EELC

EUROPEAN EMPLOYMENT LAW CASES

OFFICIAL JOURNAL OF THE EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION EELA

2014 | 1

UK: dismissals to help sell business: ETO

Greece: dismissal for being HIV-positive violates ECHR

Germany: HIV positive employee disabled, even without symptoms

Denmark: paying under-18s less not discriminatory

France: new works council legislation

Sdu UITGEVERS

www.eelc-online.com

EELC
European Employment Law Cases

Publishing information
EELC is published four times a year.
Subscription includes full access to:
www.eelc-online.com.

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

Advertising and further details please email
eelc@sdu.nl

Copyright
Sdu Uitgevers, The Hague (2013)

ISSN
1877-9107

Subscription rates: one year, including access to website: € 229,25*

* for Dutch subscribers
6% VAT will be added

Sdu UITGEVERS

Nederlandse uitgeversverbond
Groep uitgevers voor vak en wetenschap

INTRODUCTION

The case reports in this issue were contributed by lawyers from:

Randl Partners in Czech Republic
Lewis Silkin in UK (2x)
Kyriakides Georgopoulos in Greece
Luther Rechtsanwaltgesellschaft in Germany (2x)
MOSATI Rechtanwälte in Austria
Norrbom Vinding in Denmark
SteensmaEven in The Netherlands
BarentsKrans in The Netherlands
Allen & Overy in France
MGG Legal in France

Comments on the case reports were contributed by these firms as well as by Beata Kartiková (Slovakia), Hans Jørgen Bender and Are Fagerhaug (Norway), Gabriella Ormai (Hungary), Johanna Ellonen (Finland), Anna Praxitelous (Cyprus) and Daniela Krömer, Manuel Schallar and Martin Risak (Austria).

Attention is drawn to the judgment by the UK Court of Appeal on the difficult issue of when a transfer is or is not for an economic, technical or organisational ("ETO") reason. Case law on this question is scarce throughout Europe. The Court of Appeal makes a distinction between the transferor's reason for dismissals (in this case, by the administrator of a business "in administration") and his ultimate objective. Dismissals made to reduce a business' wage bill in order to continue as a business can constitute an ETO reason even if the longer term objective of reducing the wage bill is to make the business more valuable with a view to selling it. The judgment highlights the tension between the rules on transfer of undertaking and those on insolvency.

A judgment by the German *Bundesarbeitsgericht* focuses on the legislation aimed at combatting the use of "temps" for work that is effectively of a permanent nature for long periods of time, an issue that is under debate in many European countries.

Peter Vas Nunes, editor

2014/1

Transfer of undertaking may happen in unexpected cases (CZ)

CONTRIBUTOR: NATASA RANDLOVA*

Summary
There is a transfer of an undertaking not only in cases where the employer's undertaking, or part of it, is transferred to another employer based on an agreement or other legal reason but also where a company ceases to trade and another company owned by the same people starts to perform the same activities in the same premises, for the same clients but without any agreement on the transfer of the business itself, but where equipment has been contractually transferred between the two companies.

Facts
The plaintiff in this case was a female employee who worked in a dental laboratory called ALTABOR. In 2009, she was dismissed for organisational reasons caused by adverse financial circumstances of her employer. She brought a claim in court because she considered the dismissal unfair (according to her, the true reason of her dismissal was the risk of occupational disease).

While the proceedings were ongoing, one of the original owners of ALTABOR (the 'original defendant') established a new company called JK Dent with two other partners, based at the same address as the original defendant, performing the same activity for the same clients and employing the same employees. The original defendant even sold some of its equipment to JK Dent but no agreement covering sale of customers, transfer of employees, the lease arrangements or other matters was made between the two companies.

Based on these changes, the plaintiff asked the court to alter the identity of the defendant from ALTABOR to JK Dent, arguing that there has been a transfer of the undertaking. The Czech Civil Procedure allows a defendant to ask the court to replace it with another party. If the court consents to this, the former defendant can withdraw from the case.

The court of first instance agreed to a change to the identity of the defendant because it considered that because the new defendant had continued with the activities performed by the original defendant on the same premises, using original defendant's business contacts and equipment without interruption, this qualified as the transfer of an undertaking. This decision was later confirmed by the court of second instance.

However, JK Dent filed an extraordinary appeal with the Supreme Court, arguing that the Czech regulation of transfer of undertakings must be interpreted in accordance with EU Directive 2001/23/EC and therefore the court must consider whether there had been a transfer of an economic unit which preserved its identity and which may be considered as organised grouping of assets. JK Dent further emphasized that the scope of the assets transferred from the original defendant to him was small in comparison with the whole of the original defendant's assets. JK Dent also argued that the original defendant had preserved its ability to be an employer by law. Therefore, according to JK Dent, the transferred assets did not amount to a business entity that had preserved its identity within the meaning of the Directive and ECJ case law, and no transfer of undertaking had occurred.

The plaintiff in her reply stated that the Directive is not a direct source of law in the Czech Republic. In the alternative, she argued that there had been a transfer of a business unit, which amounted to a unity of tangible, intangible and personal components and that this kind of transfer constitutes a transfer, not only according to Czech law, but also under the Directive.

Judgment
The Supreme Court came to the same conclusion as the lower courts and rejected the extraordinary appeal because the new defendant had taken over most of the employees, assets and customers and performed its activities on the same premises with no gap between the end of the original defendant's activities and the start of those of the new defendant, meaning that a transfer had indeed taken place.

The Supreme Court also responded to the new defendant's argumentation. It began by stating that a directive merely obligates a Member State to ensure that its domestic legislation is compliant with that directive, i.e. that the domestic law achieves what the directive aims to do. A directive is not directly binding between private parties. However, according to the Czech Supreme Court, even if the Directive in question had been directly binding, that would not have altered the situation, given that the value of the transferred assets is not the only element that must be considered when determining whether there has been a transfer under Article 1(1) of the Directive. In addition, it was also necessary to consider for example, the kind of activities involved, whether most of the employees were taken over, whether the customers remained the same, whether there was a gap in performance of activities, etc. By contrast, the question of whether the original employer preserved its ability to be an employer, is not relevant.

Commentary
Czech law on transfer of undertakings resembles the UK's 'TUPE' legislation, in that its definition of a transfer is broader than that of Directive 2001/23. The result is that where a transaction qualifies as a transfer within the meaning of the Directive, it is also a transfer under Czech law, and conversely, a transaction that does not qualify as a transfer within the meaning of the Directive may nevertheless be a transfer under Czech law. For this reason, the courts of first and second instance in the case reported here applied only domestic Czech law. The defendant seems to have hoped that application of the Directive would yield a more favourable outcome. The Supreme Court could have limited its judgment to a statement to the effect that the Directive is not relevant, given that Czech law is more extensive than the Directive requires, but instead, the Court used the opportunity to explain why it was of the view that the situation at issue qualified as a transfer, not only under domestic law, but also within the meaning of the Directive.

This Supreme Court's ruling gives employees a level of protection in cases where their employer decides to continue its activities under the auspices of another company. It is not uncommon for former owners to set up a 'new' company to effectively continue the business, leaving behind the 'old' company's debts and ridding itself of other problems, such as disputes between the former owners. As the concept of transfer of undertakings is still not widely known in the Czech Republic and there is little case law on the topic, the rules on transfers are sometimes not applied in these situations. A Supreme Court judgment

such as the one reported here should serve as a warning that such practices do not always have the desired effect and that employees are protected exactly as the EC legislator intended when it introduced the concept of transfers in 1977.

Comments from other jurisdictions

Cyprus (Anna Praxitelous): In Cyprus, the law that provides the framework for the transfer of an undertaking to another employer is the Safeguarding of Employees' Rights in the Event of Transfer of Undertakings, Businesses or Parts of Undertakings or Businesses Law of 2000 (Law No. 104(I)/2000) which came into force on 7 June 2000 ('the Law'), as amended in 2003. The Law transposes Directive 2001/23/EC (the "Directive"), adopting the same basic principles and even reiterating a number of words of the Directive verbatim.

The Law applies to any transfer of (parts of) undertakings or businesses to another employer as a result of a legal transfer or a merger. A "transfer" means any transfer of an economic entity which retains its identity as an identifiable grouping of resources pursuing an economic activity, whether or not that activity is main or ancillary. The Law excludes from its scope vessels and ships as well as the reorganisation or redistribution of functions of public bodies.
The Law is relatively new and as such there is a lack of case law in Cyprus dealing with this matter. The courts will rely largely on precedents from other EU jurisdictions.

In the case of *Kyriakoulla Polycarpou - v - Frigg Restaurant Ltd and Redundancy Fund*, reported in EELC 2011/37, the issues were whether: (i) the dismissal was actually due to redundancy reasons; and (ii) whether there was a transfer of undertaking. According to the facts of the case, the company ceased to operate and after a certain period of time, the same activity was carried on by a second company. According to the Court, the non-existence of staff during that period of time, together with the fact that the company ceased to operate could not exclude the existence of a transfer as defined in the Directive and the Law, since the undertaking retained its identity. The Court also took into account the fact that there was no allegation that the dismissal was due to economic, technical or organization reasons that would justify a finding of redundancy. In light of the facts of this case, the Court concluded that the dismissal in question was unfair and that the applicant was entitled to compensation.

Slovakia (Beáta Kartíková): Pursuant to Slovak law, the transfer of rights and obligations arising from employment relationships occurs either by law upon legal succession or by agreement. The Slovak Republic has transposed the provisions of EU Directive 2001/23/EC into the Slovak Labour Code that state that if an economic unit (the business or part of it) or an employer's tasks or activities, or part of them, are transferred to another employer, the rights and obligations arising from employment relationships towards the transferred employees shall pass to the transferee. The term 'transfer' means the transfer of an economic unit which retains its identity as an organised grouping of resources (with tangible, intangible and personnel components), aimed at the pursuit of an economic activity, whether it be a core activity or an ancillary one.

We agree with the opinion of Czech courts that when judging whether there has been a transfer of a business (or an economic unit) not only the value of the transferred assets, but also other aspects should be considered.

There is no comparable case law dealing with transfers of employers in the Slovak Republic, but we would expect that in similar cases the Slovak courts would follow the opinion of the Czech courts.

Subject: Transfer of undertakings
Parties: L.K. – v – JK Dent s.r.o.
Court: *Nejvyšší soud Ceské republiky* (Supreme Court of the Czech Republic)
Date: 22 January 2014
Case number: 21 Cdo 753/2013
Hard copy publication: -
Internet publication: http://www.nsoud.cz/

* Nataša Randlová is a lawyer with the Prague firm of Randl Partners, randlova@randls.com.

2014/2

Dismissals shortly before a transfer were for an ETO reason even though the ultimate objective was the sale of the business (UK)

CONTRIBUTOR EMMA PERERA*

The administrator of a business in financial difficulties found a potential purchaser of its assets and in May 2010 the parties reached agreement on the sale of the assets subject to a certain condition being met. Three months later, in August 2010, the condition was satisfied and the business was sold. In the meantime, the business was experiencing such severe cash flow difficulties that in late May 2010, the administrator dismissed nearly all administrative staff. Claims were later brought by three of those employees that their dismissals were unfair under TUPE. Was there an economic, technical or organisational ('ETO') reason for the dismissals? The Court of Appeal, overturning the decision of the Employment Appeal Tribunal ('EAT'), distinguished between the immediate reason for the dismissals (cash flow difficulties) and the administrator's ultimate objective (sale of the business) and found that there was an ETO reason. This case highlights that even in the context of insolvency procedures, where decision-makers will often be focused on the sale of the business, an ETO reason for related dismissals can exist. However, a careful and detailed examination of the facts of each case will be essential.

Facts

In 2009, London-based Crystal Palace Football club got into severe financial difficulties. In January 2010, the company which owed the club, Crystal Palace FC (2000) Limited (the 'Club'), went into administration and Mr Brendan Guilfoyle was appointed as the administrator. Administration is a procedure under the Insolvency Act 1986 used by companies facing financial difficulties.

An insolvency practitioner is appointed as a company's administrator with the purpose of rescuing the company or reorganising or realising the assets of the company under the protection of a statutory moratorium which prevents creditors from enforcing claims against the company.

Often, an administrator sells the assets of the company as a going concern, which in most cases will amount to a transfer under the Transfer of Undertakings (Protection of Employment) Regulations 2006 ('TUPE').

There was only one credible bidder for the assets of the Club being a consortium led by Mr Steve Parish. Negotiations with Mr Parish were complicated as the consortium wished to purchase not only the assets of the Club but the club stadium, which was owned by a different company, Selhurst Park Ltd.

In May 2010, the terms of a sale and purchase agreement in relation to the assets of the Club were reached with Mr Parish. The agreement was held in escrow and did not have legal effect because it was being held back pending the sale of the stadium.

By the end of May 2010, the Club was facing severe cash flow difficulties. As the football season was now over and there was no sale imminent, Mr Guilfoyle decided to sell the Club's most valuable players and dismiss all administrative staff other than those necessary to permit the core operations of the Club during the closed season. These dismissals took effect at the end of May 2010. News of the dismissals was picked up by the media which had the result of putting pressure on Selhurst Park Ltd's bank to facilitate the sale of the stadium to the consortium.

As a result, in August 2010 the consortium purchased the Club's assets and the stadium and they were transferred to the consortium's company, CPFC Limited. Mrs Kavanagh and three other administrative employees who were dismissed by the Club brought claims that their dismissals were unfair.

TUPE protects employees' rights when businesses are transferred and is the transposition into domestic law of the requirements of the Acquired Rights Directive (2001/23) (the 'Directive'). Regulation 7 of TUPE makes a dismissal because of, or for a reason connected with the transfer, unfair unless there is an ETO reason.[1]

If a pre-transfer dismissal is unfair then liability for the dismissal automatically transfers to the purchaser.

In the case of *Spaceright Europe Limited v Baillavoine [2012] ICR 520*, the Court of Appeal held that the dismissal of a chief executive on the first day that his employer, *Spaceright*, went into administration had been in connection with a later transfer of *Spaceright* and that there was no ETO reason for the dismissal.

The court held that the reason for the dismissal was to make the business more desirable to prospective purchasers. This did not relate to the conduct of the business as a going concern and could not be an ETO reason.

Judgment

At first instance, the tribunal concluded that as the sale of the Club was a possibility at the time that the dismissals took place, they were for a reason connected with the eventual transfer. When considering whether there was an ETO reason for the dismissals, the tribunal made a distinction between the administrator's reason for the dismissals and his ultimate objective.

In its view, dismissals made to reduce the wage bill in order to continue a business would be an ETO reason which could be viewed separately from a longer term objective of selling the business in due course.

By contrast, reducing the workforce to make a business more attractive to a prospective purchaser (whether or not it has yet been identified), would not be an ETO reason.

Applying this to the facts, the tribunal found that although Mr Guilfoyle intended to continue the Club with a skeleton staff in the hope that it might be sold in the future, the reason he made the dismissals was because the Club had run out of money and would have to be liquidated unless staff costs were immediately reduced. Further, the particular circumstances of the Club meant that there were even stronger reasons than usual for averting liquidation. In particular, it was a seasonal business and its most valuable assets were its players, which meant that in liquidation it would have very few assets to realise. Consequently the tribunal concluded that there was an ETO reason for the dismissals.

The Claimants appealed. The EAT overturned the decision of the tribunal. In its view and relying on the decision in *Spaceright*, the only possible conclusion was that the dismissals were not for an ETO reason because they were not for the purpose of continuing the conduct of the business but were with a view to sale or liquidation. The Respondents appealed in their turn.

The Court of Appeal reinstated the tribunal's decision. Maurice Kay LJ, giving the leading judgment, found that the tribunal was justified in distinguishing between Mr Guilfoyle's reason for implementing the dismissals and his ultimate objective of selling the business as a going concern. He noted the tension between TUPE, which protects employees in the context of business transfers, and the statutory provisions relating to insolvency, which seek to ensure the best results for creditors and therefore often involve the dismissal of staff.

The "legal fulcrum" is regulation 7 of TUPE which regulates when those dismissals are fair. Assessing the application of regulation 7 is "an intensely fact-sensitive process". The courts have to be careful to avoid allowing an administrator to artificially contrive an ETO reason but at the same time care has to be taken before characterising an arrangement by an administrator as an illegitimate manipulation of TUPE.

In this context, *Spaceright* could be distinguished. There could not be an ETO reason in the *Spaceright* scenario because *Spaceright* was always going to need a chief executive (it was just desirable not to have one when selling the business); no change in the workforce was required. Therefore there could be no ETO reason.

Lord Justice Briggs, concurring, noted that if TUPE were to apply so as to transfer the liability for dismissals to the purchaser, purchasers would seek to reduce the purchase price accordingly, thus reducing the amount available to the administrator to distribute to creditors.

The result would be that those dismissed employees' claims would achieve a priority in the insolvent distribution not envisaged by the insolvency laws (as they would be able to claim in full against the purchaser).

1 From 31 January 2014, the law changed and there will only be an unfair dismissal where the 'sole or principal reason for the dismissal' is the transfer and there is no ETO reason.

In *Whitehouse v C. A. Blatchford Ltd [2000] ICR 542* the Court of Appeal made clear that the purpose of the Directive is to safeguard the rights of employees but not to place them in a better position by virtue of the transfer. In Briggs LJ's view, whilst this does not mean a dismissal by an administrator can never be a breach of TUPE, it is a further reminder of why a "subjective fact-intensive analysis of the sole or principal reason" for the dismissal is required.

Commentary

The EAT's decision, had in effect, made it impossible for administrators to dismiss employees without being in breach of regulation 7 of TUPE. This seems an overly wide interpretation of TUPE and it was therefore not surprising that it was overturned by the Court of Appeal.

It is now clear that in the context of administrations, having the sale of the business as the ultimate objective is not, of itself, sufficient to make related dismissals unfair. However, it is clear that courts will take an extensive and detailed review of the particular facts of each case to ensure there is genuinely an economic, technical or organisational reason for any dismissals and, furthermore, that they entail changes in the workforce.

As such, administrators will still need to take care when dismissing employees to avoid falling foul of TUPE.

Comments from other jurisdictions

Cyprus (Anna Praxitelous): The Safeguarding of Employees' Rights in the Event of Transfer of Undertakings, Businesses or Parts of Undertakings or Businesses Law of 2000, as amended (the "Law"), provides that a transfer shall not in itself constitute grounds for the dismissal of an employee by either the transferor or the transferee. The right to dismiss due to economic, technical or organizational reasons (ETO reasons) which require changes to the workforce, do however exist. Essentially, lawful dismissals may arise in cases where the transfer of undertaking results in redundancies, as provided in section 18 of the Termination of Employment Laws of 1967, as amended.

If the employment contract or employment relationship is terminated by reason that the transfer involves a substantial change to the terms of employment which are to the detriment of the employee, the employer shall be deemed responsible for the termination of the contract of employment, or employment relationship.

