of the Labour Administration to withhold approval of a social plan has affected the bargaining power of the trade unions. They know that the Labour Administration will withhold approval if the employer is a profitable company (or part of a profitable group) and fails to make what is generally seen to be a reasonable offer, both in terms of the number of dismissals and the severance compensation offered. Whether an offer is 'reasonable' depends on the financial situation of the group. Social plans are more generous and expensive in larger groups with substantial financial means. Conversely, social plans are cheaper in groups experiencing financial difficulties.

Conversely, the unions know that if they overplay their hand, the Labour Administration will approve the social plan. This, in combination with the new deadlines for consultation, also affects the unions' bargaining power. On balance, 10+ redundancy operations are now faster but, in the case of profitable companies, more expensive than they were before 1 July.

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(Footnotes)

1. Not for reasons of performance or other non-business reasons.
2. Works council members are elected by and amongst the employees. The elections are organised in two rounds:

- the first round is reserved for trade unions' lists. In practice, an employee, member of a union, gathers candidates around him and puts them on his list. He then sends the list to the employer: "this is the list of candidates for trade union X" (usually one of the main ones: CGT, CFDT, FO, CFTC). To be on the list, the other candidates need not be members of the union;
- a second round is organised if no trade union's list of candidates was presented at the first round, or if works council's members remain to be elected. At the second round, any list (unionised or not) can be presented.

A situation where one or more unions obtained at least 50% at the vote can be where:

- one single union collects at least 50% of the votes; or
- together, at least two unions have 50% of the votes, e.g., Union A has 25%; Union B 30%. To be valid, the agreement must be signed by A and B. It is not valid if signed by B only.

3. The agreement need not include an obligation to take positive measures on all of these topics. For example, an agreement that there shall be no working time reduction is sufficient for there to be an agreement.
4. Or an employer belonging to a community-scale group of companies.

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ECJ COURT WATCH

SUMMARIES BY PETER VAS NUNES

RULINGS

ECJ 7 March 2013, case C-127/11 *(Aldegonda van den Booren - v - Rijksdienst voor Pensioenen)* **("Van den Booren")**, Belgian case (FREE MOVEMENT - SOCIAL SECURITY)

Facts
Ms Van den Booren was a Dutch widow living in The Netherlands. Her late husband had worked in Belgium from 1951 to 1961, during which time he was insured under Belgian social security legislation. He died in 1982. In 1985, when Ms Van den Booren turned 65, she became eligible for two social security benefits: a Belgian survivor's pension and a Dutch old-age pension. In 2002 her Dutch old-age pension increased by € 42 per month, as a result of a change in Dutch law. Previously, Dutch law contained a discriminatory provision that affected old-age pensioners such as Ms Van den Booren. This provision was removed.
The Belgian social security authority (the NPO), reduced Ms Van den Booren's invalidity pension on account of the increase in her Dutch old-age pension. Although this reduction was in line with Regulation 1408/71 on social security coordination (now Regulation 883/2004), Ms Van den Booren challenged it because, if her two pensions had been governed by the laws of one Member State, the increase in her invalidity pension through the removal of a discriminatory provision of law would not have led to a reduction in her old-age pension.

National proceedings
Ms Van den Booren brought legal proceedings against the NPO before a Belgian court, seeking to reverse the decision reducing her Belgian pension. The court of first instance dismissed her claim, but on appeal the higher court referred two questions to the ECJ. In essence, it asked whether Regulation 1408/71 precludes a Member State's law from reducing a survivor's pension on the ground that the survivor's old-age pension in another Member State has increased and, if not, whether primary EU law prevents the application of the relevant provision of national law.

ECJ's findings
1. The Belgian rule reducing Ms Van den Booren's survivor's pension is in compliance with Regulation 1408/71. However, that does not prevent it from falling within the scope of primary EU law (§ 28-38).
2. Article 45 TFEU on the freedom of movement of persons militates against a national measure which is capable of hindering or rendering less attractive the exercise by EU nationals of their right to free movement. Such measures are only allowed if they pursue a legitimate aim in the public interest, are appropriate to ensuring the attainment of that objective, and do not go beyond what is necessary to attain it (§ 44-45).
3. Accordingly, it is for the national court to assess the compatibility of the Belgian rules at issue with EU law by determining whether those rules, although applying without distinction to Belgians and others, lead to an unfavourable situation in comparison with that of a person whose situation has no cross-border element and, if such a disadvantage is established, whether the national rule at issue is justified (§ 46).

Ruling (Judgment)
1. Regulation 1408/71 must be interpreted as not precluding the application of a national provision under which a survivor's pension is reduced as a result of an increase in an old-age pension received under the legislation of another Member State.
2. Article 45 TFEU likewise does not preclude the application of such national rules insofar as they do not lead, in respect of the person concerned, to an unfavourable situation in comparison with that of a person whose situation has no cross-border element, or, if such a disadvantage is established, insofar as it is justified by objective considerations and is proportionate in relation to an objective legitimately pursued by national law, this being a matter for the referring court to ascertain.

ECJ 7 March 2013, case C-393/11 *(Autorità per l'energia e il gas - v - Antonella Bertazzi and six others)* **("AEEG")**, Italian case (FIXED-TERM WORK)

Facts
In 2006, Italy adopted Law No 296/2006. It provides for the 'stabilisation' of non-managerial staff employed by public bodies on the basis of a private-law fixed-term contract. In many cases, these contracts were unlawful and the workers concerned should have been employed permanently. Law 296/2006 allowed workers who had been employed for no less than three years, to apply to become permanent civil servants. Following their appointment as civil servants, their remuneration was set as the starting rate, no account being taken of the length of service accrued under their previous fixed-terms contracts.

The seven plaintiffs in this case had worked for the AEEG, a public body, under successive fixed-term contracts. They applied to become civil servants. Their applications were accepted and they were placed at the starting level of the pay scale category that applied to them at the time their fixed-term contracts were terminated (with certain compensation for the pay differential). They objected to the fact that their prior service with the AEEG was disregarded.

National proceedings
The plaintiffs brought proceedings against the AEEG before an administrative court, which found in their favour, whereupon the AEEG appealed to the Council of State. This judicial body noted, inter alia¬, that the national legislature had not intended retroactively to validate unlawful fixed-term recruitment by converting a series of fixed-term contracts into a permanent contract. Instead, it had viewed the length of service accrued in fixed-term employment as a qualification justifying conversion to a permanent employment relationship without the need for the employees to go through the general competitive process for joining the public authority's permanent staff. The fact that length of service is set at nought is justified by the need to avoid reverse discrimination against workers who are already on the permanent staff and who were recruited based on an open competition.

The Council of State referred questions to the ECJ.

ECJ's findings
The ECJ recalled that it had answered identical questions in its judgment in Valenza (ECJ 18 October 2012, cases C-302/11-305/11, reported in EELC 2012-4).

Ruling (Judgment)
Clause 4 of the framework agreement on fixed-term work [...] which is annexed to Council Directive 1999/70 [...] must be understood as precluding national legislation, such as that at issue in the main proceedings, which prohibits periods of service completed by a fixed-

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term worker for a public authority being taken into account in order to determine the length of service of that worker upon his recruitment as a career civil servant on a permanent basis by the same authority under a stabilisation procedure specific to his employment relationship - unless that prohibition is justified on 'objective grounds' for the purpose of clause 4(1) and/or (4). The mere fact that the fixed-term worker completed those periods of service on the basis of a fixed-term employment contract or relationship does not constitute such an objective ground.

ECJ 7 March 2013, case C-128/12 *(Sindicato dos Bancários do Norte and others - v - BPN Banco Português de Negócios SA)* **("Banco Português")**, Portuguese case (MISCELLANEOUS)

Facts

On 31 December 2010 Portugal adopted legislation (*Lei do Orçamento de Estado para 2011*) aimed at combatting the economic crisis. Amongst other things, it reduced the salaries of public sector employees. On 21 September 2011 the Constitutional Court ruled that this legislation was not unconstitutional. Pursuant to said legislation, the Banco Português de Negócios (the 'Bank'), which had been nationalised in 2008 and was therefore a public body, decided to reduce the salaries of its staff, thereby breaching the applicable collective agreement. Three unions and one individual employee contested this reduction before the Labour Court of Porto.