The 2012 case of *Giorgos Economides & Others - v - Exe-Lens Ltd and Redundancy Fund* concerned an unfair dismissal claim. The matters to be examined were whether (i) a transfer of undertaking took place within the meaning of the Law and Directive 2001/23 and (ii) whether there was a genuine reason for redundancy. According to the facts of the case, two companies, the Employer Company and Interoptic Ltd, merged and transferred their activities and assets to a new company, Interlens Ltd, registered by the shareholders of the two companies. All the employees of the Employer Company, with the exception of the applicants, continued their employment with Interlens Ltd. The Employer Company made the applicants redundant due to the closing of the departments where they were employed. The Court, taking guidance from ECJ case law, ruled that a transfer of undertaking had taken place as a result of the merger. Further, the Court noted that particular attention is required in cases where dismissals due to ETO reasons have occurred at the same time as a transfer of undertaking. In relation to the reason of the applicant's dismissals, the Court ruled that, based on the facts of the case, it appeared that the Employer Company's decision to close the departments where the applicants were employed, was taken prior to the decision to transfer and concerned the viability of the business. The fact that the realisation of that decision happened at the same time as the transfer could not prevent the Employer Company from taking such decision. It was ruled that the redundancy was genuine as per the provisions of the Termination of Employment Law of 1967 as amended, due to the closing of the departments where the applicants were employed.

The Netherlands (Zef Even): Case law in the Netherlands on ETO reasons is scarce. The Dutch UWV, a governmental agency in charge of assessing requests to terminate an employment agreement by notice, has published a dismissal policy. In this policy it explains when it will grant and when it will refuse a dismissal permit. This policy also explains when this is the case if the dismissal is planned around a transfer of undertaking. Not surprisingly, the UWV clearly states that employees may not be fired by reason of the transfer itself. Dismissal permits may, however, be granted even where a possible transfer of undertaking is about to take place, should a reorganisation involving redundancies be based on an economic necessity, *regardless* of that transfer. In such a case, the company must be restored to health based on ETO reasons. Dismissal permits will be refused if the redundancies are aimed at making it easier to sell the business. The reorganisation should strictly be based on economic, technical and/or organisational circumstances, which themselves justify the dismissals, irrespective of the transfer. The outcome of the current UK judgment would therefore probably also be permitted in the Netherlands. There was after all an ETO reason for dismissal, which had the side effect that the company was easier to sell. In the *Spaceright* case, no change in the workforce was required, and therefore there could not have been an ETO reason. The same would, in my view, apply in the Netherlands.

Subject: Transfer of undertakings - ETO reasons
Parties: Crystal Palace FC Ltd and another – v – Kavanagh and others
Court: Court of Appeal
Date: 13 November 2013
Case Number: [2013] EWCA Civ 1410
Internet publication: -

* Emma Perera is a Partner at Lewis Silkin LLP: www.lewissilkin.com.

2014/3

Dismissal for being HIV-positive violates ECHR (GR)

CONTRIBUTOR EFFIE MITSOPOULOU*

Summary
In 2009, the Greek Supreme Court held that being HIV-positive does not make an employee 'disabled'. In a recent judgment, the European Court of Human Rights held otherwise.

Facts
This case was reported in EELC 2009/26. The main facts were as follows. See the 2009 report for a more detailed outline of the facts.

In February 2005, the plaintiff, Mr IB (his full name is not disclosed), informed three of his colleagues that he was HIV-positive. Soon, the entire company of about 70 employees knew about IB's medical condition. This caused anxiety among the staff. At the employer's request, a doctor explained to the staff that there was no risk of contagion, that the plaintiff was perfectly capable of continuing in his job and that there was no reason for concern. However, this explanation failed to remove the staffs' anxiety, and a group of 33 employees signed a petition to management to dismiss the plaintiff. Although management was reluctant to dismiss IB, in the end it gave in to the pressure to do so and terminated the plaintiff's contract.

The plaintiff brought legal proceedings, asking the court to declare his dismissal invalid, to order the defendant to reinstate him and to pay him compensation for lost income as well as €200,000 for emotional loss.

National proceedings
The court of first instance ruled partially in the plaintiff's favour, declaring the dismissal invalid and awarding him compensation for lost salary. The plaintiff was not awarded immaterial damages nor was he reinstated, because in the meantime he had found another job. On appeal, the Athens Court of Appeal upheld the lower court's judgment, additionally awarding €1,200 for emotional loss. It found that the staffs' anxiety was unfounded, that this had been explained adequately to them by the company doctor and that the plaintiff's infection with the non-contagious HIV virus did not stand in the way of the company's normal operations. The Court of Appeal weighed the company's need to continue operating smoothly in the face of the staff's prejudice against the plaintiff's reasonable expectation to be protected at such a difficult time for him.

The defendant company lodged an appeal with the Supreme Court. On 17 March 2009, it overturned the Court of Appeal's judgment, holding:
- that the dismissal was not motivated by spite, vengeance or anger against the plaintiff;
- that the dismissal was justified by the employer's need to restore peace and quiet among its staff and to maintain smooth operations;
- that the other employees were seriously concerned about their health.

The Supreme Court therefore annulled the Court of Appeal's judgment and instructed that court to rehear the case. However, neither party brought the case to the Court of Appeal. As a result, the case ended in terms of Greek domestic proceedings.

ECtHR's judgment
On 2 December 2009, the plaintiff, represented by two (Greek) lawyers in London, brought proceedings against the Hellenic Republic (Greece) before the European Court of Human Rights (ECtHR). He alleged violation of Article 8 in combination with Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the 'Convention'). Article 8(1) of the Convention provides that:
"Everyone has the right to respect for his private and family life, his home and his correspondence."

Article 14 provides that:
"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground 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."

The ECtHR delivered its judgment on 13 October 2013, almost four years later. Briefly stated, it held as follows.

Applicability of Articles 8 and 14
The notion of 'private life' is broad. It can cover aspects of a person's physical and social identity, including the right to enter into and to develop personal relationships, to develop one's personality and the right to self-determination.

The plaintiff's complaint is not that the Greek national authorities intervened directly in such a manner as to result in his dismissal, but rather that they failed to protect his private life against interference by his employer. This failure engages the State's responsibility.

There can be no doubt that matters of employment and matters implicating HIV-infected persons fall within the scope of private life.

Even though the plaintiff's dismissal was motivated by the need to preserve a good working climate within the company in question, the event that triggered it was the plaintiff's announcement that he was HIV-positive.

Discrimination or account of a person's health must be considered to fall within the scope of the expression "or other status" within the meaning of Article 14.

In view of the foregoing, Articles 8 and 14 apply to the circumstances of this case.

Comparator issue
According to the ECtHR's established case-law, discrimination exists where persons in similar or comparable situations are treated differently in the absence of objective and reasonable justification.

The ECtHR finds that the plaintiff's situation must be compared to that of the other employees in the company that employed him. He was treated less favourably than any of his colleagues would have been treated, solely on account of his being HIV-positive.

Justification
Once a plaintiff has established the existence of different treatment,

it falls upon the defendant demonstrate that the different treatment was justified. Such a justification must pursue a legitimate aim and the means adopted to achieve that aim must be proportionate. Although governments enjoy a certain margin of application, the extent thereof depends on the circumstances, the strand of discrimination involved and the context.

In its judgment in *Kiyutin – v - Russia* (application 2700/10), the ECtHR held that ignorance concerning the manner in which HIV spreads has fed prejudice and has led to stigmatisation and marginalisation of HIV-positive persons. This has made infected persons, as a group, vulnerable and that in turn reduces the State's margin of appreciation where it comes to (not) adopting measures in favour of this group.

A comparison of the legislation of thirty Member States of the Council of Europe indicates that seven of them have adopted statutes aimed specifically at protecting HIV-positive persons. Although the remaining 23 Member States have not done so, HIV-positive employees in those countries can rely on general non-discrimination law. The ECtHR references a 4 October 2000 judgment by the South African Constitutional Court in the *Hoffmann – v - South African Airways* case (CCT 17/00), as well as the following European judgments:

- T*ribunal correctionel de Pontoise* (France), 13 December 1995, in which an employer was sentenced to five months in prison (suspended) and a fine of €3,000 for dismissing a HIV-positive assistant veterinarian on the pretext of a business reason;
- *Tribunal de travail de Dendermonde* (Belgium), 5 January 1998, in which an employer was held to have abused its right of dismissal when it dismissed an employee on account of him being HIV-positive;
- *Tribunal federal* (Switzerland), case ATF 127 III 86, in which a dismissal based exclusively on the employee being HIV-positive was held to be abusive;
- *Regional tribunal in Poltava* (Ukraine) 18 October 2004, in which a newspaper owner was ordered to compensate an employee whom he had dismissed on account of being HIV-positive;
- *Constitutional Court* (Poland), 23 November 2009, in which a ministerial regulation to the effect that HIV-positive police officers where unfit for service was declared unconstitutional;
- *Supreme Court* (Russia) 26 April 2011, in which a provision in the Aviation Regulations prohibiting HIV-positive pilots from flying was annulled.

The ECtHR also referenced the amendment of a Croatian police regulation that prohibited HIV-positive persons from becoming or remaining police officers.

In the case at hand, the Greek Supreme Court failed to balance the competing interests of the applicant and his former employer in a manner that takes account of the circumstances of the matter and is as thorough as the manner in which the Court of Appeal weighed those interests. Moreover, the Supreme Court based its finding on a manifestly inaccurate premise, namely the "contagious" nature of the plaintiff's affliction.

Based on the above, the ECtHR orders the Greek government to pay the plaintiff not only the sum previously awarded to him for lost income, but also €8,000 for immaterial damages. The ECtHR's judgment became final on 3 January 2014.

Commentary

My commentary consists of two parts. First, I will examine how the three higher courts balanced the conflicting interests involved in this case: the Athens Court of Appeal, the Greek Supreme Court and the ECtHR. The second part of my commentary focuses on the comparator issue.

Competing interests

The Athens Court of Appeal expressly recognized that the plaintiff's HIV-positive status had no effect on his ability to carry out his work and that there was no evidence that it would lead to an adverse impact on his contract, which could have justified its immediate termination. It also recognized that the company's existence was not threatened by the pressure exerted by the employees. The employees' supposed or expressed prejudice could therefore not be used as a pretext for ending the contract of an HIV-positive colleague. In such cases, the need to protect the employer's interests must be carefully balanced against the need to protect the interests of the employee, who is the weaker party to the contract, especially where the employee is HIV-positive.

The Supreme Court, on the other hand, did not weigh up the competing interests in such a detailed and in-depth manner as the Court of Appeal. In a reasoning that was relatively short, given the importance and unprecedented nature of the issues raised by the case, it held that the dismissal had been fully justified by the employer's interests, in the correct sense of the term, since it had been decided in order to restore calm within the company and to ensure its smooth operation. Whilst the Supreme Court did not dispute the fact that the plaintiff's illness had no adverse effect on the fulfilment of his employment contract, it nonetheless based its decision, in justifying the employees' fears, on clearly inaccurate information, namely the "contagious" nature of the plaintiff's illness. In doing so, it ascribed to the smooth functioning of the company the same meaning which the employees gave, and aligned it with the employees' subjective perception of smooth functioning.

Finally, the only issue at stake for the plaintiff before the Supreme Court was the compensation he had been awarded by the Court of Appeal, as his initial request to be reinstated in his post had been dismissed by both the first instance and appeal courts. Moreover, the Supreme Court could not speculate as to what the attitude of the company's employees would have been had it upheld the findings of the lower courts in this case, or, in particular, had legislation or well-established case law protecting HIV-positive individuals in their workplace existed in Greece.

In its 2010 judgment in *Kiyutin – v – Russia*, the ECtHR held that ignorance about how AIDS spreads has bred prejudices which, in turn, have stigmatized or marginalized those who carry the HIV virus. It therefore considered that people living with HIV are a vulnerable group with a history of prejudice and stigmatization and that Member States should only be afforded a narrow margin of appreciation in choosing measures that could single out this group for differential treatment on the basis of their HIV status. In the *I.B. – v – Greece* case reported above, the applicant's employer had terminated his contract on account of the pressure to which it was subjected by certain employees, and this pressure had originated in the applicant's HIV status and the concerns to which it had given rise among those persons. Further, the company's employees had been informed by the occupational doctor that there was no risk of infection in the context of their working relations with the applicant. In view of these simple facts, the ECtHR found that the Greek Supreme Court failed to provide an adequate explanation as to how the employer's interests outweighed those of the plaintiff and it

failed to weigh up the rights of the two parties in a manner consistent with the ECHR.

Comparator

When EELC reported the Greek Supreme Court's judgment in 2009, comments were received from the UK, The Netherlands, Spain, Germany and Italy. The contributor from the UK, Richard Lister, made reference to a 2006 judgment by the British Employment Appeal Tribunal (the 'EAT') in the *High Quality Lifestyles – v –* Watts case. That case also concerned the dismissal of a HIV-positive employee.

The definition of direct disability discrimination in the UK Disability Discrimination Act 1995 was:
"A person directly discriminates against a disabled person if, on the ground of the disabled person's disability, he treats the disabled person less favorably than he treats or would treat a person not having that particular disability whose relevant circumstances, including his abilities, are the same as, or not materially different from, those of the disabled person."

According to this definition, the comparator must satisfy two conditions which appear to conflict with each other:
(a) he must not have the particular disability which the disabled person has; and
(b) his relevant circumstances, including his abilities, must be the same as, or not materially different from, those of the disabled person.

Applying this definition in *High Quality Lifestyle*, the court of first instance found that the dismissal constituted direct disability discrimination, but the EAT overruled this:
"... holding that a hypothetical comparator, who had some attribute other than being HIV positive which carried the same risk to others, would also have been dismissed".

As I interpret this, the EAT compared the dismissed employee to a (hypothetical) person with an attribute, not being HIV or another "disability", that poses a risk of transmission to other employees similar to HIV. Let us take, for example, an employee with bird flu. Supposing that in the Greek case reported above the employer had dismissed the employee for having contracted bird flu rather than HIV, and supposing also that my interpretation of *High Quality Lifestyle – v – Watts* is correct, then the EAT would not have found the dismissal to be discriminatory on account of disability.

In 2009, in the *Stockton on Tees – v – Aylott* case[1] the England and Wales Court of Appeal followed a similar reasoning as the EAT had done in *High Quality Lifestyle*. In this case, the claimant was a disabled person with bipolar affective disorder. On his return to work after a lengthy absence, strict deadlines were imposed for his work, his performance was closely monitored, and eventually he was dismissed. The tribunal found that this treatment amounted to direct discrimination, holding that *"a comparator who had a similar sickness record in respect of, for example, a complicated broken bone or other surgical problem, would not have been subjected to the same treatment"*. This led the tribunal to conclude that the claimant's dismissal had been on the grounds of his disability, concluding that *"there was a fear of the claimant's return based on a stereotypical view of mental illness"*.

The EAT, however, held that the tribunal's hypothetical comparator was wrong. It noted that, for the purposes of ascertaining whether there has been discrimination on grounds of disability, a hypothetical comparator does not have to be a "clone" of the complainant. However, it added: *"In our judgment, for a meaningful comparison to be made, the hypothetical comparator should have all the attributes or features which materially affected the employer's decision to carry out the act which is said to be discriminatory"*. On that basis, it concluded that an appropriate hypothetical comparator for the purpose of considering whether the claimant had been discriminated against in monitoring his performance and setting deadlines, in addition to having a similar sickness absence record, would have been a person who had recently been moved to a different post and whose past behaviour and performance had caused concern.

The ECtHR approaches the comparator issue differently. In its reasoning in the Greek case reported here, it held that the applicant's situation had to be compared to that of the company's other employees, since this was what was relevant in assessing his complaint of a difference in treatment. It was undisputed that the applicant had been treated less favourably than another colleague would have been, solely on the basis of his HIV-positive status.

The ECtHR does not seem to share the UK method of avoiding a conclusion of discrimination by narrowing the category of (hypothetical) comparators. I write "seem", because the ECtHR is not specific. Unfortunately, at the time of writing, only the French version of the judgment is available on the court's website. The relevant passage is (paragraph 77):
"La Cour estime que la situation du requérant doit être comparée à celle des autres salariés dans l'entreprise car c'est celle-ci qui est pertinente pour apprécier son grief tiré de la différence de traitement. Il est certain que le requérant a été traité de manière moins favorable qu'un de ses collègues ne l'aurait été et cela, en raison de sa seule séropositivité."

This seems to indicate that the ECtHR has not followed the comparator-reasoning that the EAT followed in *High Quality Lifestyle* and *Stockton on Tees*.

In my opinion, decisions such as *High Quality Lifestyle* and *Stockton on Tees* emasculate the concept of direct disability discrimination. Why would an employer behave any differently to an employee who had all the relevant attributes or features of HIV (but was not HIV positive), or to an employee who had all the relevant attributes or features of bipolar affective disorder (without actually having it)? He actually wouldn't. The British courts' interpretation of the comparative test required by the UK Disability Discrimination Act renders the concept of direct discrimination toothless.

It may be noted that two days after the Greek Supreme Court delivered its judgment, the Minister of Health issued a circular prohibiting dismissal based only on the fact that a person is HIV-positive.

Comments from other jurisdictions

Finland (Johanna Ellonen): The Finnish Supreme Court ruled on the dismissal of an HIV-positive employee as early as the beginning of the 1990's in its decision KKO:1991:2. In that decision, it upheld the District Court's and Court of Appeals' decisions in which the dismissal was held to be unjustified. The case involved an employer who dismissed a waiter a couple of months after the waiter had notified the employer that he was HIV-positive. The Supreme Court held that the dismissal

1 England and Wales Court of Appeal 29 July 2010, [2009] IRLR 548

was mainly due to the employee being HIV-positive. The employer had failed to demonstrate that the employee's working capacity had reduced or that the employee had neglected his duties. Based on information regarding the way HIV is transmitted, the Supreme Court held that working as a waiter had not established a considerable risk for the HIV infection to transmit to other employees or to customers. The Supreme Court further found that the employer had not demonstrated that the restaurant's clientele would have become aware of the employee being HIV-positive and that this would have affected the number of clients in the restaurant. The employee was awarded a compensation for unjustified termination of employment amounting to six months' salary (the maximum being 24 months' salary). The District Court would have awarded the employee a compensation amounting to 10 months' salary but the Court of Appeal lowered the compensation to six months' salary, which the Supreme Court upheld.

The reasoning in the case is very similar to that in the ECtHR's judgment in considering the way how HIV is transmitted and whether it had reduced the employee's working capacity. Interestingly, the European Convention on Human Rights entered into force in Finland on 10 May 1990, a year before the Supreme Court's judgment.

The Netherlands (Peter Vas Nunes): As it happens, the Dutch Human Rights Commission recently (31 December 2013) dealt with a case that was surprisingly similar to that of the Greek case reported above. A temporary agency employee had told three colleagues in the user company (a machinery factory) where he worked that he was HIV-positive. The user undertaking immediately terminated its contract with the temporary employment agency in respect of the "temp". The latter claimed discrimination on the grounds of disability. The user company raised a 'protection of health' defence (as per Article 2(5) of Directive 2000/78), arguing that its workers sometimes share the machines and that some of those machines have gloves fixed on them, into which a worker inserts his bare hands. Even if all regulations in the field of safety and health have been complied with, an employee can still sustain a cutting injury. This creates an unacceptable risk of a HIV-infected worker infecting others, so the user company argued. The Commission, however, ruled that the user company should have investigated that risk rather than simply assuming it existed. A protection of health defence can only be accepted where an independent expert has concluded that no reasonable accommodation is possible to eliminate the health hazard. This applies equally to a company's own staff and to temps it has hired from third parties.

Norway (Are Fagerhaug): In 1988, the Norwegian Supreme Court set aside a dismissal of a HIV-positive employee (Rt-1988-959). The case concerned a HIV-positive bartender who was fired because he was infected by HIV, and the dismissal was based on fear and other subjective considerations in relation to danger of infection of other employees and guests. The Supreme Court assumed that the bartender would not pose any real risk of infection in his work. Further, the court ruled that an unfounded fear could hardly be recognized as grounds for termination, and the Supreme Court gave the bartender right to resume his work.

Later practice has been in accordance with the 1988 Supreme Court ruling.

United Kingdom (Bethan Carney): The case of *High Quality Lifestyles Ltd v Scott Watts UKEAT/0671/05* is still the leading UK case on the comparison exercise necessary to establish direct disability discrimination. This case concerned a support worker who was HIV positive and who provided services to individuals with challenging behaviour and learning difficulties. Service users sometimes injured support workers doing this job, including by biting, scratching, kicking and punching and it was not unknown for them to draw blood. There was therefore a (small) risk of transmission. Initially, the employment tribunal found that the reason for the dismissal of the claimant was the risk of transmission and that this *automatically* meant that direct discrimination had been established. The Employment Appeal Tribunal ('EAT') criticised this approach and held that the tribunal should first have established a comparator with the same material circumstances and then have worked out if the claimant had been less favourably treated than the comparator would have been. So, if bird flu carried the same risk of transmission, had the same prognosis and affected an infected individual with symptoms that were comparable to HIV, then an employee with bird flu would be an appropriate comparator. In these circumstances, if an employer would dismiss an individual who was HIV positive but would not have dismissed the employee with bird flu, less favourable treatment (and therefore direct discrimination) would have been established.

Finally, it should be mentioned that this form of discrimination is known in the UK as 'direct discrimination' and we have two other forms of disability discrimination. The first is discrimination by not making reasonable adjustments and the second is 'disability-related' discrimination. Disability-related discrimination occurs when an employer discriminates against a disabled person for a reason related to their disability, for example, because an employee with cerebral palsy has mobility issues. It is possible to 'justify' disability-related discrimination but not direct discrimination. So, dismissing someone because they have an infectious disease would be 'disability-related' discrimination and the question of justification would be engaged. The employment tribunal at first instance found that the employer in *High Quality Lifestyles* had committed both other types of discrimination and this was upheld by the EAT.

Subject: Disability discrimination
Parties: I.B. – Hellenic Republic
Court: European Court of Human Rights
Date: 3 October 2013
Application number: 552/10
Internet publication: www.echr.coe.int → case law → reports of judgments and decisions → volumes 2013 → cases listed alphabetically by respondent State → Greece

* Effie Mitsopoulou is a partner with Kyriakides Georgopoulos in Athens, www.kglawfirm.gr.

2014/4

DISMISSAL OF HIV-POSITIVE EMPLOYEE, PART 2 (GE)

CONTRIBUTORS PAUL SCHREINER, DAGMAR HELLENKEMPER*

Summary
The *Bundesarbeitsgericht* ('BAG') has overturned the Court of Appeal's decision reported in EELC 2012/18. An HIV-infection without symptoms constitutes a disability as defined in the Ger-man Equal Treatment Act. Therefore, the dismissal of an HIV-positive employee can lead to a successful claim for damages based on disability discrimination.

Facts
The plaintiff was born in 1987 and employed as a technical chemical assistant at the defendant pharmaceutical company. The company manufactures medication that is administered intrave nously to cancer patients. The plaintiff's first day of work was 6 December 2010. During his initial medical check-up he informed the company medical doctor that he was HIV-positive. The de-fendant reacted by terminating the employment contract within the probationary period, giving two weeks' notice. This was in accordance with section 622 (3) of the German Civil Code (the 'BGB'). The dismissal was not in breach at the German Unfair Dismissal Protection Act, neither did it violate the special dismissal protection for disabled employees[1], as this legislation does not apply during the first six months of employment.

The plaintiff sued the defendant for disability discrimination, arguing that the German Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz*) ('AGG'), which is the German transposi-tion of Directive 2000/78/EC, applies irrespective of an employee's length of service. Section 7(1) AGG protects employees against dismissal based on disability discrimination.

The defendant argued that the plaintiff did not qualify as a disabled employee. In the alternative, it argued that the plaintiff had been dismissed because of a contagious disease, not because of a disability. It pointed out that its standard operating procedures ('SOP') provided that every possible precaution should be taken to ensure that nobody is employed in the production of medication who is suffering from a contagious disease or has open cuts or injuries, including chronic skin diseases and chronic infections of Hepatitis B or C and HIV.

The *Arbeitsgericht* held that the plaintiff was indeed not disabled, noting that his medically treated HIV infection without symptoms had no impact on either his social life or his professional career. An impact on one's social life or career is not sufficient to cause a medical condition to qualify as a disability within the meaning of the AGG if the impact is solely the result of an employer's reaction to the medical condition.

The plaintiff appealed to the *Landesarbeitsgericht* ('LAG') of Berlin-Brandenburg. The LAG did not rule on whether an HIV infection without symptoms constitutes a disability. It did not need to do this, finding that the AGG was not relevant, given that section 2(4) AGG provides: "Only the general and specific provisions governing the protection against unlawful dismissal shall apply to dismissals." For a detailed summary of this judgment, see *Schreiner/Hellenkemper* in EELC 2012/18.

The plaintiff appealed to the BAG.

Judgment
The first issue to be decided by the BAG was whether the plaintiff was disabled within the meaning of the AGG. The BAG found that this was the case. It relied on the definition the ECJ has re-cently given in its decision in *Ring* (ECJ, C 335/11, 4 July 2013) that a disability should be interpreted as 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 participa-tion of the person concerned in professional life on an equal basis with other workers, and the limitation is a long-term one. This would include long-term or terminal illnesses as well. The European definition would therefore always include a determination as to whether or not the impairment was suffered on a long-term basis.

The German definition is wider, as it only requires the possibility of a long-term impairment. The Court therefore determined that the plaintiff suffers a chronic disease that has a possible impact on his daily life and his acceptance in society and in his workplace because of his HIV infection. The HIV infection is untreatable and results in a progressive failure of the immune system and hence a dysfunction of the body. Stigmatization and avoidance are the results of the infection with HIV preventing full and effective participation in society. The plaintiff had been the victim of such stigmatization and avoidance resulting in the non-disclosure of the infection to the current employer.

The next question was to determine whether the plaintiff had been dismissed on the grounds of his disability.

The dismissal, as argued by the defendant, was the result of the plaintiff's inability to perform his work according to the Standard Operating Procedures to which the company had bound itself. These procedures prohibit employees with chronic infectious diseases to work in a lab. However, they allow employees with infectious diseases such as coughs and diarrhoea to be excluded from work temporarily rather than permanently. Such temporary exclusion cannot be compared to the plaintiff's permanent exclusion, which is more akin to the dismissal of a pregnant woman who cannot perform her work because of her pregnancy or the dismissal of a person in a wheelchair, given that only disabled persons are bound to a wheelchair indefinitely. The inability of such per-sons to perform work is based on their impairment, therefore their dismissal qualifies as discrimination. As a consequence, chronic infectious diseases such as Hepatitis B or C and chronic skin diseases also qualify as disabilities according to the BAG.

The BAG thought that the court of previous instance could not have judged on the validity of the dismissal without determining whether or not a symptomless HIV infection was in fact a disability.

The third question before the BAG was whether the plaintiff's dismissal was justified. The AGG, mirroring Article 4(1) of Directive 2000/78, allows unequal treatment where it is justified by a genuine and determining occupational requirement, provided that the objective of the provision causing the unequal treatment is legitimate and the requirement is proportionate.

1 Section 90(1)(1) of Book IX of the Social Code.

The fact that the cleanroom needs to be free from contagious diseases is an important professional requirement. An employer manufacturing medication for intravenous injections must pre-vent any contamination of patients using the medication and must at the same time protect the company from potential claims for damages, declining sales and harm to its reputation.

In order to achieve this legitimate aim, preventive measures need to be taken to avoid the risk of contamination. Here, the only measure the employer took into consideration was to exclude employees suffering from contagious diseases from the cleanroom. As it had not been determined whether or not other protective measures could have been taken, it was unclear if the exclusion of the employees was the only way to reach the legitimate aim.

Finally, the BAG was faced with a complication regarding the remedy for the unjustified unequal treatment. As already mentioned, the AGG provides that a dismissal in breach of the AGG can attract only those remedies that are set forth in "the general and specific provisions governing the protection against unlawful dismissal". The AGG itself is not such a general or specific provision and the statutory provisions that do govern the protection against unlawful dismissal do not apply during the first six months of employment. Strictly speaking, this would mean that the plaintiff was left empty-handed. The BAG needed to find a creative way to get round this obstacle. It did this in the following manner.

Section 134 BGB provides that a legal action (R*echtsgeschäft*) that violates a statutory prohibition is void. Section 134 BGB is a general provision that is not specific to dismissals, or indeed to employment law. A dismissal is a legal action. Therefore, a dismissal that violates the AGG is void.

If the reluctance of the employer to take (other) preventive measures was the real reason for the dismissal, then the dismissal has to be declared void, because it would qualify as discriminatory on the grounds of disability.

The fact that the SOP of the company prevent the employer from employing the plaintiff in the cleanroom does not absolve the employer from having to examine whether protective measures can be taken to eliminate the risk of contamination of the company's products.

The case has been referred back to the LAG for further determination i.e. to clarify whether the employer could have taken preventive measures to allow the employee to work in the cleanroom.

Commentary

Whereas up until now disabled employees could be dismissed during their six-month probationary period in the same way as other employees, the BAG has set the bar higher now so as to meet the European requirements (ECJ – *Ring* – C335-11). A dismissal should not be discriminatory regardless of the stage the employment relationship has reached. In the case at hand, it is now up to the LAG once again to determine if protective measures could have been taken to allow the plaintiff to be employed in the cleanroom without the risk of contamination. If, after further consideration, the court deems this in any way possible, the termination will be declared void.

The termination of an HIV-positive employee can hence only be lawful in limited situations. While the intention of the decision is to be applauded from a justice and socio-political point of view, the legal reasoning leaves some doubts. From the decision at hand one cannot formulate clear guidelines about what kind of alternative protection measures should reasonably be taken before one group of employees is excluded from a specific type of work. Therefore, it will be even harder for the employer to find the right mechanism to protect the customers from danger on the one hand, and employees from discrimination on the other hand.

In reality, this decision will therefore probably not serve to protect employees in the same situation as the plaintiff. The case probably only went as far as the BAG because the employer stated that he was dismissed because of his inability to work in the cleanroom. Since the Unfair Dismissal Act did not apply in this case, the validity of the dismissal was difficult for the employee to contest, as all the employer needed to do was present some form of reason for the dismissal. Had the employer said less in the case at hand, it probably would have had a stronger hand.

In terms of the bigger picture, employers should now assess even more carefully whether or not they could take alternative protective measures to protect their customers before terminating employees suffering from long-term illnesses, given that their actions might be measured against the AGG - either directly or in connection with the Unfair Dismissal Act - and possibly judged to be discriminatory.

Subject: Disability discrimination
Parties: unknown
Court: *Bundesarbeitsgericht* (Federal Labour Court)
Date: 19 December 2013
Case number: 6 AZR 190/12
Hardcopy publication: Betriebsberater 2014, p. 115 (short summary)
Internet-publication: www.bundesarbeitsgericht → Entscheidung → type case number in "Aktenzeichen"

* Paul Schreiner and Dagmar Hellenkemper are lawyers with Luther Rechtsanwaltsgesellschaft mbH, www.luther-lawfirm.com.

2014/5

Paying for a disabled employee's private counselling was a reasonable adjustment (UK)

CONTRIBUTOR CHARLOTTE DAVIES*

Summary

The UK Employment Appeal Tribunal ('EAT') has decided that it would have been a reasonable adjustment for an employer to pay for a disabled employee to have private psychiatric counselling to assist with her work-related stress and depression.

Facts

Mrs Butcher worked for Croft Vets Ltd (the 'Employer') as a finance and reception manager. In 2007, the Employer decided to open a new purpose built hospital. The Employer acknowledged in Mrs Butcher's appraisal letter that her *"job is so multi-faceted that it is not sustainable*

in its present form with the additional responsibilities of the new hospital". At about the time the hospital opened, Mrs Butcher also had to implement new telephone and IT systems, which both suffered from teething troubles. From late 2008, Mrs Butcher's mother was seriously ill, which the tribunal accepted would have adversely affected Mrs Butcher's ability to perform her duties in 2008 and 2009. At around this time Mrs Butcher also completed a protracted house move.

In 2010, Mrs Butcher was asked to concentrate on debt collection after the Employer decided that she had failed to report the company's bad debt position accurately. Mrs Butcher's other duties were re-distributed.

During late April 2010, a colleague expressed concerns about having found Mrs Butcher staring out of the window in tears. Mrs Butcher was then signed off sick. The Employer gave her the choice of continuing with her job based on her current job description and taking steps to improve her performance, or narrowing her job description with a commensurately lower salary. Mrs Butcher remained off sick with stress and depression and never returned to work.

In June 2010, the Employer expressed a wish to refer Mrs Butcher to a private consultant psychiatrist they had used in the past for other employees for a report on her condition that would allow them to consider any steps they could take to facilitate her return to work. This was triggered by a sick note from Mrs Butcher. Such sick notes usually include information about the employee's condition.

In August 2010, Mrs Butcher visited the consultant, who noted that Mrs Butcher had a family history of depression and acknowledged her stressful personal circumstances. Nevertheless, the consultant reported that it was mainly work-related stress that had triggered Mrs Butcher's current severe depression.

The consultant recommended that the Employer pay for Mrs Butcher to see a clinical psychologist for treatment including cognitive behavioural therapy and fund a further six psychiatric sessions at a cost not exceeding £750. However, the consultant found that there was no guarantee this would improve Mrs Butcher's health sufficiently to enable her to return to work, and estimated that there was only a 50% chance of return.

The Employer responded to the consultant a month later with a number of further questions. In November 2010, before the consultant replied, Mrs Butcher resigned, having heard nothing from her Employer.

Mrs Butcher succeeded at the tribunal with claims for unfair constructive dismissal, failure to make reasonable adjustments and that the dismissal was an act of discrimination arising from disability.

EAT Decision

The EAT upheld the tribunal's decision and, in particular, confirmed that the Employer had failed to make reasonable adjustments for Mrs Butcher.

Constructive dismissal

Constructive dismissal arises where an employee resigns as a result of an employer's repudiatory breach of contract.

The EAT confirmed that the tribunal was entitled to find that Mrs Butcher was constructively dismissed. Mrs Butcher had claimed that her Employer's failure to make reasonable adjustments (dealt with below) had caused her resignation (i.e. her constructive dismissal). The tribunal held that the Employer should have consulted with Mrs Butcher about the consultant's recommendations. The EAT confirmed that there was no error of law on the part of the tribunal. A duty to consult had arisen from the implied term of mutual trust and confidence and the Employer should have contacted Mrs Butcher following the consultant's recommendations.

Disability

Under both the Disability Discrimination Act 1995, which was in force at the time, and the Equality Act 2010 (which has since replaced it), a person has a disability if they have a physical or mental impairment which has a substantial and a long-term adverse effect on their ability to carry out normal day to day activities. The effect of an impairment is 'long term' if it has lasted at least 12 months or is likely to last for at least 12 months. It was not disputed that Mrs Butcher was disabled.

An employer only has a duty to make reasonable adjustments for an employee who is disabled if the employer knows, or ought reasonably to know, that the employee is disabled and likely to be placed at a disadvantage because of the disability.

The EAT found that following the consultant's report, the Employer knew that Mrs Butcher had a disability and that she was likely to be placed at a substantial disadvantage in fulfilling the essential functions of her job.

Provision, Criterion or Practice

For the duty to make reasonable adjustments to arise, the employer must be using a provision, criterion or practice ('PCP') that puts the disabled person at a substantial disadvantage in comparison with someone who is not disabled.

The EAT noted that the Employment Tribunal was entitled to find in this case that the relevant PCP was that Mrs Butcher should 'be able to return to work performing the essential functions of her job'. The EAT agreed that the tribunal was entitled to make this finding regardless of whether Mrs Butcher was working on full or restricted duties.

It was held that Mrs Butcher's disability placed her at a substantial disadvantage in comparison with a non-disabled person in the same employment, as Mrs Butcher's disability put her at risk of dismissal because she could not perform the essential functions of her job. As such, the PCP placed Mrs Butcher at a substantial disadvantage because of her disability.

Reasonable Adjustments

Once a PCP that puts the disabled employee at a substantial disadvantage has been identified the employer has a duty to take such steps as are reasonable to avoid the disadvantage (in other words, a duty to make reasonable adjustments).

The EAT rejected the Employer's submission that the option to carry out reduced duties for a reduced salary was a reasonable adjustment. It held that this adjustment would not have removed Mrs Butcher's disadvantage and assisted her return to work. There was cogent evidence that Mrs Butcher was unable to perform her limited duties even before she went off sick and was on full pay. The EAT went on to consider whether the scope of reasonable adjustments required an Employer to fund private medical treatment.

The EAT noted that previous case law required an adjustment to be 'job-related'. The EAT considered that the adjustment of paying for private psychiatric counselling in this case was sufficiently job-related to fall within this test. This was because the medical opinion said that Mrs Butcher was suffering from predominantly work-related stress, and the adjustments would have involved specific support to help her return to work and cope with her difficulties in performing her job.

Although the medical opinion had not guaranteed that the counselling would work, the EAT thought there were "reasonable prospects" that the adjustment would have been successful. This was sufficient to make it reasonable for the Employer to have made the adjustment and pay for the private treatment.

The EAT further found that the adjustments were within the scope of the Code of Practice (the 'Code') in force at the time. The EAT referred to an example in the Code under "giving, or arranging for, training or mentoring (whether for the disabled person or any other person)" where a disabled person returns to work following a stroke and the employer pays for a work mentor and offers time off for mentoring.

Commentary

At first sight, this may seem quite a worrying decision for employers. Paying for private medical treatment is not something that most employers would expect to have to do for disabled employees. This was not a situation where the employer was being required to adjust the workplace or working conditions. Instead, the decision took quite a broad view of what might be a job-related adjustment. Arguably, any treatment which might help the employee to get better and so return to work could fall within this category.

Despite this decision, it is important to remember that this case turns on its own facts. The EAT was not saying that it would always be a reasonable adjustment to pay for private medical treatment for disabled employees. Rather, it found that this was a conclusion that the tribunal was entitled to come to on the facts of the case. The EAT stressed that the issue in this case was not the payment of private medical treatment in general but a specific form of support which would enable Mrs Butcher to return to work by mitigating the effect of the PCP. However, it is worth noting that this decision was reached despite evidence from the Employer that this treatment was available on the NHS and that Mrs Butcher had not taken any steps to obtain the recommended treatment.