National proceedings

The court was of the opinion that the said legislation violated the EU principle of equality. However, it referred six questions to the ECJ. Most of the questions related to Article 31(1) of the Charter of Fundamental Rights of the EU: "Every worker has the right to working conditions which respect his or her health, safety and dignity".

ECJ's findings

The ECJ recalled (i) that Article 51 of the Charter provides that the Charter's provisions "are addressed to [...] the Member States only when they are implementing Union Law" and (ii) that Article 6(1) TEU provides that "the provisions of the Charter shall not extend in any way the competences of the Union [...]". Therefore the ECJ has no jurisdiction in this case.

Ruling (Order)

The ECJ lacks jurisdiction.

ECJ 11 April 2013, joined cases C-335 and 337/11 *(HK Danmark on behalf of Jette Ring - v - Dansk Almennyttigt Boligselskab DAB and on behalf of Skouboe Werge - v - Pro Display A/s in liquidation)* **("Ring")**, Danish case (DISABILITY DISCRIMINATION)

Facts

Ms Ring was employed by DAB. In the period June-November 2005 she was absent for a total of 120 days on account of chronic arthritic backache that her doctor told her was incurable and permanent. DAB did not do anything to alleviate Ms Ring's discomfort, such as purchasing an adjustable desk or allowing her to work part-time (even though DAB did employ part-time workers). In accordance with Danish law, DAB dismissed Ms Ring by reason of her prolonged absence. Immediately following the dismissal, DAB published a vacancy for a part-time position, in other premises close to those where Ms Ring had worked, similar to the position previously held by Ms Ring. She found a job with another employer that provided her with an adjustable desk. That new position was officially full-time but, pursuant to the Danish 'flexjob' arrangement (under which the government subsidises the employment of permanently partially-disabled people), she actually worked for 20 hours per week, the remaining 50% of her salary costs being funded by a government grant.

Ms Werge was employed by Pro Display. In December 2003, she sustained a whiplash injury in a traffic accident. Following a number of absences from work and periods of part time work, she called in sick in January 2005, remained sick and was subsequently dismissed. Her symptoms included neck ache, a jaw disorder, fatigue, concentration and memory problems, difficulty in formulating her thoughts, extreme sensitivity to noise, low stress tolerance and dizziness. She was declared 10% disabled with a 65% loss of working capacity, and was awarded early retirement benefits.

National proceedings

The trade union HK Denmark brought legal proceedings against DAB and Pro Display on behalf of their members Ring and Werge. The court – *the Sø- og Handelsret* – referred the following questions to the ECJ:

1a. Does the term 'disability' in Directive 2000/78 cover any person who cannot perform his or her work fully for physical, mental or psychological reasons for a period as formulated in § 45 of ECJ's ruling in Navas (C-13/05)?

b. Does a situation resulting from a doctor's diagnosis of an incurable disease fall within the concept of 'disability' as meant in the Directive?

c. Does a situation resulting from a doctor's diagnosis of a temporary illness fall within that concept?

2. Does a permanent reduction of working capacity that does not require special aids and consists mainly of not being able to work full-time, qualify as a disability within the meaning of Directive 2000/78?

3. Is the reduction of working time a 'measure' as meant in Article 5 of Directive 2000/78?

4. Does Directive 2000/78 preclude the application of national law that allows the employer to dismiss - with a reduced notice period - an employee who has received pay for a total of 120 days within an uninterrupted period of 12 months, in the event the employee is disabled within the meaning of the Directive and whose absence from work (a) is caused by that disability or (b) is caused by the employer's failure to adopt suitable measures with a view to enabling the employee to perform his work?

Observations on these questions were submitted by the governments of Denmark, Ireland, Poland, the UK, Belgium and Greece as well as the Commission.

ECJ's findings

<u>Preliminary observations</u>

1. In 2009, the EU ratified the United Nations Convention on the Rights of Persons with Disabilities (the 'UN Convention'). Council Directive 2010/48 made the UN Convention's provisions an integral part of the EU legal order. By virtue of Article 216(2) TFEU, the UN Convention prevails over acts of the EU. Consequently, Directive 2000/78 must be interpreted, as far as possible, in a manner consistent with the UN Convention (§ 28-33).

<u>Questions 1 and 2</u>

2. Directive 2000/78 does not define the concept of disability. In its ruling in *Chacón Navas* (C-13/05), the ECJ held that that concept "*must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders*

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the participation of the person concerned in professional life over a long period of time" (§ 36).

3. In 2010, i.e. several years after the *Chacón Navas* ruling, the EU ratified the UN Convention on the Rights of Persons with Disabilities. The preamble to this Convention states that the concept of disability is an evolving one. Article 1 defines disabled persons as "*those who have long-term physical, mental, intellectual or sensory impairment which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others*" (§ 37).

4. Consequently, the concept of 'disability' must be understood as referring to a limitation resulting in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers and that those impairments must be long-term (§ 38-39).

5. Directive 2000/78 is not intended to cover only disabilities that are congenital or result from accidents, to the exclusion of those caused by illness (§ 40-42).

6. A disability does not necessarily imply complete exclusion from work or professional life. Thus, the state of health of a person with a disability who is fit to work, albeit only part-time, is capable of being covered by the concept of 'disability'. A finding that there is a disability does not depend on the nature of the accommodation measures such as the use of special equipment (§ 43-47).

Question 3

7. Article 5 of Directive 2000/78 requires employers to take appropriate measures to enable disabled persons to have access to, participate in, or advance in employment. Recital 20 in the preamble gives a non-exhaustive list of such measures. Neither Article 5 nor Recital 20 mentions reduced working hours, merely "patterns of working time". This concept is not limited to such matters as the organisation of the patterns and rhythms of work and breaks. It does not exclude the adaptation of working hours, in particular the possibility for persons with a disability who are not capable, or no longer capable, of working full-time, to work part-time. Thus, a reduction in working hours may constitute one of the accommodation measures referred to in Article 5 of the Directive (§ 49-58).

8. In the disputes between Ms Ring and Ms Skoube Werge and their employers, it is for the Danish court to assess whether a reduction in working hours represents a "disproportionate burden" on their employers within the meaning of Article 5 of the Directive (§ 59-64).

Question 4(b)

9. Does Directive 2000/78 preclude national legislation under which an employer can terminate an employment contract following 120 days of illness in 12 months, where that absence is the consequence of the employer's failure to provide reasonable accommodation as provided in Article of the Directive? In such a situation, a workers' absence may be attributable to the employer's failure to act, not to the worker's disability. Hence, the Directive precludes the application of a provision of national law such as that at issue (§ 65-68).

Question 4(a)

10. Does Directive 2000/78 preclude national legislation under which an employer can terminate an employment contract following 120 days of illness in 12 months, where that absence is the consequence of his disability? (§ 69-70).

11. As the ECJ held in *Chacón Navas*, unfavourable treatment on grounds of disability undermines the protection provided for by Directive 2000/78 only insofar as it constitutes discrimination. Thus, the question is whether the Danish law at issue is liable to produce discrimination against persons with disabilities (§ 71).

12. The Danish law at issue applies in the same way to disabled and non-disabled persons who have been absent for over 120 days. Thus, there is no direct discrimination. Termination solely on the grounds of illness is not a form of discrimination covered by Directive 2000/78 (§ 72-74).

13. The concepts of 'disability' and 'sickness' cannot be treated as being the same. However, a disabled worker runs a greater risk of accumulating days of absence on grounds of illness than a worker who is not disabled. Therefore, the Danish provision at issue is indirectly discriminatory (§ 75-76).

14. The aim of that provision is to encourage employers to recruit and maintain in their employment workers who are particularly likely to have repeated absences because of illness, by allowing them subsequently to dismiss them with a shortened period of notice, if the absences are for very long periods. As a counterpart, those workers can retain their employment during the period of illness. The provision thus has regard to the interests both of employers and employees. Taking into account Member States' broad discretion in choosing to pursue a particular aim in the field of social and employment policy, and in defining measures to implement that aim, the said indirect unequal treatment may, in principle, be justified, provided the means to achieve the aim are appropriate and necessary and do not go beyond what is required to achieve that aim (§ 77-83).