The EAT also seems to have been particularly influenced by the fact that Mrs Butcher suffered from work-related stress, against a background of an excessive workload. It appears that tribunals will expect more from an employer by way of reasonable adjustments where that employer is somehow at fault in causing or continuing the disabled employee's difficulties. There is likely to be more case law in this area to determine to what extent the employer must be at fault for similar treatment to be seen as a reasonable adjustment.

In addition, tribunals must still make an assessment of whether such an adjustment is reasonable considering factors such as the size and resources of the business. This was seen in *Cordell v Foreign and Commonwealth Office*[1] where providing an English lip speaker for a deaf diplomat at a cost of £250,000 a year was found to be unreasonable.

Nevertheless, employers should be cautious of ignoring any recommendations for treatment, particularly from their own consultant. Where an employee is suffering from work-related stress, any support that the employer can provide can help to show that it is meeting its duty to help the employee to return to work. Initiatives such as a confidential employee assistance helpline or workplace mentoring may be particularly useful in such situations.

Comments from other jurisdictions

The Netherlands (Peter Vas Nunes): It is difficult to comment on this judgment from a Dutch perspective because both parties would most likely have acted differently, given (i) that the concept of constructive dismissal is almost non-existent in Dutch law and (ii) that employees are entitled to continued payment of (at least 70% of) their salary during periods of incapacity due to illness - whatever the cause of the nature of the illness - for up to two, sometimes even three years. A Dutch employee in Mrs Butcher's position would be very unlikely to have considered using anti-discrimination law to support her claim. Besides, it is uncertain whether Mrs Butcher's impairment - depression - would have qualified as a disability, seeing that only permanent or long-lasting impairments qualify as such and that there is no statutory provision defining 'long-term'. Moreover, I find it hard to imagine that a medical practitioner in the Netherlands, in correspondence with an employer, would mention the nature of the employee's impairment, let alone go into medical details, as happened in this case.

Finally, there is an interesting difference between UK and Dutch legal practice, on which I would like to remark. The Disability Discrimination Act 1995, on which Mrs Butcher based her claim, provides that *"Where a provision, criterion or practice applied by or on behalf of an employer [...] places the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled, it is the duty of the employer to take such steps as it is reasonable, in all the circumstances of the case, for him to take in order to prevent the provision, criterion or practice [...] having that effect".*

In other words, the duty to provide a disabled employee with reasonable accommodation exists only where not doing so would lead to unequal treatment. The first sentence of Article 5 of Directive 2000/78 also links the "accommodation duty" to unequal treatment, but it does so less explicitly, merely providing that: "In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided" (emphasis added). The link between the duty to provide accommodation and equal treatment is similarly vague in the Dutch Disability Discrimination Act. In practice, it is sufficient for a Dutch employee to argue, "I am disabled, therefore my employer must provide me with reasonable accommodation". The intermediary step that employees must take in the UK ("step 1: I am disabled, step 2: my employer is applying a PCP that places me at a disadvantage, therefore, step 3: my employer must accommodate me") is skipped over. Whether this difference in approach has practical significance is another matter. I suspect that if an employee is disabled he will always be able to take step 2 without difficulty.

Norway (Are Fagerhaug): According to the Norwegian Working Environment Act, if an employee (whether "disabled" or not) suffers reduced capacity for work as a result of an accident, sickness, fatigue or the like, the employer shall, as far as possible, implement the necessary measures to enable the employee to retain or be given suitable work. Thus, there is rarely a need for an employee to rely on

1 UKEAT/0016/11.

the legislation regarding disability discrimination in order to claim adjustments or other reasonable accomodation.

The employer's obligation to implement necessary measures is not static, and the extent of the obligation will depend on a concrete assessment of the situation as a whole. Even though it is not normal that the obligation will include covering the employee's medical expenses for psychological counselling, we cannot exclude that such measures may be considered part of the obligation in a given situation. We do however find it unlikely that the outcome of this particular case would have been the same in Norway.

Subject: Disability discrimination; duty to make reasonable adjustments
Parties: Croft Vets Ltd –v- Butcher
Court: Employment Appeal Tribunal
Date: 10 July 2013
Case Number: UKEAT/0430/12/LA
Internet publication: http://www.bailii.org/uk/cases/UKEAT/2013/0430_12_0210.html

* Charlotte Davies is an associate solicitor at Lewis Silkin LLP, www.lewissilkin.com.

2014/6

Equal pay for "temps" and the exemption from directive 2008/104 for publicly supported integration and (re-)training programs (AT)

CONTRIBUTOR MARTIN RISAK/MANUEL SCHALLAR*

Summary
For public or publicly supported vocational training, integration or retraining programs to be excluded from the scope of Directive 2008/104 on temporary agency work and national law transposing it, they must provide specific strategies and measures for workers who are difficult to place.

Facts
The plaintiff was a qualified lawyer who was also qualified to become a judge. In 2007, he applied for a job with the Austrian judicial authorities that deal with asylum applications, the *Bundesasylsenat*[1]. He was informed that the *Bundesasylsenat* could not employ him directly on account of budgetary headcount restrictions, but that he could be employed through a temporary employment agency. There was a significant likelihood that at a later stage he would be offered employment directly with the *Bundesasylsenat*, but there was no guarantee.

The plaintiff agreed to work for the *Bundesasylsenat* through a temporary employment agency. Accordingly, he entered into the employment of the defendant Verein J, a publicly funded non-profit association. This association was established with a view to helping unemployed adolescents and young adults gain relevant work experience while working in organisations that would normally not hire them.

Although the plaintiff performed the same work as the *Bundesasylsenat's* own employees, he was paid less. Until about late 2012 or early 2013, he did nothing about this, but then he brought legal proceedings against the defendant, seeking payment of the balance between what he earned and what employees of the *Bundesasylsenat* earned for the same work. His claim was based on the Temporary Agency Work Act, as amended, from 1 May 2011. The Temporary Agency Work Act is the transposition of Directive 2008/104 on temporary agency work. Article 10 of the Act is similar to Article 5 of the Directive, which provides that the basic working and employment conditions of temporary agency workers shall be, for the duration of their assignment to a user undertaking, at least those that would apply if they had been recruited directly by that undertaking to occupy the same job.

The defendant based its defence on Article 1(4)(1) of the Temporary Agency Work Act, which implements Article 1(3) of the Directive. This provision allows Member States to:
"... provide that this Directive does not apply to employment contracts or relationships concluded under a specific public or publicly supported vocational training, integration or retraining program".

Additionally, the defendant argued that the plaintiff knew and accepted the terms of his employment and was aware that he would not have been able to work for the *Bundesasylsenat* other than through the defendant. The only other way for him to gain work experience at the *Bundesasylsenat* would have been in the form of an administrative internship, in which case he would have earned even less.

In May 2013, the *Landesgericht Linz* rejected the plaintiff's claim. On appeal, the *Oberlandesgericht Linz* overturned the judgment and upheld the claim. The defendant appealed to the *Oberste Gerichtshof* (Supreme Court).

Judgment
Article 1/4 Z1 of the Temporary Agency Work Act explicitly states that the terms of the Directive do not apply to temporary agency work that is part of a public or publicly supported vocational training, integration or retraining program. The provision transposes Article 1 (3) of Directive 2008/104 more or less verbatim.

The Austrian Supreme Court decided that Article 1/4 Z1 of the Temporary Agency Work Act did not apply in the case at hand, as the essential feature of an integration or retraining program is that the participants are difficult to place and their placement goes beyond the simple provision of temporary agency workers. Such programs must include plans and strategies to provide opportunities for the participants, which they did not have before.

In the case under consideration, the claimant worked for the asylum authorities as a temporary agency worker simply because they could not afford to employ more workers directly and yet needed additional staff. As the claimant was not subject to any support concerning (re-) training or integration the reason for choosing to employ him by this mechanism was clearly to provide the authority with cheap labour.

1 The plaintiff initially worked for the *Bundesasylsenat*. After a certain time he transferred to the *Asylgerichtshof*. For ease of reference, both institutions are referred to in this case report as the Budesasylsenat.

Further, the claimant was a qualified lawyer with many years of professional experience and therefore not at all difficult to place. As he undertook the same work as directly employed legal staff without any accompanying integration or training measures he was entitled to equal pay under the Temporary Agency Work Act.

Commentary
This case demonstrates what can happen when a public authority tries to make savings whilst at the same time creating new institutions or enlarging existing functions. Even though it was clear that the judges of the asylum authorities required certain auxiliary legal services because of lack of funding for direct employment, the authority tried to use this legal mechanism, The aim of employing the claimant as a temporary agency worker was therefore to enable of the provision of those services more cheaply – and not in order to integrate an otherwise excluded worker. The Supreme Court correctly interpreted the exemption provision in the Act restrictively, in line with Directive 2008/104, and did not find that it applied to mere cost-saving measures.

Subject: Temporary agency work, equal pay, exemptions from the scope of application
Parties: Mag. G. W. – v - Verein J
Court: *Oberster Gerichtshof* (Supreme Court)
Date: 19 December 2013
Case number: 9ObA124/13w
Internet publication: http://ris.bka.gv.at/Jus → Geschäftszahl → case number

* Martin Risak is an associate professor and Manuel Schallar is a student assistant at the Department of Labour Law and Law of Social Security at the University Vienna, www.univie.ac.at.

2014/7

Justified differential treatment of under-18s (DK)

CONTRIBUTOR MARIANN NORRBOM*

Summary
Section 5a(5) of the Danish Anti-Discrimination Act, by which collective bargaining agreements may provide a difference in pay for under-18s compared to adults and an option to dismiss employees when they reach 18, is in accordance with Article 6(1) of Directive 2000/78 on anti-discrimination.

Facts
The case concerned a young sales assistant who, in accordance with the applicable collective agreement between his employer (a Danish chain of supermarkets) and the trade union HK, was paid less than his adult colleagues because he was under 18. In line with common practice in this sector, he was given notice when he reached 18.

The parties agreed that the employer's actions were in accordance with the collective agreement and that the collective agreement was fully in line with the derogation in section 5a(5) of the Danish Anti-Discrimination Act, which states that the principle of non-discrimination on grounds of age does not apply to under-18s if the employer is covered by a collective agreement containing specific provisions governing under-18s and their pay.

However, the trade union argued that section 5a(5) of the Danish Anti-Discrimination Act was incompatible with the Anti-Discrimination Directive (Directive 2000/78) and brought proceedings against the employer and the Danish Ministry of Employment.

The employer and the Danish Ministry of Employment argued that the derogation in the Danish Anti-Discrimination Act was intended to support young people's integration into the labour market by making it easier for them to gain work experience before the age of 18 and that this was a legitimate aim in accordance with the Anti-Discrimination Directive.

They further argued that the special pay regime for under-18s and the possibility of dismissing them when they turn 18 constituted an appropriate means of achieving the legitimate aim, and that the regime did not go beyond what was necessary to achieve this aim.

Decision
The Danish Supreme Court referred to Article 6(1) of the Anti-Discrimination Directive according to which a difference of treatment on grounds of age may be justified if it is objectively and reasonably justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

The Danish Supreme Court then noted that the Anti-Discrimination Directive explicitly mentions the establishment of special conditions for young people for the purpose of supporting their vocational integration as a possible difference in treatment.

With reference to the preparatory notes to the Danish Anti-Discrimination Act and various other factors, the Danish Supreme Court stated that it could be taken as a fact that section 5a(5) of the Act is intended to support young people's integration into the labour market by making it easier for them to gain work experience before the age of 18 and that this is a legitimate aim in accordance with the Act.

The Danish Supreme Court further affirmed that the special pay regime for under-18s and the possibility of dismissing them when they turn 18 must be deemed to be appropriate means of achieving the legitimate aim and it noted that it did not find that the regime went beyond what was necessary to achieve the aim. This was because the Court had regard, among other things, to the fact that the derogation only applied to the extent that the employment was covered by a collective agreement containing special provisions governing under-18s and their pay.

On that basis, the Danish Supreme Court upheld the Danish Eastern High Court's judgment in favour of the employer and the Danish Ministry of Employment.

Commentary
The decisions of the Danish Eastern High Court and the Danish Supreme Court are not surprising, as the Danish approach had previously been specifically mentioned by the ECJ in the *Hütter* case (ECJ 18 June 2009, case C-88/08), as a standard of reference.

In the *Hütter* case, the ECJ had stated that the circumstances differed from the measures described by the Danish government, which sought

further vocational integration of under-18s through a reduction in minimum pay compared to the pay level of adult employees.

Further, the Danish Supreme Court found that without the option of differential treatment, including the possibility of dismissing employees as they turn 18, employers would be less inclined to employ under-18s because of their lack of experience and the specific health and safety regulations that apply to this demographic group.

Comments from other jurisdictions

The Czech Republic (Nataša Randlová): There is no rule that would entitle employers to dismiss employees as they turn 18 under Czech law. However, along with the complete recodification of Czech private law provided by the New Civil Code as of 1 January 2014, an entirely new regime for the termination of the employment relationship of minor employees came into the Czech Labour Code. This allows for the immediate termination of the employment relationship of an employee who is under 16 by his parents or those with parental responsibility for the child in law.

The purpose of this is to allow for (principally) parents to terminate the employment relationship of a child who is under 16 years old if this is necessary for educational or health reasons and/or the development of the child. Such a termination, however, is only valid if confirmed by a court order.

And this is where the matter becomes somewhat absurd – within general civil proceedings before the Czech courts, it takes approximately a year simply to schedule the first hearing of the case. Therefore, if a parent wants to terminate his child´s employment relationship immediately, for health reasons for example, this simply cannot be achieved in a timely way. Moreover, there are questions as to who the parties to the proceedings would be. And finally, as this only arises in relation to employees under-16, in practice this means 15 year-olds, as children may only form an employment relationship once they reach 15 or complete their compulsory education.

To summarise – the regime described above is likely to have no practical effect on employment law practice, nor will it serve to protect minor employees.

The Netherlands (Peter Vas Nunes): In the Netherlands, many if not all supermarkets (as well as employers in some other sectors) have a policy of paying young staff (much) less than older staff. This has attracted some criticism over the years, but on the whole the policy meets with understanding, given the low profit margins in the food retail industry. What angers the unions more than the age-based pay differential is the supermarkets' policy of (i) hiring exclusively young staff for their unskilled jobs (on temporary contracts) and (ii) letting employees go when they get older and replacing them with younger staff, even though this hiring and firing policy is a logical consequence of the need to pay low wages.

The Dutch Minimum Wage Act sets age-dependent minimum wage levels. Employees aged 23 and over are presently entitled to a minimum of €1,477.80 + 8% = €1,596 gross per month. Younger employees are entitled to the following percentages of this amount:

Age	Percentage
22	85.0
21	72.5
20	61.5
19	52.5
18	45.5
17	39.5
16	34.5
15	30.0

In view of this enormous difference in the statutory minimum wage, it is hardly surprising that the vast majority of stock clerks and cashiers in supermarkets are 17-20 year-olds (younger ones being insufficiently employable and older ones being too expensive).

Article 7(1)(a) of the Age Discrimination Act provides that differences of treatment on grounds of age that are based on statute and are aimed at increasing employment opportunities for certain age groups, are deemed to be objectively justified. This provision is generally held to be in line with (Article 6(1) of) Directive 2000/78. Paying young employees less than adults undoubtedly increases youngsters' employment opportunities.

The former Equal Treatment Commission (now the Human Rights Commission) has held that a policy of hiring exclusively young individuals for unskilled jobs is a logical consequence of a legitimate policy of paying young staff less than adult staff, as per the Minimum Wage Act. However, a policy of not extending such young employees' contracts after a few (usually three) years, is not (automatically) objectively justified, according to the Equal Treatment Commission. It reasons that such a policy may increase employment opportunities for young people on a collective basis, but is not in the interests of the individual employees concerned and, more relevantly perhaps, is not based on statute. I find this reasoning somewhat formalistic.

Subject: Age discrimination
Parties: HK (trade union) on behalf of A supported by non-party intervener LO (the Danish Confederation of Trade Unions) – v – employer B and the Danish Ministry of Employment supported by non-party intervener DA (the Confederation of Danish Employers)
Court: The Danish Supreme Court
Date: 14 November 2013
Case number: 185/2010
Hard Copy publication: Not yet available
Internet publication: available from info@norrbomvinding.com

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

2014/8

Permanent "temp" not employed by user undertaking (GE)

CONTRIBUTORS PAUL SCHREINER AND KLAUS THÖNIßEN*

Summary
Since 2011 it has been unlawful to assign a temporary agency worker other than on a 'temporary' basis. However, the law is silent on the meaning of 'temporary', as well as on the legal consequences of violating the 'temporary' requirement. However, the law is likely to be amended shortly.

Facts
This case arose from a dispute between a 'temporary' agency worker and the hospital in which he worked. The hospital in question was publicly owned and it owned the entire share capital of a temporary employment agency (the 'Agency'). Most of the Agency's employees were assigned to work in the hospital, i.e. in the Agency's own parent company. One of those employees was the initial plaintiff in this case, whom we shall call the "temp".

German law requires a commercial temporary employment agency to have a permit. This is provided in the Temporary Employment Act (*Arbeitnehmerüberlassungsgesetz*, the 'AÜG'), which is the German transposition of Directive 2008/104 on temporary agency work. Section 9(1) of the AÜG provides that an employment contract between an unlicensed agency and a temporary agency worker is unlawful. The consequence is that the temporary agency worker would be deemed by law (Section 10(1) AÜG) to be an employee of the user undertaking to which the agency has assigned him.

Section 1(1) (second sentence) of the AÜG provides, following a 2011 amendment, that temporary workers may only be assigned temporarily ('*vorübergehend*'). See the case reported in EELC 2012/60. What 'temporarily' means is unclear. Moreover, the AÜG is silent on the legal consequence of using temporary agency workers on a permanent basis.

The temp in this case was hired on 1 March 2008. He was assigned to the hospital, where he worked in the IT department. In 2012, he brought proceedings before the local *Arbeitsgericht*. The proceedings were directed against both the agency and the hospital. The temp argued that they had breached the AÜG by letting him work permanently in the hospital and that, by analogy to Section 10(1) AÜG, his employment contract with the agency had converted into a contract with the user undertaking, in this case the hospital. He sought a declaration that the hospital had become his employer.

The *Arbeitsgericht* dismissed the claim. The temp appealed to the *Landesarbeitsgericht*. It overturned the lower court's judgment and ruled in his favour. The hospital appealed to the *Bundesarbeitsgericht* ('BAG').

Judgment
The BAG began by noting that the agency was fully licensed and that its licence had remained valid for the entire period that the temp had worked in the hospital. Therefore, his contract of employment with the agency was valid. Given that the only provision in the AÜG allowing an employment contract to be constructed with the user undertaking is Section 10(1), and given that the AÜG is silent on the consequences of violating the 'temporary' requirement, the courts lack the authority to declare a temporary agency worker to have converted into an employee of the user undertaking on any grounds other than that provided in Section 10(1). In addition, Directive 2008/104 itself contains no penalty. Admittedly, the directive defines a 'temporary agency worker' as "a worker with a contract of employment with a temporary work agency with a view to being assigned to a user undertaking to work **temporarily** under its supervision and direction". However, the directive lacks any provision explaining what the consequences would be in the event a temporary agency worker was assigned to a user undertaking to work there permanently. Moreover, there are so many possible ways to sanction the permanent use of temporary agency workers that only the legislator can determine what the correct sanction should be, not the courts.