15. Having regard to the Member States' broad discretion to define measures to implement a particular aim of social policy, the provision at issue is appropriate. It is for the Danish courts to determine whether it is necessary (§ 84-91).

Ruling (Judgment)

The concept of 'disability' in Council Directive 2000/78 [...] must be interpreted as including a condition caused by an illness medically diagnosed as curable or incurable where that illness entails a limitation which results, in particular, from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers, and the limitation is a long-term one. The nature of the measures to be taken by the employer is not decisive for considering that a person's state of health is covered by that concept.

Article 5 of Directive 2000/78 must be interpreted as meaning that a reduction in working hours may constitute one of the accommodation measures referred to in that Article. It is for the national court to assess whether, in the circumstances of the main proceedings, a reduction in working hours, as an accommodation measure, represents a disproportionate burden on the employer.

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Directive 2000/78 must be interpreted as precluding national legislation under which an employer can terminate the employment contract with a reduced period of notice if the disabled worker concerned has been absent because of illness, with his salary being paid, for 120 days during the previous 12 months, where those absences are the consequence of the employer's failure to take the appropriate measures in accordance with the obligation to provide reasonable accommodation laid down in Article 5 of that Directive.
Directive 2000/78 must be interpreted as precluding national legislation under which an employer can terminate the employment contract with a reduced period of notice if the disabled worker concerned has been absent because of illness, with his salary being paid, for 120 days during the previous 12 months, where those absences are the consequence of his disability, unless that legislation, as well as pursuing a legitimate aim, does not go beyond what is necessary to achieve that aim, that being for the referring court to assess.

ECJ 11 April 2013, case C-290/12 *(Oreste Della Rocca - v - Poste Italiane SpA)* **("Della Rocca")**, Italian case (TEMPORARY AGENCY EMPLOYMENT)

Facts
Mr Della Rocca was employed as a 'temp' by a temporary employment agency (the 'Agency') for three consecutive periods of approximately three, eight and four months. The Agency assigned him to work for *Poste Italiane*, the user company. Taking the view that no proper reasons were given for the temporary nature of his contracts and their renewal, Mr Della Rocca brought an action before the *Tribunale di Napoli*, asking that court to find that he was in fact in a permanent employment relationship with *Poste Italiane*.

National proceedings
Poste Italiane submitted that the renewal of the employment contracts between the Agency and Mr Della Rocca was not subject to any statutory limitations, given that temporary agency work is governed by Legislative Decree 276/03 and that decree derogates from the Italian rules under which a second or further fixed-term contract is, in certain situations, considered to be a contract of indefinite duration (Legislative Decree 368/01).
The court expressed doubts as to the compatibility of Decree 276/03 with Clause 5 of the Framework Agreement on fixed-term work annexed to Directive 1999/70, which provides that the Member States shall introduce measures to prevent the abuse of successive fixed-term contracts, [...] such possible measures being the need to provide objective reasons justifying the renewal of a fixed-term contract. The referring court took the view that it must first be determined which employment relationship comes within the scope of the Framework Agreement: the relationship between the temp and the Agency or the relationship between the temp and the user company.
It took this view because the preamble to the Framework Agreement provides that "This agreement applies to fixed-term workers, with the exception of those placed by a temporary agency at the disposition of a user company. It is the intention of the parties to consider the need for a similar agreement relating to temporary agency work". That intention was implemented in 2008, when Directive 2008/104 on temporary agency work was adopted. The referring court found it necessary to determine, first of all, which employment relationship comes within the scope of Directive 1999/70, because of the ECJ's ruling in *Briot* (case C-386/09). That ruling appears to indicate that the relationship between the Agency and the temp remains subject to the Framework Agreement, since the exemption from that Agreement under Directive 2008/104 is limited to the relationship between the temp and the user company.
If the Framework Agreement is applicable, the referring court asked whether Clause 5 allows technical, production or organisational reasons for the conclusion of a contract for the supply of fixed-term staff to be sufficient grounds to justify the conclusion and extension of a fixed-term contract between the temp and the agency – given that these are features, not of the temporary employment business, but of the user's undertaking and are unrelated to the specific employment relationship.
Lastly, the referring court wondered whether Clause 5 permits the consequences of abuse of fixed-term employment contracts to be borne by a third party, in this case the user company.

ECJ's findings
1. Poste Italiane submitted that the questions referred to the ECJ are not relevant as they concern the application of the Framework Agreement to the employment relationship between the temp and the Agency, whereas Mr Della Rocca is claiming against the user company. The ECJ rejects this defence, as the ECJ may refuse to rule on a question only where it is quite obvious that the interpretation of EU law sought bears no relation to the facts of the main action or its purpose, where the problem is hypothetical, or where the ECJ does not have before it the factual or legal material necessary to give a useful answer (§ 29-31).

2. The deadline for transposing Directive 2008/104 on temporary agency work into national law was 5 December 2011. The temporary work performed by Mr Della Rocca was performed between November 2005 and January 2007. Therefore, that Directive is not applicable to the main proceedings. The issue is, therefore, limited to the applicability of the Framework Agreement (§ 33).

3. Although the Framework Agreement itself does not exclude temporary work from its scope, the preamble does. It excludes both the employment relationships between the temp and the Agency and between the temp and the user company. It is clear that it is the intention of the Framework Agreement to exclude agency work from its scope (§ 34-40).

4. There is no contradiction with *Briot*, which concerned a different issue (non-renewal of a fixed-term contract prior to a transfer of undertaking) (§43-44).

Ruling (Judgment)
The Framework Agreement on fixed-term work must be interpreted as not applying either to the fixed-term relationship between a temporary worker and a temporary employment business or to the employment relationship between such a worker and a user undertaking.

ECJ 11 April 2013, case C-401/11 *(Blanka Soukupová - v - Minister stro zemedelstrí) ("***Soukupová***")*, Czech case (GENDER DISCRIMINATION)

Facts
The age at which Czech citizens become eligible for state retirement benefits differs for men and women and, for women, on the number of children they have raised. This difference is not in breach of Directive 79/7 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, because Article 7(1) of that Directive allows Member States to exclude from its scope (i) "the determination of pensionable age for the purposes of granting old-age and retirement pensions" and (ii) "advantages in respect of old-age pension schemes granted to persons who have raised children".

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Ms Soukupová was a farmer. Having raised two children, she became eligible for state retirement benefits at age 57 and 4 months. In 2006, by which time she had reached the age of 59, she applied for benefits under the Czech support scheme for early retirement. This scheme is basically the transposition of Regulation (EC) 1257/1000 on support for rural development. Article 10 of this Regulation provides: "Support for early retirement from farming shall contribute to the following objectives: to provide an income for elderly farmers who decide to stop farming, to encourage the replacement of such elderly farmers by farmers able to improve, where necessary, the economic viability of the remaining agricultural holdings, to reassign agricultural land to non-agricultural uses where it cannot be farmed under satisfactory conditions of economic viability". Article 11 sets out the conditions under which a farmer who stops farming is eligible for early retirement benefits. One of these conditions is that the farmer is not less than 55 years old "but not yet of normal retirement age".

Ms Soukupová's application for early retirement benefits was turned down because the Czech law implementing Regulation 1257/99 required applicants to have reached the age of 55 but not yet the age for entitlement to a state pension. Given that Ms Soukupová was already in receipt of a state pension at the time she filed her application, she was ineligible under Czech law.

National proceedings

Ms Soukupová challenged the rejection of her application for early retirement benefits, arguing that the requirement under Czech law that an applicant be below the age for entitlement to a state pension was (i) in conflict with the requirement under Regulation 1257/1999 that an applicant be "not yet of normal retirement age" and (ii) discriminatory on the basis of gender, given that, under Czech law, women who have raised more children enjoy a shorter period in which to apply for early retirement from farming that that granted to men or women who have raised fewer children.

The court of first instance turned down Ms Soukupová's claim. On appeal, this judgment was overturned. The government (Ministry of Agriculture) appealed to the Supreme Administrative Court. It referred three questions to the ECJ.

ECJ's findings

1. With its first two questions, the referring court asked, in essence, whether it is compatible with EU law for "normal retirement age" in Regulation 1257/1999 to be determined differently depending on gender and, in the case of female applicants, on the number of children raised (§ 22).

2. Early retirement support under Regulation 1257/1999 acts as an economic incentive which seeks to encourage elderly farmers to stop farming, earlier than they would do under normal circumstances and, thus, to facilitate structural change in the agricultural sector. It is an instrument of the Common Agricultural Policy and not a social security benefit falling within the scope of Directive 97/7. Therefore, Member States may not rely on the difference in treatment that Article 7(1) of that Directive authorises them to retain when defining retirement age in the field of social security (§ 23-26).

3. In implementing Regulation 1257/19999, the Member States must respect the principle of equal treatment and non-discrimination enshrined in Articles 20, 21 and 23 of the Charter of Fundamental Rights of the EU (§ 27-28).

4. According to settled case-law, those principles require that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified. It is clear that elderly female farmers and elderly male farmers are in comparable situations, in the light of the purpose of Regulation 1257/1999. In those circumstances, it would be contrary to EU law and the general principles of equal treatment and non-discrimination for those situations be treated differently, without objective justification (§29-33).

5. Contrary to the submissions of the Czech and Polish governments, the difference in treatment at issue cannot be justified (§ 34).

3. Where discrimination contrary to EU law has been established, observance of the principle of equality can be ensured only by granting to persons within the disadvantaged category the same advantages as those within the favoured category (see ECJ case C-18/95 Terhoeve and C-399/09 Landtová) (§ 35).

Ruling (Judgment)

It is incompatible with EU law and the general principles of equal treatment and non-discrimination for "normal retirement age" in Regulation 1257/1999 to be determined differently depending on gender and, in the case of female applicants, on the number of children raised.

ECJ (Grand Chamber) 16 April 2013, case C-202/11 (*Anton Las – v – PSA Antwerp NV*) ("**Las**"), Belgian case (FREE MOVEMENT)

Facts

Mr Las, a Dutch national, was employed as Chief Financial Officer by PSA Antwerp, a Belgian company belonging to a multinational group headquartered in Singapore. His employment contract was drafted in the English language. Most of Mr Las' work was carried on in Belgium. Mr Las was dismissed. In accordance with Article 8 of his employment contract he was paid a certain severance compensation. His lawyer informed PSA that Article 8 was null and void, given that the Belgian Decree on Use of Languages provides that employment contracts where the employer is established in the Dutch-speaking part of Belgium ("Flanders") must be drafted in the Dutch language, on pain of nullity. Arguing that he was therefore not bound by Article 8, Mr Las brought an action before the local *Arbeidsrechtbank*, claiming additional compensation.

National proceedings

Mr Las' claim was based on the contention that said Article 8 was invalid because his employment contract had not been drafted in Dutch. PSA countered that the Belgian law requiring employment contracts to be written in Dutch where the employer is established in Flanders, should be set aside, as it violates Article 45 TFEU (freedom of movement of workers). The court referred the following question to the ECJ: "Does the [Decree on Use of Languages] infringe [Article 45 TFEU] ..... in that it imposes an obligation on an undertaking established in the Dutch-speaking region when hiring a worker in the context of employment relations with an international character, to draft all documents relating to the employment relationship in Dutch, on pain of nullity?"

ECJ's findings

- The employment contract at issue falls within the scope of Article 45 TFEU, since it was concluded between a Netherlands national, resident in The Netherlands, and a company established in Belgium (§ 17).

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- Article 45 may be relied on, not only by workers, but also by their employers. In order to be truly effective, the right of workers to be engaged and employed without discrimination necessarily entails as a corollary the employer's entitlement to engage them in accordance with the rules governing freedom of movement for workers (§ 18)

- Article 45 TFEU precludes any national measure which, even though applicable without discrimination on grounds of nationality, is capable of hindering or rendering less attractive the exercise by Union nationals of the fundamental freedoms guaranteed by the Treaty. Legislation such as the Degree on Use of Languages is liable to have a dissuasive effect on non-Dutch-speaking employees and employers from other Member States and therefore constitutes a restriction on the freedom of movement for workers (§ 19-22).

- Such national measures may be allowed only if they pursue a legitimate objective in the public interest, are appropriate to ensuring the attainment of that objective, and do not go beyond what is necessary to obtain the objective pursued (§ 23).

- The Belgian government claims that the Decree on Use of Languages addresses a threefold need: (1) to encourage the use of one of Belgium's official languages, (2) to enable employees to examine employment documents in their own language and (3) to ensure the efficacy of the checks and supervision of the employment inspectorate. All of these objectives are legitimate. The issue is thus whether the Decree on Use of Languages is proportionate to those objectives (§ 24-29).

- Parties to a cross-border employment contract do not necessarily have knowledge of the official language of the Member State concerned. In such a situation, the establishment of free and informed consent between the parties requires them to be able to draft their contract in another language. In the light of this fact, legislation declaring a contract not drafted in the official language to be invalid goes beyond what is strictly necessary to obtain the said objectives (§ 30-32).

Ruling

Article 45 TFEU must be interpreted as precluding legislation of a federated entity of a Member State, such as that in issue in the main proceedings, which requires all employers whose established place of business is located in that entity's territory to draft cross-border employment contracts exclusively in the official language of that federated entity, failing which the contracts are to be declared null and void by the national courts of their own motion.

ECJ 25 April 2013, case C-81/12 (*Asociatia ACCEPT – v – Consiliul National pentru Combaterea Discriminarii*) ("**ACCEPT**"), Romanian case (SEXUAL ORIENTATION DISCRIMINATION)

Facts

Mr Becali was the owner of FC Steaua, a Romanian football club. On 8 February 2010 he sold his shares, but he continued to be widely regarded as the owner and leading manager ("patron") of FC Steaua. On 13 February, in a television interview, he made discriminatory statements about another club's football player, who was rumoured to be homosexual, and about homosexuals in general, such as, "Not even if I had to close down [FC Steaua] would I accept a homosexual on the team". The management of FC Steaua made no effort to distance itself from these remarks. On the contrary, the club's lawyer confirmed that the club had adopted a policy of not recruiting homosexual players.

On 3 March 2010, ACCEPT, a non-governmental organisation whose aim is to promote and protect lesbian, gay, bi-sexual and transsexual rights, lodged a complaint against Mr Becali and FS Steaua before the National Council for Combatting Discrimination "CNCD". By decision of 13 October 2010, it issued a warning against Mr Becali (not a fine, because under Romanian law the limitation period for imposing a fine for administrative offences is six months from the date an which the offence took place, and more than six months had passed since 13 February 2010). As for Steaua, the CNCD considered that Mr Becali's statements would not be regarded as emanating from an employer and that therefore those statements did not fall within the scope of a possible employment relationship.

National proceedings

ACCEPT appealed to the *Curtea de Apel Bucaresti.* It referred four questions to the ECJ. The first two questions sought to determine whether Articles 2(2) and 10(1) of Directive 2000/78 must be interpreted as meaning that facts such as those at issue are capable of amounting to "facts from which it may be presumed that there has been discrimination", even though the statements at issue come from a person lacking the legal capacity to represent the employer. The third question was whether, if the answer to the previous question is affirmative, the modified burden of proof laid down in Article 10(1) of the Directive would not require evidence impossible to adduce without interfering with the right to privacy (essentially, that FC Steaua has in the past recruited homosexual players). The fourth question was whether national law may provide that the only penalty for discrimination, following six months after the transgression, is a warning.

ECJ's findings

<u>First and second question</u>

- Directive 2000/78 applies to "all persons [...] in relation to conditions for access to employment [...] including recruitment conditions [...]". It is irrelevant that the system of recruitment of professional football players is not based on direct negotiation requiring the submission of applications (§ 44-45).