Thus, the temp in this case, finally lost his case.

Commentary
The BAG's decision deserves approval, but it is not likely to be relevant for long, for the following reason. In September 2013 federal elections were held in Germany. They resulted in a "grand coalition" between the Christian Democrats and the Social Democrats, who entered into a coalition agreement. One of the elements of that agreement is that legislation will be introduced aimed at (i) clarifying the concept of 'temporary' assignment and (ii) making clear what the sanction for permanent assignment is. The agreement calls for an 18-month cap on assignments. Any assignment exceeding this limit will no longer be considered to be 'temporary'. It will be interesting to see what the sanction for exceeding this limit will be.

Comments from other jurisdictions
Austria (Daniela Krömer): The term "temporary" and the consequences of "non-temporary" agency work have not been explicitly decided upon by the Austrian courts. In 2003, the Austrian Supreme Court (OGH) in 9 ObA 113/03p came to the conclusion that a temporary agency worker who was as-signed to the user undertaking for nine years was "atypical" and it awarded him severance pay in accordance with the collective agreement that applied to "permanent" workers. The Supreme Court was criticised for this decision, as it was seen as lacking a sound legal basis. In its later judgments, the Supreme Court has not used the term "atypical", even though it was asked to rule on assignments lasting five years (9 ObA 158/07m) and six years (8 ObA 54/11s).

The Austrian legislator accepts long term assignments: in a recent amendment to the Act on Temporary Agency Work (Arbeitskräfteüberlassungsgesetz, the 'AÜG'),of 2012/13, a provision is included (§ 10 Abs 1a AÜG) that entitles temporary agency workers to the same company pensions as their regularly employed colleagues once they have been assigned for over four years. This indicates that assignments for more than four years are accepted.

The Czech Republic (Nataša Randlová): Under Czech law, an employment agency may temporarily assign an employee to the same company for no more than 12 consecutive months. However, there are two exceptions to this rule:
(i) where the employee is assigned to perform work in a particular job as a substitute for an employee who is temporarily unable to perform work either because the employee is on maternity leave or pa-rental leave;

(ii) the employee asks the employment agency to be assigned to the company for more than 12 months.

The second exception especially, is very often used in practice and it breaks the maximum temporary-assignment rule fundamentally, as there are no other limits or requirements that apply. In much the same way as the German rules described above, Czech law also remains silent on the legal consequences of using temporarily assigned employees on a permanent basis. Effectively, the scope of temporary assignments can only be limited by the collective agreement of a particular company.

Employment agencies and temporarily assigned employees really deserve a better and more detailed regulatory framework – as planned in Germany. The most problematic issues include the termination of temporary assignments and the special nature of temporary assignment contracts - which do not fall squarely either into employment or civil law.

Hungary (Gabriella Ormai**): On 1 July 2012 a new Labour Code (Act I of 2012) came into force in Hungary. The previous Labour Code had been amended with an effective date of 1 December 2011 to incorporate a maximum of five years for temporary agency services. The new Act has retained this approach by stipulating that a temporary agency worker may not be assigned for more than five years to the same 'user' employer. This five-year period also includes any extension and any new assignments to the same employer within six months of the expiry of the previous assignment, even if a different temporary agency service provider assigns the same temporary agency worker.

In terms of the consequences of this, the Act only states that a breach of the five-year maximum duration is unlawful and therefore prohibited. The relevant commentary states that this means that a temporary agency worker can reject a further assignment. In addition in the case of a labour inspection the competent labour authority may impose sanctions, for example, a fine or the revocation of the temporary agency service provider's permit.

Another deviation from the German practice described above is that under Hungarian law there can be no valid agreement on the assignment of temporary agency workers between two employers within the same group if, for example, one is fully or partially the owner of the other. This rule prevents similar cases from the one at hand arising in Hungary.

The Netherlands (Peter Vas Nunes): Temporary employment agencies have been in the legal spotlight for decades. Until 1998, a permit was required to operate a temporary employment agency and up until the early 1980s the unions were wary of the phenomenon of agency work. Over the course of time, the unions gave up their resistance and decided that negotiating with the agency industry is better than fighting it (in fact, as early as 1971, one union entered into a collective agreement for certain 'temps').

Gradually, the industry has become more respectable - at least most of it - and it has been deregulated. The focus has shifted to combatting what is known as *malafide* employment agencies, which exploit (mainly foreign) workers or evade taxes and social insurance legislation. The government, the unions and the associations of employment agencies are doing all they can to distinguish between respectable and shady agencies. One of the many ways this is being done is certification and co-liability for unpaid taxes and social insurance contributions.

A recent development relates to so-called *payrolling*. The distinction between a regular employment agency and a payroll company is not always clear. Basically, an employment agency is in the business of 'labour market allocation', whereas a payroll company is essentially an extension of the user undertaking. The latter searches and selects its staff and then asks the payroll company to employ those staff members on its behalf. Recently, several courts have held that these staff members are actually in the employment of the user undertaking, despite explicit contractual wording to the contrary. The Supreme Court has yet to pronounce on this issue.

Norway (Hans Jørgen Bender): In Norway, the Working Environment Act section 14-9 has regulations on when temporary employment is considered legal. The possibility of entering into a temporary employment contract (either directly between the worker and the user undertaking or indirectly through a temporary employment agency) is limited and can only be agreed upon:
a) when warranted by the nature of the work and the work differs from that which is ordinarily per-formed in the undertaking,
b) for work as a temporary replacement for another person or persons,
c) for work as a trainee,
d) for participants in labour market schemes under the auspices of or in cooperation with the Labour and Welfare Service,
e) for athletes, trainers, referees and other leaders within organised sports.

A temporary employment shall, if demanded by the employee, be converted into an indefinite-term employment if the conditions for temporary employment described above are not fulfilled.

A temporary employment pursuant to a) and b) above is automatically converted into an indefinite-term employment if the employee has been temporarily employed for more than four consecutive years.

Slovakia (Beáta Kartíková): In Slovakia a temporary employment agency can be penalised if it has no licence to operate, but a temporary employee would not in that case be considered to be an employee of the user undertaking.

However, if a user undertaking 'repeatedly' agrees (i.e. within six months of the end of a previous temporary employment arrangement) to take the same temporary assignee from an employment agency more than five times within 24 consecutive months in circumstances where there is no substantive reason under the Slovak Labour Code to do so (e.g. for maternity/parental leave cover or seasonal work), the employment between the temporary employment agency and the employee and will cease and the employee will be employed for an indefinite period with the user undertaking.

Similarly to German law neither the Slovak Labour Code nor any other Slovak laws explicitly define 'temporary employment'. The fact that temporary employment should not cover permanent work for the user undertaking can be deduced from the provisions of the Slovak Labour Code. These state that a temporary assignment agreement between the employer and the employee or an employment agreement between a temporary employment agency and the employee shall include the duration for which the temporary assignment is agreed and that temporary assignment shall end on the expiry of the period for which it was agreed.

Nevertheless, the legal consequences of using temporary assignment on a permanent basis are not regulated. We are not aware of any similar cases in Slovakia and question how the Slovak courts might rule on such a matter.

Subject: Temporary employment
Parties: not published
Court: *Bundesarbeitsgericht* (Federal Labour Court)
Date: 10 December 2013
Case number: 9 AZR 51/13
Hardcopy publication: FD-ArbR 2013, 353262; GWR 2014, 111; APNews 2014, 23
Internet-publication: http://www.bundesarbeitsgericht.de →Entscheidungen →Suche →case number

* Paul Schreiner and Klaus Thönißen are lawyers with Luther Rechtsanwaltsgesellschaft mbH, www.luther-lawfirm.com.
** Gabriella Ormai is the managing partner of the Budapest office of CMS Cameron McKenna LLP, www.cms-cmck.com.

2014/9

Jurisdiction of French courts in case of transnational dispute (FR)

CONTRIBUTORS CLAIRE TOUMIEUX AND SUSAN EKRAMI*

Summary
Where an employee works for stable periods, successively, in various countries, the jurisdiction of his last place of work should be used in the event of a dispute, provided it has been the "clear will of the parties" that the employee would carry out his activities in that place on a lasting basis.

Facts
Mr. Inzirillo was hired on 5 February 2007 by ABN AMRO Management Services Ltd as a quantitative analyst of derivative products under a UK employment contract. In October 2007, ABN AMRO Management Services was purchased by the Royal Bank of Scotland in London and Mr. Inzirillo's employment contract was transferred to the latter. In 2008, Mr. Inzirillo obtained his employer's authorization to work partly from his home located in Slough, England. In August 2009, he decided on his own initiative to move to France and he continued to work from his home in Lille and went back to London once a week. In November 2009, he signed a new employment contract with the same employer with his place of work described as London.

In December 2010, Mr. Inzirillo was made redundant for economic reasons. He sued the Royal Bank of Scotland for unfair dismissal, first in the UK Courts and then at the French Employment Tribunal of Lille (after withdrawing his claim in the UK), arguing that his last place of work was Lille, where he spent 80% of his working time. The Royal Bank of Scotland argued that the French Employment Tribunal was not competent for territorial reasons, but this was not accepted by the summary application judges. The Royal Bank of Scotland lodged an appeal against their decision, which was overturned by the Court of Appeals of Douai on 29 June 2012.

Mr. Inzirillo challenged the Court of Appeal's decision and brought the case before the French Supreme Court.

Judgment
The Supreme Court upheld the decision of the Court of Appeals of Douai, holding that pursuant to Article 19 (2a) of EU Regulation 44/2001 of 22 December 2000, an employer domiciled in a Member State can be sued in another Member State in the courts of the place where the employee habitually carries out his work or in the courts of the last place where he did so. The habitual place of work is the place where the employee spends most of his time working for his employer, taking into account the entire period of activity of the employee. In the case of working periods in successive countries, the jurisdiction of last place of activity can be used, provided it is the clear will of the parties that the employee will carry out his activities in that place on a lasting basis.

The Supreme Court added that under the terms of the employee's last employment contract, which entered into force on 1 November 2009, the authorization obtained in 2008 to work partly from his home in Slough had not modified his place of work within the Global Banking & Markets department in London. This was because the employer had never agreed to the transfer of his workplace to France and its tolerance of his home-working arrangement while he was no longer domiciled in the UK could only be regarded as a temporary derogation from his employment contract, which had designated the Global Banking & Markets department in London as his workplace. Moreover, throughout the period of his activity from 5 February 2007 to 29 December 2010, he had spent most of his working time within the Global Banking & Markets department in London and this had consistently remained the effective centre of his working activities.

The Supreme Court concluded that the Court of Appeals of Douai had correctly ruled that in the absence of the parties' clear intention that Mr. Inzirillo would perform his duties on a lasting basis from his home in France, the Global Banking & Markets department in London had remained the place where the employee habitually carried out his work within the meaning of Article 19 (2a) of Regulation 44/2001.

Commentary
The French Supreme Court has provided a useful indication about which court is competent when an employee working mainly from home decides to move to another Member State – in this case, from the UK to France. Article 19 (2a) of Regulation 44/2001 provides that *"an employer domiciled in a Member State can be sued in another Member State, in the courts of the place where the employee habitually carries out his work or in the courts of the last place where he did so"*. According to Mr. Inzirillo, as of the date he had moved to France, 80% of his work was carried out from his home in Lille and only 20% in London. But the French Supreme Court was not persuaded by his arguments and concluded that the French Employment Tribunal of Lille had no jurisdiction to hear the case.

The Supreme Court reiterated its previous case law, which stated that *"the habitual place of work is where the employee spends the majority of his working time, taking into account the entire period of the employee's activity"*[1].This position is consistent with European Court of Justice case law. In a decision of 27 February 2002 the ECJ ruled that: *"the entire period of activity of the employee is taken into account in determining*

1 Cass. Soc. 31 March 2009, No. 08-40367.

the place where the employee has carried out the most significant part of his work and as such is the centre of his contractual relationship with the employer"[2]. In the case at hand, this factor alone was sufficient to indicate that it was the UK courts that had territorial jurisdiction because during the whole period of his activity, Mr. Inzirillo had spent 29 months in London compared to 17 months in France.

However, the Supreme Court went further in its reasoning by introducing a novel notion which is "the clear will of the parties". The Court held that in the case of stable periods of work in successive countries, the territorial jurisdiction of the last place of activity should be retained "if it has been the clear will of the parties that the employee would lastingly carry out his activities in that place". In other words, the habitual place of work is not only the place where the employee spends most of his working time (taking into account the whole period of his activity) but also the place both parties have 'clearly' agreed upon as being the workplace.

Applying the facts, the Supreme Court held that the employer had never expressly agreed to the transfer of Mr Inzirillo's workplace to France but the latter had decided to move to France on his own initiative and for his personal convenience. According to the Supreme Court judges, his employment contract still designated London as his place of work and the employer's tolerance of his working from home - which meant that he was no longer domiciled in the UK - was just a temporary derogation from the terms of his employment contract.

We can only agree with this new approach. The flexibility brought to the employees by Regulation 44/2001 in the case of transnational disputes now has a new limit, which is the "clear will of the parties" with respect to the workplace. Indeed, even though the employee has the right to choose his place of residence, his unilateral decision to change it for personal convenience – albeit that this was tolerated by his employer – does not mean that the employer must then have to defend itself in a foreign jurisdiction, against its legitimate expectation.

One should further expect this reasoning to apply in relation to the law on employment contracts, which also depends on the concept of 'habitual place of work' within the meaning of EU Regulation 593/2008 of 17 June 2008 ('Rome I') on the law applicable to contractual obligations[3].

Comments from other jurisdictions

United Kingdom (Bethan Carney): This case provokes the question whether an employment tribunal in the UK would have accepted jurisdiction to hear Mr Inzirillo's claim in these circumstances. In my view it is likely that UK courts would have accepted jurisdiction – avoiding the possibility that a claimant would be left without a remedy in these particular circumstances. However, a UK employment tribunal would have applied a slightly different test and there is not, as far as I know, any UK case law covering the situation where an employee 'works from home' and chooses to work in a different country from the employer.

Although the law on unfair dismissal originally stated that an employee 'ordinarily working' outside Great Britain would not have the right to bring an unfair dismissal claim, the Employment Rights Act 1996 was amended in 1999 to delete this provision and it became silent as to its territorial scope. This silence resulted in several conflicting lower court decisions about when employees who worked abroad would be able to bring claims in the UK, as the courts struggled to work out the issue of jurisdiction. Some clarity was brought to the issue by the House of Lords (now known as the Supreme Court) in its decision in *Serco Ltd – v - Lawson* [2006] ICR 250. The House of Lords held that employees working in Great Britain would be able to bring a claim if they were working in the country at the time of dismissal (rather than just on a casual visit). This was not primarily a test about what the contract says about place of employment but about the factual circumstances (although the contract might help to throw light on the factual circumstances). The court also said that peripatetic employees who work in several different countries but are based in Britain should be able to bring claims in this country; also, employees working abroad for the purposes of a business based in the UK (e.g. as a foreign correspondent for a British newspaper) or those working in an extra-territorial British 'enclave' abroad, such as an army base. Finally those with 'equally strong' connections with Britain might be able to bring claims here but it is not sufficient merely to have been recruited in Britain by a British employer.

The latest decision on this vexed area of law is the Supreme Court decision of *Ravat - v - Halliburton Manufacturing and Services Ltd [2012] IRLR 315*. In this case, the court held that where the employee's work is not carried out in Great Britain, the correct question is to ask whether 'the connection with Great Britain is sufficiently strong' to let it be said that Parliament would have thought it appropriate for the employment tribunal to hear the claim. This will always be a question of fact and the sorts of facts that the courts have regarded as significant when considering this question are:

- Where is the employee's home?
- Where is the employer based?
- What currency was the employee paid in?
- Where were taxes paid?
- Was the employee on the same salary and benefits structure as other UK employees?
- What was the law governing the contract?
- Where were the human resource issues governing the employee handled?
- In which country was the contract formed?
- To which workforce does the employee belong?
- To which other countries does the employment have a connection and in what ways? (The courts will do a balancing exercise between the different countries.)

Mr Inzirillo's employer was British. It is likely that he was paid in pounds sterling and was regarded as part of the British workforce (with similar terms and conditions and benefits as other British employees). In these circumstances, it seems likely that a British court would think that his employment has a closer connection with Britain than with France. However, although the UK courts would probably have accepted jurisdiction initially, they will not hear a claim after it has been initiated and then withdrawn and so Mr Inzirillo will be 'estopped' from attempting to restore his claim in the UK.

2 ECJ 27 February 2002, C-37/00, Herbert Weber c / Universal Ogden Services Ltd, C37-00.

3 Article 8 of Regulation Rome I provides that "*an individual employment contract shall be governed by the law chosen by the parties. Such a choice of law may not, however, have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by the law of the place he habitually carries out his work (...)*".

Subject: Territorial jurisdiction
Parties: Daniel Inzirillo vs. Royal Bank of Scotland
Court: *Cour de cassation* (French Supreme Court)
Date: 27 November 2013
Case Number: N° 12-24880
Hard copy publication: Official Journal
Internet publication:
http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000028257450&fastReqId=1875408501&fastPos=1

* Claire Toumieux and Susan Ekrami are a partner and lawyer with Allen & Overy LLP in Paris, www.allenovery.com.

2014/10

All-in wages for small part-timers not prohibited (NL)

CONTRIBUTOR PETER VAS NUNES*

Summary
The defendant in this case stopped paying its "small" part-time employees (those with contracts not exceeding 12 hours per week) their salary during paid annual leave, instead of paying them a higher "all-in" (or "rolled up") hourly wage. Two unions challenged this change as being at odds with the law, but the court found in favour of the defendant.

Facts
This case involves a long-standing dispute between the largest Dutch group of retail stores, Albert Heijn ('AH'), and the two largest trade unions. The dispute centres around the collective agreements governing the parties' relationship inasmuch as they relate to paid annual leave, the mandatory 8% holiday bonus under Dutch law and certain other benefits that are not relevant for the purpose of this case report.

In the Netherlands, the standard procedure in respect of paid leave is for employees to take off time from work (holiday), during which time they continue to receive their salary and other benefits. The standard procedure in respect of the holiday bonus is for employees to receive, in the month of May, a sum equal to 8% of their annual base salary, the idea being that this bonus covers the extra expense usually associated with summer holidays. This system works well for full-time employees, but many employers with a large number of employees who only work a few hours per week consider the system to be administratively burdensome.

In January 2009, AH, following the example of its main competitors, introduced a change in the way it remunerates its approximately 63,500 employees with a contract for 12 or less hours per week, also known as "small part-timers". Instead of (i) continuing to pay salary during their leave and (ii) paying an 8% holiday bonus in May, AH now pays its small part-timers an all-in hourly wage equal to their former base hourly wage plus a certain percentage in lieu of payment during leave plus the 8% holiday bonus.

The average small part-timer at AH is aged 19, works for seven hours per week and has been in AH's employment for 25 months.

On 18 February 2009 the unions applied for an injunctive court order requiring AH to refrain from paying its small part-timers all-in hourly wages and to revert to the former system of remuneration. The application was rejected in two instances (in March 2009 and, on appeal, in October 2009: see EELC 2010/21). In 2011 the unions brought regular (i.e. non-injunctive) proceedings. They asked the court to order AH to revert to the pre-2009 system of paying its small part-timers their salary during leaves as well as the 8% holiday bonus once each year. They argued that paying all-in hourly wages is age-discriminatory, violates Dutch law and is in breach of the relevant collective agreement.

Judgment
Dutch law, in line with Directive 2003/88, provides that employees shall continue to receive their salary during leave and that they may not substitute this right with monetary compensation except upon termination of their employment and except for leave in excess of the statutory minimum. The rationale is that this allows employees to actually take time off work. Paying employees all-in salaries creates a risk that they will not go on holiday and will therefore not enjoy the periodic time off work that is necessary to work safely. However, this does not mean that all-in wages are prohibited under all circumstances. In fact, the government has declared several collective agreements that expressly provide for all-in wages to be universally binding (i.e. giving them *erga omnes* effect), which it surely would not have done had that been unlawful.

The court followed AH's argument that paying small part-timers all-in hourly wages does not amount to a waiver of a right, but merely separates in time the worker's absence from work and the continued payment of salary. AH's new remuneration system does not prevent its small part-timers from taking up their annual leave, and in fact AH encourages them to do so. The fact that they have already received in advance the pay that they would have continued to receive during their leave is unlikely to deter them from actually taking time off work, given that most of them are students for whom their job is no more than a source of supplementary income and given that for the average small part-timer the value of three weeks' paid leave is no more than €91 gross. Moreover, there is no evidence that any of AH's small part-timers have complained about the new remuneration system since it was introduced four years ago.

As for the holiday bonus, the court held that including an 8% add-on in the hourly wage in lieu of an annual payment violates neither Dutch law nor the collective agreements in force between the parties.

Commentary
Remarkably, this judgment in this normal, non-injunctive procedure is shorter and less reasoned than the judgments in the preceding injunction proceedings that were reported on in EELC 2010/21. In those judgments the court considered the parties' arguments relating to the ECJ's ruling in *Robinson-Steele* (C-131/04 and C-257/04), where the ECJ held that Directive 93/104 (now Directive 2002/88):
"precludes part of the remuneration payable to a worker for work done from being attributed to payment for annual leave without the worker receiving, in that respect, a payment additional to that for work done. There can be no derogation from that entitlement by contractual arrangement"

but at the same time also held that this directive:
"does not preclude, as a rule, sums paid, transparently and comprehensibly, in respect of minimum annual leave [...] in the form of part payments staggered over the corresponding annual period of work and paid together

with the remuneration for work done, from being set off against the payment for specific leave which is actually taken by the worker".

I am told that the unions asked the court to refer questions to the ECJ. It is disappointing that the court saw no need to do this and, in fact, did not even refer in its judgment to this request. It remains to be seen whether the unions appeal the judgment.

The court also declined to address the argument that rolled-up paid leave discriminates (indirectly) on the basis of age and possibly on other bases as well.

The 2010 case report received comments from the Czech Republic and the UK. In the Czech Republic, employers are not permitted to pay employees 'rolled-up' holiday pay, but casual workers employed for no more than a few hours per week are not considered to be employees and are therefore not eligible to any holiday pay at all. In the UK, there has been much confusion about the implications of *Robinson-Steele*, with many employers wanting to continue to pay rolled-up holiday pay and wages, particularly for shift workers, and anxious to rely upon the 'set-off' argument.

One may wonder why the unions in this case made the effort to challenge AH's practice. There seems to have been no urge by any of AH's employees to challenge that practice. In fact, the majority of AH's small part-timers might have preferred receiving a higher hourly salary rather than a lower one plus pay during leave. The unions' position strikes one as somewhat paternalistic and smacks of "we know better than our members what is good for them". However, I am told that the unions in this case were and are sincerely concerned that certain vulnerable groups of part-time workers - not only young workers, but also, for ex-ample, single mothers with little other income - may be financially forced to work years on end without taking up holiday.

Comments from other jurisdictions

Austria (Manuel Schallar): All Austrian collective bargaining agreements include a stipulation to pay a 13th and a 14th monthly salary ("holiday pay" and "Christmas remuneration"). If such extra payments are paid Austrian tax law applies a lower rate of tax of only 6% on them (in comparison to progressive income tax up to 50%). Therefore, it is very uncommon but legally possible to include these extra payments into the monthly salary – as long as the employees are not less well off than in the case of a monthly salary plus the two additional monthly wages. In total, they must earn the same salary, including the tax difference. The compensation for the latter would lead to a higher financial burden on the employer.
However, payments in lieu of leave are explicitly illegal during the employment relationship. Therefore such a rolled up holiday pay would not pay off the right to annual leave and the employee would be still entitled to take such leave in kind.

Denmark (Mariann Norrbom): Compared to Dutch law and UK law, Danish law seems very simple regarding the matter of rolled up holiday pay.

Under the Danish Holiday Act, hourly paid employees are entitled to holiday pay amounting to 12.5% of the employee's pay. Monthly paid employees are generally entitled to pay during holiday and an annual holiday bonus of 1% of the employee's pay, but may opt out of this rule and receive holiday pay instead. In that case, the holiday pay will amount to 12% of the employee's pay. In both cases, the percentage may be changed by collective agreement.

The holiday pay is paid to the employee at the beginning of the holiday or – if the employment has been terminated – at the effective date of termination if this is earlier than the beginning of the holiday.

Under no condition – not even through a collective agreement – does an employer have the option of including holiday pay in the wages. Consequently, an arrangement like the one in the Dutch case reported above would be unlawful in Denmark – even if it had been endorsed by the trade unions.

Norway (Hans Jørgen Bender): The Norwegian Holiday Act states that rolled up holiday pay is unlawful, unless such arrangement is agreed in a collective agreement. An agreement between the employee and the employer with rolled up holiday pay will be deemed unlawful, and the employer will as a main rule be obliged to pay holiday pay in accordance with the Holiday Act, i.e. when the employee takes holiday, even if this means that the employer will in effect be paying twice.

United Kingdom (Bethan Carney): The legal position in the UK on rolled up holiday pay has not become significantly clearer since the case of *Robinson-Steele*.

Non-statutory guidance from the Government seems to indicate that it believes rolled up holiday pay to be unlawful. It initially advised employers to change their pay arrangements (if they used rolled up holiday pay) but said that whilst employers were in the process of changing their arrangements they might be able to set off pay from sufficiently "transparent and comprehensible" rolled up holiday pay arrangements against claims. It later changed that guidance to simply say that rolled up holiday pay arrangements were unlawful and that payment for annual leave should be made when the leave is taken.

In *Lyddon - v - Englefield Brickwork Ltd* [2008] IRLR 198, the EAT held that an employer was entitled to set off rolled up holiday pay against a worker's entitlement under the Working Time Regulations 1998. The court said in this case that whilst it was desirable that the sum attributable to holiday pay (or formula for calculating it) be set out in writing before a worker starts work, there was no exhaustive set of criteria which had to be satisfied before a tribunal could properly reach a conclusion on whether there was a clear and transparent contract term. In this case, the pay slip showed how much "holiday pay" was being paid each month.

The case of *Lyddon - v - Englefield Brickwork* was heard after the ECJ's decision in *Robinson-Steele* but the *Lyddon* case does not analyse the ECJ case particularly, or do anything other than refer to it and say that the conditions in *Robinson-Steele* for set off had been met. In particular, the EAT decision did not give any consideration as to whether the right to set off might be time barred after companies had had a reasonable time to change their pay arrangements and stop using rolled-up holiday pay. Government guidance did not address this issue either and said little more than I have set out above.

Subject: Paid annual leave
Parties: *CNV Dienstenbond and FNV Bondgenoten - v - Gall & Gall B.V., Etos B.V. and Albert Heijn B.V.*
Court: *Kantonrechter* (Lower Court) in Zaandam
Date: 21 November 2013
Case number: 526207/CV EXPL 11-7552
Publication: JAR 2014/29

* Peter Vas Nunes is counsel at BarentsKrans.nl www.barentskrans.nl.

2014/11

Deduction of expenses from posted workers' minimum wage allowed (NL)

CONTRIBUTOR ZEF EVEN*

Summary
An employer (in this case, a temporary employment agency) was entitled to deduct expenses for housing costs and health insurance premiums from the minimum wage payable to two Polish posted workers, even though such deductions went beyond the deduction limits set in the enforcement policy of the Inspection of Social Affairs.

Facts
This case involved a Dutch temporary employment agency that deducted from the minimum wage payable to two of its Polish posted employees more than was allowed under the policy described below.

In the Netherlands, statutory minimum wages apply, based on the Minimum Wage Act. A transnational service provider, as referred to in the Posted Workers Directive (Directive 96/71/EC), must apply those minimum wages to posted workers. In practice, some service providers deduct certain costs from the wages paid to posted workers, by setting off these costs against the wages. These are normally expenses incurred in relation to the posted workers, such as the cost of living, travelling expenses and health insurance premiums. Sometimes they are even fines imposed on the posted worker by the service provider, for example for not putting out the rubbish correctly. According to the Minister of Social Affairs, set-offs are applied in particular in relation to migrants from middle and eastern European countries. As a result of these deductions of expenses by means of set-off against the minimum wage, the payment of the actual wages drops below the level of the statutory minimum wage.

The Minister takes the view that these deductions should therefore cease, with two exceptions. Reasonable expenses paid by the employer on behalf of the employee in respect of housing costs and health insurance premiums may be set off against the minimum wage. These expenses are, according to the Minster, inevitable. In addition, the Minister sees no problem with the employer assisting the employee in finding a place to live and obtaining adequate health insurance, as long as the costs involved are reasonable. In order to give a clear indication as to what is considered reasonable, the Minister has determined that the set-offs should be limited to a maximum of (i) 20% of the gross minimum wage for housing costs and (ii) 10% of the gross minimum wage for health insurance premiums. Since July 2011, these rules have become part of the enforcement policy of the Social Affairs Inspectorate (the 'Inspectorate'), which is the government agency in charge of the enforcement of the Minimum Wage Act. The Minister has also clearly stated that set-offs in violation of the policy would to be regarded as violations of the Minimum Wage Act.

In terms of the pay of the two Polish posted employees in this case, the employer set off more than was allowed under the enforcement policy for housing costs and health insurance premiums. The Inspectorate fined the employer for this violation. The employer found this unacceptable. It argued that Dutch law allows set-offs of expenses up to the so-called "attachment-exempt threshold" (i.e. the minimum income necessary to enable someone to make an acceptable living).. The enforcement policy therefore had no legal basis. According to the Inspectorate, the employer did not pay the actual minimum wage because it set off various costs against the wages due and that was in violation of the Minimum Wage Act.

Judgment
The District Court subscribed to the employer's point of view, holding that the Minimum Wage Act makes no reference to set-offs. In consequence, the general rules relating to set-offs should be applied. Set-off is a method by which an obligation to pay money is satisfied other than by payment. The Minimum Wage Act refers to an *entitlement* to a certain minimum wage, not to the actual *payment* of that wage. An entitlement logically precedes set-off. Because of the entitlement there is an obligation on the employer to pay but this can be satisfied by the set-off. The Minimum Wage Act does not preclude set-off and therefore the employer therefore did not violate any rule of public law by this means. Consequently, there was no justification for the Inspectorate to impose a fine.

Commentary
The ruling is brief and easy to follow. One thing that was not explained was why Dutch law applied. Polish law could very well have been applicable to the employment agreement of the Polish employees. The court's ruling that set-offs are allowed under Dutch law, even if the minimum wage is paid, is convincing, provided that the set-offs are limited to the attachment-exempt threshold. Nevertheless, the Minister of Social Affairs responded firmly to this ruling. In a letter of 15 January 2014 to the Lower House of Parliament, he announced that the Inspectorate would lodge an appeal against the judgment, without explaining the legal grounds for this. He simply stated that he still believed that set-offs against the minimum wage are not permitted, with the exceptions laid down in the enforcement policy.

The likely reason for this firm response is that, recently, migrant labour, particularly from middle and eastern European countries, has been a topic of intense debate in Dutch politics. For example, a recent case also involving the use of posted workers building a tunnel on one of the main highways in the south of the Netherlands, has gained considerable media attention. The minimum wage paid to these workers was reduced by about EUR 1,000 per month in order to cover a number of expenses. An expert commission was asked to investigate and concluded in an extensive report that, although this practice could not be considered "modern slavery", the deductions did violate the collective labour agreement that was declared universally applicable. That collective labour agreement stipulated, briefly put, that the employer must reimburse the cost of living (i.e. expenses for food and lodging) of employees over and above their salary, if these employees in all reasonableness are unable to travel from the building site to their home address.
More generally, the expert commission held the view that deductions

such as those at stake here, were excessive. Unfortunately, the expert commission did not answer the important question of whether the clause in the collective labour agreement conforms to EU law. It is not beyond doubt that an entitlement to reimbursement of living expenses falls within the scope of the expression "minimum rates of pay", as defined in Article 3.1(c) of the Posted Workers Directive. If this is not the case, the provision may very well be in violation of Articles 56 and 57 TFEU. In fact, a complaint has been lodged with the European Commission on this particular issue, asking the Commission to assess whether or not the provision violates the right to free movement of services.

In another case, a Finnish court has requested a preliminary ruling on a matter very much akin, in case C-396/13: *"is Article 3 of Directive 96/71, read in the light of Articles 56 and 57 TFEU, to be interpreted as meaning that the concept of minimum rates of pay covers basic hourly pay according to pay groups, job guarantee pay, holiday allowances, flat-rate daily allowances and compensation for daily travel-to-work time, as those terms of work are defined in a collective agreement declared universally applicable and falling within the scope of the annex to the directive?"*

In the meantime, action by the Minister of Social Affairs is expected. He has already publicly stated that the Dutch labour market cannot cope with the number of migrant workers that exist, especially at the bottom of the labour market. These workers, according to the Minister of Social Affairs, shut out Dutch employees. The Minister has announced legislative measures to counter bogus constructions involving posted workers and to combat the performance of work in the Netherlands on a temporary basis in breach of the rules. He is further attempting to find European partners to address this issue at European level.

Comments from other jurisdictions

Austria (Martin Risak): The central question from the Austrian perspective would be whether the minimum wage must be paid in cash or can be paid in kind (e.g. in the form of health insurance cover or accommodation). The courts have interpreted some collective agreements as meaning that the minimum wage must be paid in cash and it is unlawful to offset it against, for example, the private use of a company car. Deductions of the kind described above might be considered to be payments in kind and therefore deemed unlawful. On the other hand, in my view, there is no strong argument against the employer helping the employee, for example, to find accommodation in the country he or she is posted to, as long as the costs deducted from the wages are reasonable and the employee has the chance to opt out of this arrangement. In such a case, the deduction would not amount to an avoidance of the obligation to pay the minimum wage and should be considered lawful.

Subject: Posted Workers
Parties: Employer (temporary employment agency) – v – Social Affairs Inspectorate
Court: *Rechtbank Den Haag* (District Court of The Hague)
Date: 11 December 2013
Case number: SGR 13/6793
Hardcopy publication: JAR 2014/79
Internet publication: www.rechtspraak.nl → ECLI:NL:RBDHA:2013:16924

* Zef Even is a partner at SteensmaEven www.steensmaeven.com.

2014/12

Leaving the church serious cause for termination (GE)

CONTRIBUTORS PAUL SCHREINER AND DAGMAR HELLENKEMPER*

Summary

An employee was dismissed by a religious organisation for leaving the Roman Catholic Church. The courts upheld the dismissal in three instances.

Facts

The plaintiff, born in 1952, had been employed by Caritas since 1992 as a social worker. Caritas is a Roman Catholic relief, development and social service organization. During the last years, the plaintiff worked as a social educationalist in a project offering children educational support. No part of his work was of a religious or clerical nature.

In 2011, he decided to leave the Roman Catholic Church. He gave two reasons. One was the recent discovery of cases of sexual abuse of children by Catholic priests. The other was the fact that he held critical views about the Good Friday liturgy. He informed his employer, the defendant, about this. The defendant determined that the plaintiff was no longer loyal to the church, nor to Caritas, whose purpose is defined as charitable altruism. Consequently, he could no longer perform the "service for humanity", which Caritas sees as its mission for the Catholic Church.

It was common ground that until this time, the plaintiff had an irreproachable working record. As he had been employed since 1992, the provisions applying to his employment contract provided that the only way to terminate the contract was by way of extraordinary dismissal (*außerordentliche Kündigung*) without notice for serious cause (*wichtigen Grund*). The defendant terminated the contract in this manner, but nevertheless gave six months' notice.

The plaintiff brought a claim against the defendant for wrongful termination. He argued that the position he held was one involving neither management nor religious, clerical or pastoral functions. He added that the length of his employment (19 years) and his age (60) would also have to be taken into consideration. The defendant argued that the employee's decision to leave the church presented an offence to the Christian faith and to the morals to which Caritas was bound. In its view, this offence constituted serious cause that could be dealt with by way of extraordinary dismissal.

Judgment

Both the BAG and the previous instance courts decided in favour of the defendant. It held that the defend-ant was allowed to dismiss the plaintiff without notice because his breach of loyalty towards the Catholic Church presented sufficient grounds for such a termination. Article 140 of the Constitution, which was taken from the Weimar Constitution (Article 137 WRV), guarantees each religious community the right to ar-range and manage their affairs independently, albeit within the limits of national law. Therefore, the defendant had the right to determine what constitutes a serious cause that could be dealt with by way of extraordinary dismissal.

In the case at hand, the definition of serious cause was not in conflict with regular German law, in this in-stance, section 1 of the Unfair Dismissal Act (*Kündigungsschutzgesetz*) and Section 626 of the Civil Code (which defines the grounds for extraordinary termination). To determine this, the court took into account, on the one hand, the provision granting rights of self-determination to religious communities and, on the other, the plaintiff's right to religious and professional freedom deriving from the Constitution. Since the plaintiff was well aware of the fact that the defendant considered leaving the church a breach of loyalty and hence a serious cause for termination, the BAG held that the definition of serious cause did not violate regular German law.

The BAG also found that the termination was not void by reason of a violation of sections 1[1] and 7[2] of the German Equal Treatment Act (the *Allgemeines Gleichbehandlungsgesetz*, 'AGG', the German transposition of Directive 2000/78/EC). These provisions prohibit discrimination on the grounds of, inter alia, religion. The BAG stated that there had been unequal treatment between the employee, who had left the church, and other employees who had remained within the Catholic Church. Therefore, the plaintiff had been subjected to direct discrimination. The employee's contract would not have been terminated had he continued to be a member of the Catholic Church. However, the employer's action was justified pursuant to section 9[3] of the AGG. According to that provision, a difference in treatment of employees of a religious community or an affiliated organisation on the grounds of religion does not constitute discrimination where such grounds constitute a justified occupational requirement by the nature of the particular activity. In essence, section 9 allows religious communities or comparable organisations to require individuals working for them to act in good faith and with loyalty to the organisation's religious principles or ethos.