- The *Feryn* case (C-54/07) concerned statements by a director who was authorised to represent his company. However, that ruling does not suggest that in order to establish a presumption of discrimination it is necessary that a statement be made by someone legally authorised to do so. An employer cannot deny the existence of presumptively discriminatory facts merely by asserting that a statement was made by a person who was not legally capable of binding it in recruitment matters. A court may take into account the fact that such an employer has not distanced itself from the statement. Public perception may also be relevant (§ 46-51).

- The fact that a football club might not have started any negotiation with a view to recruiting a player does not preclude the possibility that the club has been guilty of discrimination (§ 52).

<u>Third question</u>

- Where the burden of proof has shifted to the employer, it may refute the alleged discrimination by any legally permissible means. It is not necessary, in a case such as the present one, for the employer to prove that it has in the past recruited homosexual players, as such a requirement is apt, in certain circumstances, to interfere with the right

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to privacy. Evidence refuting a presumption of discrimination may, for example, include a reaction by the employer clearly distancing itself from public statements or the existence of clear recruitment policy provisions aimed at ensuring compliance with the principle of equal treatment (§ 54-59).

Fourth question

- Directive 2000/78 confers on Member States responsibility for determining the rules on sanctions applicable to infringements of the principle of non-discrimination. Those sanctions must be effective, proportional and dissuasive. A purely symbolic sanction is not sufficient (§ 60-64).

- It is possible under Romanian law that, even where a complaint of discrimination is lodged well within the six-month period following the discriminatory event, the CNCD does not deliver its decision until after the expiry of that period, by which time any other penalty than a warning is no longer possible. It is for the referring court to determine whether this fact might make victims of discrimination or organisations such as ACCEPT so reluctant to bring proceedings as to make the sanctions not genuinely dissuasive (§ 65-72).

Ruling (judgment)
Articles 2(2) and 10(1) of Council Directive 2000/78 [...] must be interpreted as meaning that facts such as those from which the dispute in the main proceedings arises are capable of amounting to "facts from which it may be presumed that there has been ... discrimination" as regards a professional football club, even though the statements concerned come from a person presenting himself and being perceived in the media and among the general public as playing a leading role in that club without, however, necessarily having legal capacity to bind it or to represent it in recruitment matters.
Article 10(1) of Directive 2000/78 must be interpreted as meaning that, if facts such as those from which the dispute in the main proceedings arises were considered to be "facts from which it may be presumed that there has been direct or indirect discrimination" based on sexual orientation during the recruitment of players by a professional football club, the modified burden of proof laid down in Article 10(1) of Directive 2000/78 would not require evidence impossible to adduce without interfering with the right to privacy.
Article 17 of Directive 2000/78 must be interpreted as meaning that it precludes national rules by virtue of which, where there is a finding of discrimination on grounds of sexual orientation within the meaning of that directive, it is possible only to impose a warning such as that at issue in the main proceedings where such a finding is made after the expiry of a limitation period of six months from the date in which the facts occurred where, under those rules, such discrimination is not sanctioned under substantive and procedural conditions that render the sanction effective, proportionate and dissuasive. It is for the national court to ascertain whether such is the case regarding the rules at issue in the main proceedings and, if necessary, to interpret the national law as far as possible in light of the wording and the purpose of that directive in order to achieve the result envisaged by it.

ECJ 25 April 2013, case C-398/11 (*Thomas Hogan and others – v – Minister for Social and Family Affairs, Ireland and Attorney General*) ("**Hogan**"), Irish case (INSOLVENCY)

Facts
The ten plaintiffs in this case were formerly employed by Waterford Crystal. They were enrolled in the company's pension scheme. It entitled them to an old-age pension equal to two thirds of the balance of a sum based on their last-earned salary and the State pension. The pension scheme's assets were administered by a trustee and separated from the company in a trust. The scheme was funded by contributions from the employees and the employer. The employees paid a percentage of their salary. The employer made annual contributions to the pension fund calculated to ensure that in the long term the pension scheme had sufficient assets to meet its liabilities. In 2009, Waterford Crystal became insolvent, as a result of which the pension scheme was wound up and each employee became entitled to a share of the fund's assets. Given that the pension fund's liabilities exceeded its assets, the employees were informed that they would receive no more than a percentage (somewhere between 16 and 41%) of the amounts to which they would have been entitled if they had received the present value of their accrued old-age pension rights.

National proceedings
The plaintiffs brought an action, claiming that Ireland had failed to properly transpose Article 8 of Directive 2008/94 ("Article 8"). Article 8 enjoins Member States to ensure that the necessary measures are taken to protect the interests of employees and former employees in respect of rights conferring on them entitlement to old-age benefits under supplementary occupational pension schemes outside the national statutory social security schemes.

The plaintiffs based their claim on the ECJ's 2007 ruling in *Robins* (C-278/05). In that judgment, which was based on Directive 80/987 (that was replaced in 2008 by Directive 2008/94), the ECJ ruled that:

- accrued pension rights need not necessarily be funded by the Member States themselves or be funded in full;
- a system of protection such as that at issue in Robins (under which entitlement to pension benefits could be reduced by as much as 80% in the event of insolvency) is incompatible with Directive 80/987;
- if that directive has not been properly transposed into domestic law, the liability of the Member State concerned is contingent on a finding of manifest and grave disregard by that State for the limits set at its discretion.

More in particular, the ECJ in *Robins* ruled that "neither Article 8 of the Directive nor any other provision therein contains elements which make it possible to establish with any precision the minimum level required in order to protect entitlement to benefits under supplementary pension schemes. Nevertheless, having regard to the express wish of the Community legislature, it must be held that provisions of domestic law that may, in certain cases, lead to a guarantee of benefits limited to 20 or 49% of the benefits to which an employee was entitled, that is to say, of less than half of that entitlement, cannot be considered to fall within the definition of the word 'protect' used in Article 8 of the Directive.

The Irish High Court referred to the ECJ seven questions on the interpretation of Directive 2008/94.

ECJ's findings
- The first question related to the fact that the plaintiff's claim for loss of pension benefits was not a claim against their former employer. The ECJ pointed out that the plaintiffs' entitlement to old-age benefits arose from their contract of employment. Member States may fulfil their obligation under Article 8 by ensuring, either that the

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employer is able to meet its pension obligations, or, that an institution separate from the employer is able to do so. The plaintiffs' interests in respect of old-age pension were not protected by Ireland in the event of their employer's insolvency. Consequently, Directive 2008/94 must be interpreted as meaning that it applies to the entitlement of former employees to old-age benefits under a supplementary pension scheme set up by their employer (§ 22-27).

• The taking in account of State pension benefits, for the purposes of applying Article 8, would be contrary to the practical effect of the protection required by that article (§ 28-32).

• Article 8 does not distinguish between the possible causes for the underfunding of a supplementary occupational pension scheme, but lays down a general obligation to protect the interests of employees and leaves it to Member States to define the methods by which they fulfil that obligation. Therefore, in order for Article 8 to apply, it is not necessary to identity the causes of the underfunding (§ 35-40).

• In *Robins* the ECJ acknowledged that the Member States have considerable latitude in determining the means and the level of protection of rights to old-age benefits under supplementary occupational pension schemes in the event of insolvency of the employer. However, the ECJ held that domestic law that may lead to a guarantee of benefits limited to less than half of the benefits to which an employee was entitled does not fall within the definition of the word "protect". That assessment takes account of the need for balanced economic and social development, by taking into consideration, on the one hand, divergent and rather unpredictable developments in the economic situations of the Member States and, on the other, the necessity of ensuring that employees have a minimum guarantee of protection. Against that background, it is not the specific nature of the measures adopted by a Member State that determines whether that Member State has correctly fulfilled the obligations laid down in Article 8, but rather the outcome of those national measures. The Irish legislation at issue (that allows an outcome under which the plaintiffs will be receiving no more than 16-41% of their pension rights' value) does not seem to be capable of guaranteeing the minimum level of protection required by *Robins* (§ 41-47).