The German transposition of Directive 2000/78 (the AGG) does not differ from the Directive, which in Article 4(2) allows Member States to:
"maintain national legislation [...] pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos."

Article 140 of the Constitution could represent such national legislation, although the BAG did not deem it necessary to decide this question. In the present case, the requirement to be catholic was considered to be an occupational requirement and the BAG held that the plaintiff did not meet that requirement any more.

In the case at hand, there was no need to decide whether section 9 AGG also requires that the nature of the services rendered by the employee specifically implies a need to show loyalty towards the Church. This was because, for example, a church organist would need to be a member of the Catholic Church, even though he may not speak to anyone about his religious beliefs. Therefore, the court dismissed the plaintiff's argument that his daily work lacked religious content. The BAG explained that, even though no clerical content was being taught, a belief in altruism and an ethos of service towards mankind were nonetheless conveyed by the employer and employees in all their educational projects. On this basis, even the strictest opinion in German legal literature would find that the breach of loyalty in the case at hand constituted serious cause.

Commentary

This decision - though legally correct from our point of view – has been the subject of a great deal of criticism, especially because of the long employment relationship and the employee's age (60 at the time of the termination). Many argued that leaving the church could not be grounds for termination for cause, as that would put it in the same category as fraudulent or criminal acts towards the employer or intentional breaches of duty.

These arguments, however, cannot succeed because in this case, the employee was not actually facing a termination for cause but rather an ordinary termination - given that there was no other way to terminate the contract than by way of termination for cause. The employment relationship did not end immediately but six months later, which is the same as the notice period for an ordinary termination.

It is clear then, that social workers and teachers working for clerical organisations are required to respect the beliefs and the ethos of the organisation they work for. Although the Catholic Church has been much criticised in recent times for many reasons, in the end it is not very different from other organisations that are founded on a particular view. Political parties and trade unions, for example also expect employees to share their views and do not employ non-members.
This case illustrates that the right of religious groups to self-management and self-determination that has always been part of the German Constitution is to be respected as much as the freedom the Constitution reserves for individuals.

Comments from other jurisdictions

Austria (Martin Risak): Under Austrian law there are two possible arguments that can be made that dismissal of a worker for leaving the

1 Section 1: Purpose
The purpose of this Act is to prevent or to stop discrimination on the grounds of race or ethnic origin, gender, religion or belief, disability, age or sexual orientation.

2 Section 7: Prohibition of Discrimination –
(1) Employees shall not be permitted to suffer discrimination on any of the grounds referred to under section 1; this shall also apply where the person committing the act of discrimination only assumes the existence of any of the grounds referred to under section 1.
(2) Any provisions of an agreement which violate the prohibition of discrimination under subsection (1) shall be ineffective.
(3) Any discrimination within the meaning of subsection (1) by an employer or employee shall be deemed a violation of their contractual obligations.

3 Section 9 - Permissible Difference in Treatment On Grounds of Religion or Belief
(1) Notwithstanding section 8, a difference of treatment on the grounds of religion or belief of employees of a religious community, facilities affiliated to it (regardless of their legal form) or organisations which have undertaken jointly to practice a religion or belief, shall not constitute discrimination where such grounds constitute a justified occupational requirement for a particular religion or belief, having regard to the ethos of the religious community or organisation in question and by reason of their right to self-determination or by the nature of the particular activity.
(2) The prohibition of different treatment on the grounds of religion or belief shall be without prejudice to the right of the religious community referred to under section 1, the facilities assigned to it (regardless of their legal form) or organisations which have undertaken jointly to practice a religion or belief, to require individuals working for them to act in good faith and with loyalty to the ethos of the organisation.

church, as described in this case report, is unlawful. One is that the Equal Treatment Act (*Gleichbehandlungsgesetz*) prohibits discrimination based on religion or belief. The Equal Treatment Act transposes Directive 2000/78/EC and makes use of exemption from the Directive for 'occupational requirements'. As in Germany, the Austrian legislator transposed the text of the Directive more or less verbatim. There has not yet been any case-law, but I am not sure that the Austrian courts would have decided the same way as the German ones, given that Caritas assists people irrespective of their social, national and religious affiliations and that a social worker's job lacks explicit religious content. It is therefore possible that affiliation to the Catholic Church might not be considered by the Austrian courts as a genuine, legitimate and justified occupational requirement.

If the dismissal was not discriminatory ,the next question under Austrian law would be whether it could be deemed socially unjust. There is an exception for undertakings that serve the confessional aims of a church, but it only applies if protection against dismissals would conflict with the special character of the undertaking. Even if the protection did apply the employer may still justify a dismissal on the grounds that dismissal would not be an unreasonable reaction to a worker leaving the church. However, as no relevant jurisprudence exists I am not sure how the Austrian courts might rule if a case such as the German one described above were brought before them.

Denmark (Mariann Norrbom): Section 6 of the Danish Anti-Discrimination Act specifies that the general prohibition against discrimination on grounds of political opinion, religion or belief does not apply to employers whose express purpose is to promote a particular political or religious viewpoint or a particular religious persuasion and where the employee's political opinion, religion or belief may be deemed to be of importance to the employer.

It can be seen from the preparatory notes to the Danish Anti-Discrimination Act, however, that in order for this exception from the general prohibition to be available, it is a condition that the employee must be required to express his or her beliefs in the performance of his or her duties, e.g. a teacher who is required to express his or her beliefs in his or her teaching activities.

There is no case law from the Danish courts on this issue, but the Danish Board of Equal Treatment has decided in favour of the employer in two cases concerning applicants for a vacant position with a religious institution. In one of the cases, the vacancy was a secretarial position and in the other it was a position as an organisational consultant. In both cases, the religious institutions were justified in expressly requiring applicants to be a member of the Danish National Church (in the case involving the secretary) or a Christian congregation (in the case involving the organisational consultant). Thus, the scope of the condition is not quite clear and it is therefore not unlikely that a Danish court would reach the same conclusion in a case similar to the German one reported above.

Slovakia (Beáta Kartíková): In the case reported above, the right for individuals to perform work without reference to their religion and the prohibition against discrimination on the grounds of religion or belief blur with the right of self-management of churches and religious organizations - and it is not entirely clear which right would prevail in Slovakia.

In Slovakia an employer may terminate employment with notice if the employee has not abided by the requirements for carrying out the agreed work, as set out in the internal rules of the employer, and there is no fault on the part of the employer. The law does not specify what kind of requirements may be made, but they will be acceptable if justified by the nature of the work.

It is debatable whether the requirements of a particular religion as set out in the internal regulations of a church or religious community for employees performing activities other than clerical or religious ones, would be considered justified. This is because the Slovak Constitution guarantees freedom of religion and the right of the individual to change his or her religion and indeed, to have no religion. The Slovak Labour Code states that individuals have the right to protection against malicious dismissal from employment in accordance with the principle of equal treatment and that this right is inalienable. The individual cannot be discriminated against on grounds of religion or belief. In employment relationships, discrimination against employees on grounds of religion or belief is expressly prohibited. The law provides that a person's religion should not be a reason to restrict his or her constitutionally guaranteed rights and freedoms, particularly the right to practice a profession. One can assume that this applies equally to individuals without religion.

Registered churches and religious communities have also the constitutional right to administer their own affairs. Moreover, the law guarantees churches and religious communities the right to issue their own internal rules, unless these are contrary to law. Any work requirement included in the internal rules should be justified by the nature of the work. The Slovak Labour Code provides that the employment relationships of employees of churches and religious societies that carry out ecclesiastical activities are governed by the Slovak Labour Code, unless their internal regulations provide otherwise. If an employee is to perform ecclesiastical activities, this should be made clear in the job description .

We are of the view that churches and religious communities can, as employers, make it a special work requirement in their internal rules that employees practice the religion if those employees carry out ecclesiastical activities or other similar activities. However, this would not be the case if the employees do not perform duties of a religious or clerical nature (e.g. administrative staff and managers).

It is common practice in Slovak registered churches and religious communities for jobs not involving ecclesiastical functions (e.g. managers) to be done by employees who are not members of the church or are members of another church.

For those reasons, in our view, the Slovak courts would probably have decided in the case at hand in favour of the employee.

United Kingdom (Bethan Carney): As in Germany, the UK Equality Act 2010 has a specific exception from the law on religious discrimination for organisations with an 'ethos' based on religious belief (paragraph 3, schedule 9). This provision states that:
"a person (A) with an ethos based on religion or belief does not contravene a provision mentioned in para-graph 1(2) [prohibition on discrimination in employment, contract work, etc.] by applying in relation to work a requirement to be of a particular religion or belief if A shows that, having regard to that ethos and to the nature or context of the work -
(a) it is an occupational requirement,

(b) the application of the requirement is a proportionate means of achieving a legitimate aim, and
(c) the person to whom A applies the requirement does not meet it (or A has reasonable grounds for not being satisfied that the person meets it)".

This is in addition to the 'genuine occupational requirement' defence to religious discrimination that applies to all employers.

Although Caritas would be regarded as having an 'ethos' based on religion or belief, it is still unlikely that the courts in the UK would have found that this exception applies to these circumstances; in other words, it is likely that a UK court would have found that this dismissal constituted religious discrimination. This is because the UK courts have construed this provision very narrowly.

In the employment tribunal case of *Sheridan v Prospects For People With Learning Disabilities ET Case No.2901366/06* and *Hender v Prospects For People With Learning Disabilities ET Case No.2902090/06* the tribunal held in a similar case to this one that a Christian charity providing support services for people with learning difficulties could not operate a policy of only employing Christians. The tribunal held that the services being provided were not religious in nature and the majority of people being supported were not Christians. Relevant to the issue of proportionality, the tribunal found that some functions of the support workers' role had a Christian element but that the employer should have considered whether those functions could have been carried out by another member of staff or whether a lesser requirement than being a practicing Christian would have been sufficient for the role – such as being sympathetic to the ethos.

In another similar case (G*lasgow City Council v McNab [2007] I.R.L.R. 476*), the Employment Appeal Tribunal held that it was not a genuine occupational requirement for a pastoral care position at a Roman Catholic school to be Roman Catholic.

It seems probable, then, that in the United Kingdom, the courts would have found the claimant's argument that the daily work lacked religious content more persuasive than the German courts did in this case.

Subject: Religious discrimination
Parties: Unknown - v - Caritas
Court: *Bundesarbeitsgericht* (Federal Labour Court)
Date: 25 April 2013
Case number: 2 AZR 579/12
Hardcopy publication: NZA 2013, 1131
Internet-publication: www.bundesarbeitsgericht → Entscheidungen→ enter case number at "Aktenzeichen"

* Paul Schreiner and Dagmar Hellenkemper are lawyers with Luther Rechtsanwaltsgesellschaft mbH, www.luther-lawfirm.com.

2014/13

New French Works Council legislation (ARTICLE)

AUTHOR SÉBASTIEN LE COEUR*

Introduction
On 15 June 2013, legislation took effect that I anticipate will have a deep impact on labour relations in France. The legislation is one of the fruits of the *Accord National*[1] of 11 January 2013. That agreement paved the way for reforms in a number of fields. One of those reforms resulted in new rules on collective redundancies, on which I wrote in EELC 2013/33. This article deals with another set of new rules, in the field of consultation between the management and the works council (*comité d'entreprise)*.

France has had works council legislation ever since 1945, long before the adoption of Directive 2012/14 on informing and consulting employees. That legislation was amended several times with a view to increasing the level of consultation between management and staff representatives. In 1982, an obligation on employers was created to consult with their works council prior to implementing a decision that leads to substantial changes in the workforce, the organisation of the company or the content of the work. In 2005, an obligation was introduced for large companies (300+ employees) to consult with their works council with respect to staff planning and training. Moreover, in the course of time, a second employee representative body, the health & safety council (*comité d'hygiène, de sécurité et des conditions de travail*), has been created.

Despite all these legislative changes, works councils have widely considered the law insufficient to enable them to perform their tasks adequately. Although works councils had to be informed and consulted on a wide range of topics, and the law provided for an annual meeting on matters such as the company's economic and financial situation (basically, its profit and loss account), R&D, health and safety and training, for example, this merely allowed the works council to be informed of and consulted about decisions that were already made. Except in the event of major reorganisations, works councils were not involved in the decision-making process. In other words, until now, works councils were consulted in a piecemeal way. They had difficulty 'joining the dots' between the information they heard and the things they didn't hear - and they often could not see changes coming that they might have seen had they been informed and consulted more fully, particularly as regards future strategy.

Following his election, President Hollande launched negotiations between the social partners that eventually led to the *Accord National*, which in turn led to the adoption, on 14 June 2013, of the Loi relative à la sécurisation de l'emploi and an implementing Decree of 27 December 2013. This legislation brings two significant changes:

1 *Accord National Interprofessionnel pour un nouveau modèle économique et social au service de la competitivité des entreprises et de la sécurisation de l'emploi*, agreed on 11 January 2013 between the principal associations of employers and employees, with the exception of the Confédération Générale du Travail.

1. an obligation for management to consult with the works council at least once a year regarding the company's strategy;
2. a restriction on works councils' ability to delay the consultation process.

Annual consultation

As of 2014, the employer must consult with the works council at least once a year regarding the company's strategy - that is to say, its strategy for the coming years - and its anticipated impact on the business, headcount, job content and skills, the way the work is organised and the use of contractors, temporary agency workers and short-term employment contracts. The purpose of the consultation is to explain to the works council, and to listen to its views on, how the company's added-value is created and shared between shareholders, management, staff and creditors. For international companies with a French subsidiary this will entail discussing such matters as the French entity's contribution to the group results and the group strategy inasmuch as it is relevant to the French subsidiary (e.g. its business development, hiring and firing, management compensation and real estate). This is likely to form a real challenge for many companies. Works councils will demand detailed information in writing.

Databases

Under the new rules, information provided to the works council must be entered into a computerised database that is accessible on a confidential basis to both the works council and the health & safety council and relevant unions. The database must be kept regularly updated. Information may not be removed from the database for two years and it must cover the company's strategy for the coming three years. The database must include information on at least the following subjects:

- equity capital, bank loans, other debts;
- mergers, acquisitions, divestments;
- shareholder remuneration;
- outsourcing;
- government subsidies and tax breaks;
- significant transfers of capital between group entities;
- (planned) investments in material and immaterial assets;
- fluctuations in headcount;
- fluctuations in percentages of staff on short-term contracts, traineeships, part-time contracts and temporary agency assignments;
- compensation, broken down by qualifications and gender and specifying the total earnings of the five highest paid individuals in the company (or ten in companies with 200+ employees);
- the works council's "social and cultural activities";
- working conditions;
- professional training.

Most of this information is already required to be provided to the works council under existing law. What is new is that the works council will have continuously updated information available at all times, as it were, within a mouse click.

Companies employing 300+ employees in France must have their database in place by 15 June 2014. Smaller companies have one more year to comply.

Limitation on duration of consultations

Until the *Loi relative à la sécurisation de l'emploi* and its implementing Decree of 27 December 2013, there was no firm time limit within which the works council had to complete the consultation process. By law, the consultation had to continue until the works council considered itself to be fully informed. Depending on the complexity of a topic, the works council could delay the consultation process for weeks or months, arguing that it had not yet been fully informed.

Under the new law, the works council's consultation is limited in time by two new mechanisms:

- it is limited by agreement or, in the absence of an agreement, by the Decree of 27 December 2013;
- at the end of the allotted time, the consultation stops, whether or not the works council has given its opinion.

No later than the beginning of the consultation, management and the works council must agree upon the maximum duration of the consultation process. This may not be less than 15 days. It should be long enough to allow for a meaningful exchange of information and views, depending on the complexity of the subject. If no agreement is reached, the Decree of 27 December 2013 provides for a cut-off date that is (i) one month after the start of the process; (ii) two months, if the works council appoints an expert; or (iii) three months if the health & safety council is also involved.

In the event that the works council considers that management has failed to provide sufficient information, it can apply to the court for an injunctive order requiring the management to submit the missing information. The new law provides that the court must issue such an order within eight days. Whether the courts will be able to meet this ambitious deadline has yet to be seen.

Although works council members enjoy strong statutory protection against dismissal and other forms of retaliation, in practice, most works councils will be reluctant to start proceedings against their management, certainly in small companies, where union influence tends to be small and works council members are often inexperienced in legal matters. There is a total of 34,800 companies in France with 50 or more employees, but no more than 2,600 could be considered large (500+ employees) and so I do not anticipate much litigation in this area.

In theory, failure by management to comply with the law is a criminal offence. However, unless it has blatantly provided insufficient information, managers are unlikely to be prosecuted for failure to provide a works council with sufficient information.

Flaws in the new legislation

I see three major shortcomings in the new legislation (i.e. the law and decree). First, it does not put a cap on the duration of consultations involving the health & safety council. This means that this council still has the ability to delay consultations. As most large reorganisations require both the works council and the health & safety council to be consulted, this omission in the rules could defeat the purpose of the new law.

Another shortcoming is that the new law is unclear on when the time limits on consultation start to run. Do they start to run when the works council has received all the information it reasonably needs to render its opinion, as some works councils will be bound to argue? If so, that could also frustrate the purpose of the new law.

Thirdly, the time limits themselves are not logical. The basic period of one month is too long for simple matters. This period jumps to two

months as soon as the works council decides to engage an outside expert. This will surely tempt many a works council to appoint an expert, if only to unilaterally extend its time for rendering an opinion. In cases where the health & safety council also needs to be consulted, which is the case whenever a major reorganisation is planned, the time limit goes up to three months, which in many cases, in my opinion, is excessively long.

Conclusion

The new rules will not change much for the largest French companies, which already have a well-defined written policy about consultations and are used to consulting with a professional works council. For the vast majority of French companies with 50 or more employees, however, the new rules bring significant change, both legal and in terms of management culture. For the first time, works councils must be consulted prior to the implementation of strategy. Instead of informing the works council after strategic decisions - in some cases, mistakes - have been made, the works council will have a say before the decisions are made. In my opinion, this represents a major shift, as this new type of communication will become the starting point for all subsequent consultations. It should put those subsequent consultations into perspective and, hopefully, make them more meaningful.

In companies with a tradition of good social relations, the new legislation has been well received. It is certainly an improvement for works councils. But many French companies will find the new law an additional burden. They will need to get used to spelling out a clear strategy in writing for the benefit, not just of management and shareholders, but of others too. This will also apply to many subsidiaries of international companies.

A trend seems to be emerging as a result of the new legislation, where management negotiate a framework agreement with the works council and the health & safety council specifying the duration of consultations based on subject matter and type of project. Framework agreements of this kind should bring more predictability for all parties.

Comments from other jurisdictions

Hungary (Gabriella Ormai): In Hungary there is a recent trend towards limiting works councils' rights. On 1 July 2012 a new Labour Code (Act I of 2012) came into force. We would like to focus on the most significant changes the new Act introduced in relation to works councils by way of comparison to the situation in France.