• The measures taken by Ireland subsequent to *Robins* have not brought about the result that the plaintiffs would receive in excess of 49% of the value of their accrued old-age benefits. Is this fact in itself a serious breach of Ireland's obligations? Individuals harmed have a right to reparation against a Member State where three conditions are met: (1) the rule of EU law infringed must be intended to confer rights on them; (2) the breach of that law must be sufficiently serious; and (3) there must be a direct causal link between the breach and the loss. The referring court's 7th question relates to Condition 2.
As soon as the judgment in *Robins* was delivered, the Member States were informed that correct transposition of Article 8 requires an employee to receive, in the event of the insolvency of his employer, at least half of the old-age benefits arising out of the accrued pension rights for which he has paid contributions under a supplementary occupational pension scheme (§ 48-52).

Ruling (judgment)

• Directive 2008/94 applies to the entitlement of former employees to old-age benefits under a supplementary pension scheme set up by their employer.
• Article 8 of Directive 2008/94 prohibits State pension benefits from being taken into account in assessing whether a Member State has complied with the obligation laid down in that article.
• "Article 8 [...] must be interpreted as meaning that, in order for that article to apply, it is sufficient that the pension scheme is underfunded as of the date of the employer's insolvency and that, on account of his insolvency, the employer does not have the resources to contribute sufficient money to the pension scheme to enable the pension benefits owed to the beneficiaries of that scheme to be satisfied in full. It is not necessary for those beneficiaries to prove that there are other factors giving rise to the loss of their entitlement to old-age benefits.
• Directive 2008/94 must be interpreted as meaning that the measures adopted by Ireland following the judgment [...] of 25 January 2007 in [...] *Robins* [...] do not fulfil the obligations imposed by that directive and that the economic situation of the Member State concerned does not constitute an exceptional situation capable of justifying a lower level of protection of the interests of employees as regards their entitlement to old-age benefits under a supplementary occupational pension scheme.
• Directive 2008/94 must be interpreted as meaning that the fact that the measures taken by Ireland subsequent to *Robins* [...] have not brought about the result that the plaintiffs would receive in excess of 49% of the value of their accrued old-age pension benefits under their occupational pension scheme is in itself a serious breach of that Member State's obligations.

ECJ 13 June 2013, case C-415/12 (*Bianca Brandes – v – Land Niedersachsen)* ("**Brandes**"), German case, (PAID LEAVE)

Facts

Ms Brandes formerly worked five days a week. On account of maternity and parental leave she did not work for most of 2010 and 2011. During this period she accumulated an entitlement to 29 days of paid annual leave, which she had been unable to use due to her maternity and parental leave. When she resumed her work following the expiry of her parental leave, her workload was reduced to three days per week. She asked her employer to confirm that she had retained the right to 29 days of paid leave. Her employer refused to confirm this, pointing to a *Bundesarbeitsgericht* decision of 1998, according to which, in the case of a change in a worker's working time, the entitlement to leave already accumulated by the worker must be adjusted proportionally to the relationship between the new and the old number of days worked. Based on this decision, the employer argued that Ms Brandes was entitled to 29 x 3 : 5 = 17 days of paid leave accumulated in 2010/2011. With those 17 days, Ms Brandes would be able to be absent from work for the same number of weeks as she would have been able to take off had she continued to work full-time and retained entitlement to 29 days of paid leave. Granting her 29 days would be discriminating against her full-time colleagues, who needed to work more for the same amount of free time.

National proceedings

Ms Brandes applied to the local *Arbeitsgericht*. She asked the court to confirm her entitlement to 29 days of paid leave accumulated in 2010/2011. The court acknowledged that the ECJ had already ruled on a similar issue in *Landeskrankenhäuser Tirols* (C-486/08). However, that case concerned a rule on leave expressed in weeks. For that reason, the court asked the ECJ whether EU law, in particular Clause 4 of the Framework Agreement on part-time work annexed to Directive 97/81 (as amended by Directive 98/23), must be interpreted as meaning that it precludes national provisions under which the number of days of paid annual leave which a full-time worker was unable to exercise during

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the reference period is, due to the fact that that worker moved to a scheme of part-time work, subject to a proportional reduction.

ECJ's findings

• Although the referring court referred in particular to Clause 4 of the Framework Agreement on part-time work, which provides that, where appropriate, the principle of *pro rata temporis* shall apply, Article 7 of Directive 2003/88, which provides for a minimum period of paid annual leave, must also be taken into account. As the ECJ has repeatedly stated, the entitlement of every worker to paid leave is a particularly important principle of EU social law, laid down in Article 31(2) of the Charter of Fundamental Rights of the EU, and the right to paid leave may not be interpreted restrictively (§ 24-29).

• As the ECJ held in *Landeskrankenhäuser Tirols*, the taking of annual leave in a period after the reference period has no connection to the hours worked during that later period. Consequently, a change of working hours when moving from full-time to part-time employment cannot reduce the right to annual leave that the worker has accumulated during full-time employment. The ECJ does not accept the argument that the entitlement to paid leave accumulated by Ms Brandes would not suffer any reduction since, expressed in terms of weeks of leave, it would remain identical before and after her move to part-time work. In having one "week" of leave recognised, in the context of his now part-time work, represented by three days of work per week, it is clear that the worker is being released from his obligation to work to the extent only of three days (§ 30-41).

Ruling (order)

The relevant EU law must be interpreted as meaning that it precludes national provisions [...] under which the number of days of paid annual leave which a full-time worker was unable to exercise during the reference period is, due tot the fact that that worker moved to a scheme of part-time work, subject to a reduction which is proportional to the difference between the number of days of work per week carried out by that worker before and after such a move to part-time work.

ECJ 20 June 2013, case C-7/12 *(Nadežda Riežniece – v – Zemkopibas ministrija and Lauku atbalsta dienests)* ("**Riežniece**"), Latvian case (PARENTAL LEAVE AND SEX DISCRIMINATION)

Facts

Ms Riežniece was a public official. Her position was legal advisor. In 2006 her performance was appraised. That was her last performance appraisal before going on parental leave. She returned from parental leave in 2009. By that time the department for which she worked was being reorganised. The proposed new organisation included one legal advisor position less than the existing organisation. In order to determine which legal advisor would be losing his or her position, the performance and qualifications of Ms Riežniece and her three colleagues were assessed. Of the eight criteria used for that assessment three were new as compared with the 2006 appraisal and two of the criteria used in 2006 were not used in 2009. Two colleagues, a man and a woman, who had not been absent on parental leave, were assessed for the period February 2008 – February 2009. Ms Riežniece and another female colleague, who had also taken parental leave, were assessed on the basis of the last annual performance appraisal conducted before they took parental leave. That colleague scored the highest mark. Ms Riežniece was ranked last and was informed that her position would be eliminated. She was offered, and accepted, a similar position in another government department. However, that position was also eliminated shortly afterwards.

National proceedings

Ms Riežniece brought an action before the Administrative Court, seeking a declaration that the decision to eliminate her position was unlawful, as well as damages. Her claim was only partially upheld. She appealed, without success. She then appealed to the Senate of the Supreme Court. She based her appeal on the final sentence of Clause 2 of the Framework Agreement on Parental Leave annexed to Directive 96/34 (replaced in 2010 by Directive 2010/18): "At the end of parental leave, workers shall have the right to return to the same job or, if that is not possible, to an equivalent or similar job consistent with their employment contract or employment relationship". The court referred three questions to the ECJ. In essence they were whether Directive 76/206 on equal treatment for men and women in employment (replaced in 2006 by Directive 2006/54) and the Framework. Agreement on Parental Leave are to be interpreted as precluding: (1) a situation where, as part of an assessment of workers in the context of abolition of public officials' posts due to national economic difficulties, a female worker who has taken parental leave is assessed in her absence on the basis of the last annual performance appraisal done before she took parental leave, using new criteria, whilst workers who remained in active service are assessed on the basis of a more recent period, and (2) a situation where that female worker who has been transferred to another post at the end of her parental leave following that assessment is dismissed due to the abolition of that new post.

ECJ's findings

• An employer is not prohibited from dismissing a worker who has taken parental leave provided that the worker was not dismissed on the grounds of the application for, or the taking of, parental leave. Consequently, the Framework Agreement does not preclude a situation where an employer, in the context of the abolishment of a post, proceeds with the assessment of a worker who has taken parental leave with a view transferring that worker to an equivalent or similar post (§ 31-36).

• If women take parental leave far more often than men, which it is for the referring court to determine, the method for assessing workers in the context of the abolishment of a post must not place workers who have taken parental leave in a less favourable situation than workers who have not taken parental leave (§ 37-41).

• Although the assessment of workers over two different periods may not be a perfect situation, it is nevertheless appropriate, given that workers who have taken parental leave are absent during the period immediately preceding the assessment, provided that the assessment criteria used are not such as to place those workers at a disadvantage. Such an assessment must be based on criteria which are identical to those which apply to workers in active service. In the present case, the five criteria used for the 2006 performance appraised overlap only partially with the criteria used for the 2009 performance appraisal. Moreover, the two assessments had different objectives. The first was aimed at assessing the quality of work and promoting professional development, whilst the second was carried out in the context of the abolishment of a post. In those circumstances, the referring court must ascertain whether the 2009 appraisal was carried out in such a manner that the overall mark given to Ms Riežniece might result from the use of criteria which she could not satisfy because she was absent from work and whether her results from the 2006 appraisal were used objectively for the 2009 appraisal. If there was a failure in the 2009 appraisal to observe the correct principles outlined above, there was

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indirect gender discrimination (§ 42-48).

- It is for the referring court to ascertain whether it was not possible for the employer to return Ms Riežniece to her post and, if so, whether the work to which she was assigned was equivalent or similar and consistent with her employment contract or employment relationship. If it is true that she was offered a post that was already due to be abolished, the employer did not comply with its obligation to offer her an equivalent post (§ 49-55).

Ruling

Directive 76/207, where a much higher number of women than men take parental leave, and the Framework Agreement on parental leave must be interpreted as precluding:

- a situation where, as part of an assessment of workers in the context of abolishment of officials' posts due to national economic difficulties, a worker who has taken parental leave is assessed in his or her absence on the basis of assessment principles and criteria which place him or her in a less favourable position as compared to workers who did not take parental leave; in order to ascertain whether or not that is the case, the national court must *inter alia* ensure that the assessment encompasses all workers liable to be concerned by the abolishment of the post, that it is based on criteria which are absolutely identical to those applying to workers in active service and that the implementation of those criteria does not involve the physical presence of workers on parental leave; and
- a situation where a female worker who has been transferred to another post at the end of her parental leave following that assessment is dismissed due to the abolishment of that new post, where it was not impossible for the employer to allow her to return to her former post or where the work assigned to her was not equivalent or similar and consistent with her employment contract or employment relationship, *inter alia* because, at the time of the transfer, the employer was informed that the new post was due to be abolished, which it is for the national court to verify.

PENDING CASES

Case 458/12 (*Lorenzo Amatori and others – v – Telecom Italia)*, reference lodged by the Italian Tribunale di Trento on 11 October 2012 (TRANSFER OF UNDERTAKING)

Does the Acquired Rights 2001/23 preclude national law which permits the transferee to take over the employment relationships of the transferor, without the employees' consent, even where (i) the part of the business transferred is not a functionally independent economic entity already existing before the transfer and identifiable as such by the transferor and the transferee at the time when it is transferred or (ii) after the transfer, the transferor undertaking wields in-depth and supreme control over the transferee?

PENDING CASES

Case C476/12 *(Österreichischer Gewerkschaftsbund – v – Verband Österreichischer Banken und Bankiers)*, reference lodged by the *Austrian Oberster Gerichtsho*f on 24 October 2012 (PART-TIME WORK)

An Austrian collective agreement provides for payment by employers to employees of a child allowance. This is a benefit aimed at covering part of parents' expenses for the maintenance of a child.

Question 1: is the principle of *pro rata temporis* under Clause 4.2 of the Framework Agreement on part-time work annexed to Directive 97/81 to be applied to child allowance in the event an employee works part-time?

Question 2: if not, does Clause 4.1 mean that unequal treatment of part-time workers, by means of a proportionate reduction in their entitlement to child allowance, is objectively justified on the basis that having to pay part-timers a full child allowance:

a. makes part-time work more difficult or impossible;

b. leads to distortion of competition on account of the greater financial burden on employers who employ a larger number of part-time workers and to a lesser willingness to hire part-timers;

c. leads to more favourable treatment of part-timers who have additional part-time work;

d. leads to more favourable treatment of part-timers because they have more free time than full-timers and have better childcare options available to them?

Question 3: if not, is Article 28 of the Charter of Fundamental Rights to be interpreted as meaning that where a minor point in a collective agreement is found to be invalid in a system of employment law in which substantial minimum employment standards have been established, the penalty for invalidity extends to all the provisions of the collective agreement relating to that area (in this case, child allowance)?

Cases C-488, 489, 490, 491and 526/12 *(Sándor Nagy – v – Hajdú-Bihar Megyei Kormányhivatal and 3 other cases)*, references lodged by the Hungarian *Debreceni Munkaügyi Bíróság* on 31 October 2012 (DISMISSAL PROTECTION)

The questions relate to Article 30 of the Charter of Fundamental Rights, which provides:

"*Every worker has the right to protection against unjustified dismissal, in accordance with Union law and national laws and practices.*"

Does this provision guarantee the possibility of a legal remedy only for unlawful and unjustified dismissal? Does it mean that an employer is bound to provide the employee with reasons in writing on dismissal? Does failure to communicate reasons in itself make the measure unlawful or may the employer state reasons subsequently in the course of any litigation? [*See also C-614/12 and C-10/13 below.*]

Case C-509/12 *(IPTM – Instituto Portuário e dos Transportes Marítimos – v – Navileme)*, reference lodged by the Portuguese *Tribunal Central Administrativo Norte* on 9 November 2012 (NATIONALITY DISCRIMANATION AND FREE MOVEMENT)

Do Articles 18 (prohibition of nationality discrimination), 45(3) (freedom to provide services) and 52 by virtue of 62 TFEU preclude a provision of national law which requires residence within national territory as a precondition for the issue of a recreational boating licence?

Case C-514/12 *(Zentralbetriebsrat der gemeinnützigen Salzburger Landeskliniken Betriebs GmbH – v – Province of Salzburg)*, reference lodged by the Austrian *Landesgericht Salzburg* on 14 November 2012 (FREE MOVEMENT)

Do Article 45 TFEU and Article 7(1) of Regulation 492/2011 preclude

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national legislation under which, for the purposes of determining the effective date of advancement, a public employer takes into account all uninterrupted periods of service which its employees have completed with it, but takes into account only a proportion of the periods of service which its employees have completed with other employers?

Case C-522/12 *(Tevfik Isbir – v – DB Services GmbH)*, reference lodged by the German *Bundesarbeitsgericht* on 19 November 2012 (POSTING)

In essence, the *Bundesarbeitsgericht* asks what types of remuneration are covered by Article 3(1)(c) of the Posting Directive 96/71 in respect of minimum rates of pay.

Case C-539/12 (ZjR Lock – v – British Gas Trading Limited & Others), reference lodged by the UK Employment Tribunal on 26 November 2012 (ANNUAL PAID LEAVE)

Must employers pay their employees, in respect of periods of annual leave, by reference to the commission payments they would have earned during that period in consideration of sales that would have been made had they not taken leave? If so, what principles must Member States adopt in calculating the sum that is payable to the worker by reference to such commission.

Case C-540 and 541/12 *(Rena Schmeel and Ralf Schuster – v – Federal Republic of Germany)*, reference lodged by the German *Verwaltungsgericht Berlin* on 28 November 2012 (AGE DISCRIMINATION)

Does Directive 2000/78 cover civil servants? If so, does it mean that a national provision under which the basic pay of a civil servant (i) is dependent on his age upon hiring and (ii) rises thereafter according to the duration of his employment, is directly or indirectly age discriminatory? If so, is it justifiable? If it is not justifiable, (i) is the consequence levelling up, (ii) does the legal consequence of the discrimination follow directly from EU law or only from the Member State's failure to implement EU law and (iii) may national law make claims dependent on the civil servant having enforced his claim in good time? [*See also case C-20/13 below*.]

Case C-588/12 *(Lyreco Belgium N.V. – v – Sophie Rogiers)*, reference lodged by the Belgian *Arbeidshof te Antwerpen* on 14 December 2012 (PARENTAL LEAVE)

In a situation where a full-time worker is dismissed while working part-time on account of parental leave, does the Framework Agreement on Parental Leave annexed to Directive 96/34 preclude the 'protective award' (payable under Belgian law to a dismissed worker) from being calculated on the basis of the part-time salary, where the same worker would be entitled to a protective award calculated on the basis of his full-time salary if he had reduced his working hours by 100%?

Case C-595/12 *(Loredana Napoli – v – Ministero della Giustizia)*, reference lodged by the Italian *Tribunale Amministrativo Regionale per il Lazio* on 19 December 2012 (GENDER DISCRIMINATION)

These questions deal with Recast Directive 2006/54 and the situation where a female worker misses the first part of a professional training course on account of maternity leave. Does such a worker have the right to be admitted to the latter part of the course or may she be enrolled on a subsequent course, even though the timing of that subsequent course is uncertain? If a female worker has not been able to attend (all of) a course, may she be refused a position for which having completed the course is a requirement? Must the employer set up a parallel remedial course to allow the training shortfall to be remedied?

Case C-603/12 *(Pia Braun – v – Region Hannover)*, reference lodged by the German *Verwaltungsgericht Hannover* on 21 December 2012 (FREE MOVEMENT – SOCIAL SECURITY).

This question concerns the right to cross-border education grants.

Case C-610/12 *(Johannes Peter – v – Bundeseisenbahnvermögen)*, reference lodged by the German *Verwaltungsgericht Giessen* on 27 December 2012 (MARITAL STATUS DISCRIMINATION)

May a claim for equal treatment in the past be limited to the beginning of the financial year in which the claim was first made?

Case C-614/12 *(József Dutka – v – Mezogazdasági és Vidékfejlesztési Hivatal)*, reference lodged by the Hungarian *Debreceni Munkaügyi Bíróság* on 31 December 2012 (DISMISSAL PROTECTION)

These questions concern the scope of Article 30 of the Charter of Fundamental Rights. Does it cover the automatic termination of the employment relationship or its termination by decision? Does it lay down a prohibition against unjustified dismissal or merely a requirement for the reasons for a dismissal to be made clear in the dismissal document and for the employee to be able to verify their truthfulness and relevance? Is legislation that allows a public worker to be dismissed without reasons being given contrary to Article 30? [*See also C-6788/12 et seq. above and C-10/13 below.*]

Case C-4/13 *(Agentur für Arbeit Krefeld – Familienkasse – v – Suzanne Fassbender-Firman)*, reference lodged by the German *Bundesfinanzhof* on 2 January 2013 (FREE MOVEMENT – SOCIAL SECURITY)

These questions relate to family benefits in a cross-border situation.

Case C-10/13 *(Csilla Sajtos – v – Budapest Fováros VI ker. Önkormányzata)*, reference lodged by the Hungarian *Fovárosi Munkaügyi Bíróság* on 8 January 2013 (DISMISSAL PROTECTION)

Does the right to protection against unjustified dismissal constitute a fundamental right which, as a general principle, forms part of EU law and is to be regarded as a primary rule of law? If so, are civil servants also entitled to that right?

Case C-20/13 *(Daniel Unland – v – Land Berlin)*, reference lodged by the German *Verwaltungsgericht Berlin* on 15 January 2013 (AGE DISCRIMINATION)

The same questions as in cases C-540 and 541/12 summarised above, but with the following additional questions:

Does a transitional law under which existing judges are placed on a particular point of the new salary scale according to the pay they attained under the old (discriminatory) law on the transition date and according to which further progression to higher points is calculated based on experience attained since that date, constitute a perpetuation of existing age discrimination? If so, is this perpetuation justified by the legislative aim of protecting not only acquired rights but also the expectation of lifetime income? Or can it be justified by the fact that the

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alternative (individual placement also of existing judges according to experience) would involve increased administrative expenditure? If not, is levelling up the only remedy?

Does a transitional law which secures faster pay progression for existing judges who had reached a certain age at the time of transition than that available to existing judges who were younger that time, constitute age discrimination?

Cases C-22/13. C-61/13, C-62/13 and C-63/13 *(Raffaella Mascolo – v – Ministero dell'Istruzione and other cases)*, references lodged by the Italian *Tribunale di Napoli* on 17 January 2013 and 7 February 2013 (FIXED-TERM WORK)

These questions relate to Clause 5 of the Framework Agreement on fixed-term work annexed to Directive 1999/70. This clause requires Member States to introduce certain measures, "in a manner which takes account of the needs of specific sectors and/or categories of workers", to prevent abuse of fixed-term contracts "where there are no equivalent legal measures to prevent abuse". The Italian regulatory framework for the schools sector allows for successive fixed-term contracts to be concluded with the same teacher an indefinite number of times and without any break in continuity, in order, inter alia, to address permanent staff-related requirements. Does that regulatory framework constitute an "equivalent legal measure"? Can the fact that teachers work for the public service justify results that are different from those in the private sector? What are the consequences of an unlawful interruption of a fixed-term employment relationship?
Is a statement of the circumstances in which a fixed-term contract may be converted into a permanent contract one of the aspects about which the employee must be informed under Directive 91/533 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship? If so, is a retroactive amendment to the legislative framework contrary to Article 8(1) of Directive 91/533 (under which employees who consider themselves wronged by a failure to comply with the Directive must be able to pursue their claims by judicial process)?

Case C-38/13 *(Małgorzata Nierodzik – v – Samodzielng Publiczny Psychiatryczny Zakład Opieki Zdrowotnej)*, reference lodged by the Polish *Sad Rejonowy w Białymstoku* on 25 January 2013 (FIXED- TERM WORK)

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Does Directive 1999/70 permit a situation in which a public service worker, who has been recruited on a fixed-term contract without the Directive's requirements having been satisfied, is entitled to compensation in respect of damage only if he proves (or provides presumptive evidence) that he has had to forgo other, better employment opportunities?

Case C-53/13 *(Strojírny Prostejov, a.s. – v – Odvolací financni reditelství)*, reference lodged by the Polish *Krajský soud v Ostrave* on 30 January 2013 (FREEDOM TO PROVIDE SERVICES)

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Case C-57/13 *(Marina da Conceição Pacheco Almeida – v – Fundo de Garantia Salarial)*, reference lodged by the Portuguese *Tribunal Central Administrativo Norte* on 4 February 2013 (INSOLVENCY)
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Case C-89/13 *(Luigi D'Aniello et al – v – Poste Italiane SpA)*, reference lodged by the Italian *Tribunale di Napoli* on 22 February 2013 (FIXED-TERM WORK)

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Case C-118/13 *(Gülay Bollacke – v – K+K Klaas & Kock B.V. & Co. KG)*, reference lodged by the German *Landesarbeitsgericht Hamm* on 14 March 2013 (PAID LEAVE)

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Case C-173/13 *(Maurice and Blandine Leone – v – Garde des Sceaux)*, reference lodged by the French *Cour administrative d'appel de Lyon* on 9 April 2013 (GENDER DISCRIMINATION)

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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).

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

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18 October 2012, C-498/10 (*X*) re deduction of income tax at source from footballers' fees (EELC 2012-4).

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8 November 2012, C-268/11 (*Gühlbahce*) re residence permit of Turkish husband (EELC 2012-4).

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20 June 2013, C-7/12 (*Riežniece*): re dismissal after parental leave based on older assessment than employees who did not go on leave (EELC 2013-2).

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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).

15. Fundamental Rights

7 March 2013,C-128/12 (*Banco Portugues*): ECJ lacks jurisdiction re reduction of salaries of public service employees (EELC 2013-2).

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