The new Act has retained the three main competences of the works councils, namely: (i) the right to co-determination; (ii) the right to prior consultation; and (iii) the right to information. While matters about which the works council has the right to a consultation before a decision is made by the employer were widened (and now cover, e.g., the technical means to monitor employees, health and safety measures, the principles determining salary structure and measures to protect the environment), the right to co-determination was narrowed in terms of decisions relating to the use of welfare funds, (however, it is not uncommon for such funds to exist). In case of the right to consultation, the employer is still not bound to follow the views of the works council.

An important change is that whilst before the new Act if the employer breached the works council's right to co-determination prior to consultation, the relevant measure was invalid, the new Act does not provide such a legal consequence any more, with the result that even if the works council takes a breach to the employment tribunal, the tribunal cannot invalidate the relevant measure.

Hungarian labour law is also not particularly generous to works councils when it comes to the duration of consultations. Generally, if the law or parties do not specify otherwise, the employer may not implement a planned measure that is subject to consultation until seven days from the date the consultation began. If there is no agreement, the employer may close the consultation after the deadline has passed.

Finally, the new Act significantly limits the dismissal protection that works council members used to enjoy. While the previous law provided dismissal protection to every member of the works council (e.g. a requirement to obtain the consent of the works council to the termination of the member's employment with notice), in the new Act, such protection is only granted to the chair of the works council. In extreme cases, this can be used to force new elections, since if more than one-third of the council members lose their membership (which is automatic upon termination of employment), the works council would cease to exist.

Finally, the new Act significantly limits the dismissal protection works council members enjoyed. While the previous law provided such dismissal protection (e.g. the requirement to obtain the consent of the works council to the termination of the member's employment with regular notice) to every member of the works council, based on the new Act such protection is only granted to the chairman of the works council. In extreme cases, this can be used to force new elections since if more than one-third of the council members lost membership (which is automatic upon the termination of employment), the works council ceases to exist.

* Sébastien Le Coeur is a lawyer with MGG Legal in Paris, www.mgglegal.com (member of ELLINT, www.ellint.net).

ECJ COURT WATCH

SUMMARIES BY PETER VAN NUNES

RULINGS

ECJ 12 December 2013, case C-50/13 *(Rocco Papalia – v – Commune di Aosta)* **("Papalia")**, Italian case (FIXED-TERM WORK)

Facts

Mr Papalia was employed by the municipality of Aosta from 1983 until 2012 on the basis of multiple successive fixed-term contracts. On 17 July 2012 he was informed that his last contract, which ran until 30 June 2012 would not be extended. He brought proceedings in which he claimed conversion of his contract into a permanent one or, alternatively, monetary compensation.

National proceedings

The court referred to Article 36(5) of Law 165/2001 ('Article 36(5)'), which provides that employees in the public sector who have been illegally employed on fixed-term contracts instead of permanent contracts, are not entitled to have their contract converted into a permanent contract. The court further referred to settled case law of the Italian Supreme Court to the effect that such employees can only claim monetary compensation for abuse of the fixed-term rules if they prove that that abuse has obligated them to give up a better job opportunity. However, being uncertain as to the compatibility of Article 36(5) with Clause 5 of the Framework Agreement on Fixed-Term Work annexed to Directive 1999/79 ('Clause 5'), the court referred a question to the ECJ.

ECJ's findings

1. The ECJ begins by pointing out that it has already provided the answer to the questions in its judgments and orders in *Adeneler* (2001), *Marrosu* (2006), Vassallo (2006), *Angelidaki* (2009), *Vassilakis* (2008), *Koukou* (2009), *Lagoudakis* (2009) and *Affatato* (2010). The rulings in *Marrosu* (C-53/84) and *Vassallo* (C-180/04) even concerned Article 36(5). In these cases, the ECJ held that Clause 5 does not require Member States to provide for the conversion of fixed-term contracts into permanent ones, neither does it require them to provide details of the circumstances in which fixed-term contracts may be used, leaving to the Member States a certain margin of appreciation (§ 15-16).
2. The Member States must adopt legislative measures to guarantee the effectiveness of the measures it has taken to comply with Clause 5 and such measures must be proportionate, effective and dissuasive. Moreover, the remedies must not be less favourable than those applicable in similar situations under domestic law (principle of equivalence) and they must not render the exercise of the rights conferred by EU law impossible or excessively difficult (principle of effectiveness) (§ 17-22).
3. In terms of the principle of equivalence, Mr Papalia and the Italian government disagree on whether it is true, as the former alleges, that a plaintiff, who claims to have suffered a loss as a result of having been employed unlawfully on the basis of successive fixed-term contracts, does not benefit from a presumption of having suffered a loss and must, therefore, prove that the succession of fixed-term contracts prevented him from accepting a better job. Given this disagreement on the facts of the matter, the ECJ cannot pronounce on this point (§ 23-28).
4. In terms of the principle of effectiveness, it is the domestic court's privilege to determine, within the context of the domestic law, whether it is impossible or excessively difficult for a plaintiff such as Mr Papalia to exercise his rights under Clause 5. However, seeing that the referring court has observed that this is the case, it will need to examine this aspect, including the burden of proof issue (§ 29-33).

Ruling (order)

The Framework Agreement on Fixed-Term Work precludes measures under national law, such as those in the present case, which provide solely for the right to claim monetary loss, in the case of abuse of successive fixed-term contracts by a public sector employer, and not for conversion into a permanent employment contract, if the right of conversion would entail having to prove lost employment opportunity and the burden of proving that would have the effect of rendering the exercise of the rights conferred by EU law practically impossible or excessively difficult.

ECJ 15 January 2014, case C-176/12 *(Association de mediation sociale – v – Union locale des syndicats CGI and others)* **("AMS")**, French case (INFORMATION AND CONSULTATION)

Facts

Article 27 of the Charter of Fundamental Rights of the EU provides that workers and their representatives must be guaranteed information and consultation. Directive 2002/14 requires the Member States to make arrangements for information and consultation in 'undertakings' employing at least 50 employees or in 'establishments' employing at least 20 employees. The Directive defines 'employee' as any person who is protected as an employee under national employment law, and it requires each Member State to determine the method for calculating said thresholds of 50 and 20 employees.

French legislation provides that "the election of staff representatives is obligatory for all establishments with 11 or more employees". Where an undertaking or establishment has 50 or more employees, the trade unions must designate a union representative and must create a works council. Article 1111-3 of the *Code du travail* excludes certain categories of persons from the calculation of said 50 and 20 employee thresholds, namely apprentices and other "employees with assisted contracts".

AMS is a private organisation that aims to reintegrate unemployed persons and others into working life. It offers those persons the opportunity to gain professional training.

In 2010, a local union affiliated with CGT appointed Mr Hichem Laboubi as its representative. AMS challenged this appointment, taking the view that, although in total more than 50 persons were employed at AMS, the vast majority of them were employees with assisted contracts and that fewer than 11 of them were 'employees' within the meaning of French legislation.

National proceedings

AMS brought proceedings before the local *Tribunal d'instance* for the annulment of Mr Laboubi's appointment. The CGT union brought a counter-claim for an order that AMS organise elections for a staff representative body. The court referred a question on a point of law to the *Cour de cassation* (Supreme Court), which referred the question on to the *Conseil constitutionnel* (Constitutional Council). It replied that Article 1111-3 of the Code du Travail was not unconstitutional.

In the continuation of the proceedings before the *Tribunal d'instance*, the union submitted that Article 1111-3 is contrary to EU law. The court agreed and declared Mr Laboubi's appointment to be valid. AMS appealed to the Supreme Court, which referred questions to the ECJ for a preliminary ruling.

ECJ's findings

1. Article 1111-3 has the consequence of exempting certain employers from the obligations laid down in Directive 2002/14 and of depriving their employees of the rights granted under that Directive. Although the Member States have a broad margin of discretion in choosing how to achieve their social policy aims, that margin cannot have the effect of frustrating the implementation of a fundamental principle of EU law. Hence, Article 3 of the directive precludes a provision such as Article 1111-3 (§ 23-29).
2. Article 3 of Directive 2002/14 is sufficiently unconditional and precise to have direct (vertical) effect (§ 30-35).
3. However, even a clear, precise and unconditional provision of a directive seeking to confer rights or impose obligations on individuals cannot of itself apply in proceedings between private parties. Therefore, the union in this case cannot rely on Article 3 of the Directive 'as such' against AMS (§ 38-40).
4. In order for Article 27 of the Charter to be fully effective, it must be given more specific expression in EU or national law. This has not happened in a manner relevant to this case, given that Article 3 of Directive 2002/14 does not lay down a specific prohibition on excluding a specific category of persons from the calculation of staff thresholds. In this connection, the facts of the case may be distinguished from those which gave rise to the ECJ's ruling in *Kücükdeveci* in so far as the principle of non-discrimination on grounds of age at issue in that case is sufficient in itself to confer on individuals an individual right which they may invoke as such. Accordingly, Article 27 of the Charter cannot be invoked in a dispute, such as that in the main proceedings, in order to conclude that Article 1111-3 should not be applied (§ 41-49).

Ruling (judgment)

Article 27 of the Charter [...] by itself or in conjunction with the provisions of Directive 2002/14 [...] must be interpreted to the effect that, where a national provision implementing that Directive, such as Article 1111-3 of the French Labour Code, is incompatible with European Union law, that article of the Charter cannot be invoked in a dispute between individuals in order to disapply that national provision.

ECJ 16 January 2014, case C-429/12 *(Siegfried Pohl – v – ÖBB Infrastruktur AG)* **("Pohl")**, Austrian case (AGE DISCRIMINATION)

Facts

Mr Pohl was employed by Austrian Railways ('ÖBB') from 25 November 1974 (at which time he was under 18 years of age) until 4 March 2005. His last salary increase was on 1 January 2002, when he was promoted to point 15 on the salary scale. In 2011, many years after retiring, he brought an action against his former employer, arguing that he should have been promoted to point 16 on the scale before retiring, in which case his pension benefits would have been higher. His claim was based on the fact that, under Austrian law, railway employees have a 'reference date' for advancement, under which years worked before the age of 18 do not count, years worked in Austria after that age but prior to being hired by ÖBB count for half a year and each year of service following hiring counts fully. On this basis, ÖBB informed Mr Pohl, at the time he was hired, that his reference date for the purpose of advancement was 12 November 1971. Had Mr Pohl's years of service before the age of 18 counted and had his years of service between his 18th birthday and 25 November 1974 counted in full rather than for half, his 'reference date' would have been earlier and he would have reached point 16 on the salary scale before retiring.

National proceedings

The *Landesgericht Innsbruck* dismissed Mr Pohl's claim. On appeal, the *Oberlandesgericht Innsbruck* submitted four questions to the ECJ for a preliminary ruling. The first two questions and the fourth deal with equal treatment. The third question has to do with the fact that, under Austrian law, Mr Pohl's claim was time-barred, as he had failed to make a claim within 30 years from the conclusion of the agreement fixing the reference date. The referring court wished to know whether the result of EU law is that the 30-year limitation period should start to run from the conclusion of the agreement fixing the reference date (in this case 1974) or from the date that the ECJ delivered its judgments in *Österreichischer Gewerkschaftsbund* (case C-195/98, judgment delivered in 2000) or *Hütter* (case C-88/08, delivered in 2009).

ECJ's findings

1. It is settled case law that, in the absence of EU rules, it is for the national legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down detailed procedural rules governing the safeguarding of rights which individuals derive from EU law. However, these rules must not be less favourable than those governing similar national actions (principle of equivalence) and must not render the exercise of rights conferred by EU law practically impossible or excessively difficult (principle of effectiveness). Given that EU law does not provide for rules relating to periods within which actions must be brought in regard to the principle of equal treatment, the Austrian time-bar rules apply, subject to said principles (§ 23-25).
2. The 30-year limitation period applies irrespective of whether the claim comes within the scope of EU law or that of Austrian law. Therefore, that period is not contrary to the principle of equivalence (§ 26-28).
3. The dates on which the ECJ ruled in *Österreichischer Gewerkschaftsbund* and *Hütter* are not relevant. A preliminary ruling by the ECJ does not create or alter the law, it is merely declaratory (§ 29-32).
4. Mr Pohl's claim was time-barred from 24 November 2004, that is to say almost seven years before he brought his claim. Even if one were to take his last advancement on 1 January 2002 as a starting point for the time-bar, he still had almost three years before his claim became time-barred. And if one were to take 3 December 2007 - the deadline for implementing Directive 2000/78 - as the start date, he would still have had almost one year to bring his claim before the fatal date of 24 November 2004. In the light of these facts, the Austrian 30-year limitation period, which started to run on 24 November 1974, was not such as to make it practically impossible or excessively difficult for Mr Pohl to exercise the rights he may derive from EU law (§ 33-36).

Ruling

European Union law, and, in particular, the principle of effectiveness, does not preclude national legislation, such as that at issue in the main proceedings, from making the right of an employee to seek a reassessment of periods of service to be taken into account in order to fix a reference date for the purposes of advancement, subject to a 30-year limitation period. This period either starts to run from the

conclusion of the agreement on the basis of which that reference date was fixed or from the time when the person was placed on an incorrect point on the salary scale.

ECJ 13 February 2014, joined cases C-512/11 and C-513/11 *(Terveys- ja sosiaalialan neuvottelujärjestö TSN ry – v – Terveyspalvelualan Liitto ry and Ylemmät Toimihenkilöt YTN ry – v – Teknologiateollisuus ry, Nokia Siemens Networks Oy)* **("Kultarinta")**, Finnish case (PARENTAL AND MATERNITY LEAVES)

Facts

Ms Kultarinta (the plaintiff in case C-512/11) went on maternity leave, during which she continued to receive full pay. Following her maternity leave, she took unpaid parental leave, as provided under Finnish law, for the period 19 March 2009 to 4 April 2011. In 2010 she notified her employer that she was pregnant again and therefore wished to interrupt her (unpaid) parental leave and to start a new period of (paid) maternity leave. Her employer agreed to the interruption of the parental leave but refused to pay her salary during the new period of maternity leave. This was in accordance with the relevant collective agreement, which provided that, in order to receive remuneration during a period of maternity leave, a worker must move directly from work (or paid leave) to maternity leave.

The case of Ms Novano (the plaintiff in case C-513/11) was similar to that of Ms Kultarinta.

National proceedings

Both plaintiffs brought an action before the Labour Court. It referred questions to the ECJ. The court asked whether Directive 2006/54 on equal treatment of men and women in employment (the 'Recast Directive') and Directive 92/85 (the 'Maternity Directive') preclude national provisions under which a worker moving from unpaid leave to maternity leave is not paid remuneration during the maternity leave.

ECJ's findings

1. Although the referring court has limited its questions to the interpretation of Directives 2006/54 and 92/85, its questions must be understand as relating to Directive 96/34 on parental leave (§ 32-35).
2. The choice of a worker to exercise her right to parental leave should not affect the conditions on which she may exercise her right to take a different form of leave (§ 48).
3. The effect of a condition such as that at issue in the main proceedings is to require a worker, when she decides to take a period of parental leave, to renounce paid maternity leave in advance in the event that she should need to interrupt her parental leave to take maternity leave immediately afterwards. Consequently, a worker would be dissuaded from taking such parental leave. Given that a new pregnancy is not always foreseeable, a worker is not always able to know at the time of her decision to take parental leave, whether she will need to take maternity leave during that leave. Accordingly, a condition such as that at issue in the main proceedings undermines the effectiveness of Directive 96/34 (§ 49-51).

Ruling (judgment)

Directive 96/34 [...] must be interpreted as precluding a provision of national law, such as that provided for in the collective agreements at issue in the main proceedings, pursuant to which a pregnant worker who interrupts a period of unpaid parental leave within the meaning of that directive to take maternity leave within the meaning of Council Directive 92/85 with immediate effect [...] does not benefit from the remuneration to which she would have been entitled had that period of maternity leave been preceded by a minimum period of resumption of work.

ECJ 13 February 2014, case C-596/12 *(European Commission – v – Italian Republic)* **("Commission – v – Italy")** (COLLECTIVE REDUNDANCIES)

Facts

The Italian law on collective redundancies excludes certain managerial staff – the '*dirigenti*' – from its scope.

National proceedings

The European Commission brought an action on the basis of Article 258 TFEU against Italy, alleging that it has failed to transpose Directive 98/59 properly. The Italian government denied the allegation, arguing that Article 5 of the Directive allows Member States to adopt legislation that is more favourable for employees and that its law is more favourable for *dirigenti*.

ECJ's findings

1. The aim of Directive 98/59 is to ensure similar protection for employees throughout the EU and to bring the cost involved with that protection for employees in the different Member States closer to one another. Hence the notion of 'employee' in the directive may not be defined according to national law but must be defined autonomously (§ 16).
2. The essential characteristic of an employment relationship is the fact that an individual provides services to another party, under that party's supervision, for a certain period of time for consideration in the form of remuneration (§ 17).
3. The Italian Supreme Court holds the view that Italian law and the collective agreements governing *dirigenti*, which guarantee them financial protection, afford them more favourable protection than that provided in Article 5 of the Directive. This view cannot be accepted. The Directive obligates employers that contemplate collective redundancy to consult with the unions with a view, in particular, to discussing ways to avoid dismissal. The Directive would be rendered ineffective if certain categories of employees lacked such protection (§ 19-23).

Ruling

By excluding *dirigenti* from the scope of the procedure set out in Article 2 of Directive 98/59, the Italian Republic has failed to fulfil its obligations under that directive.

ECJ 27 February 2014, case C-588/12 *(Lyreco Belgium N.V. – v – Sophie Rogiers)* **("Lyreco")**, Belgian case (PARENTAL LEAVE)

Facts

Ms Rogiers was a full-time employee. She took 50% parental leave starting 27 April 2009. On that same day her employer Lyreco dismissed her, the employment contract ending on 31 August 2009. The reasons for her dismissal were (i) lack of work and (ii) her refusal to accept another position.

Belgian law, as it stood at the time, provided that in the event of parental leave, the employer may not terminate the employment relationship save for a 'compelling reason' or for a reason that has been acknowledged by a court to constitute a 'sufficient reason' unconnected with the (request to be given) parental leave. This law transposes the

Framework Agreement on parental leave annexed to Directive 96/39 (as amended). Belgian law also provides that an employer that terminates the employment contract of an employee in the event of the latter's (request for) parental leave, in the absence of a compelling or sufficient reason, shall pay the worker a "fixed-sum of protective compensation" equal to six months' salary.

National proceedings

Ms Rogiers brought an action. The court found that she had been dismissed without a compelling or sufficient reason. It ordered Lyreco to pay Ms Rogiers a protective award equalling six months' salary at 50%. Lyreco appealed and Ms Rogiers cross-appealed. The Court of Appeal agreed with the public prosecutor's opinion on the matter that the manner in which the first instance court applied the law was "absurd", as it would mean that an employee taking 100% parental leave would not be entitled to any protective award at all (six months' salary at 0% being nil). However, the Court of Appeal found it necessary to ask the ECJ for clarification, because it was uncertain whether the ECJ's judgment of 22 October 2009 in the *Meerts* case (case C-116/08, reported in EELC 2010-1) could be applied to a protective award. In *Meerts*, the ECJ held that the salary owed during, or in lieu of, the notice period must be calculated on the basis of the salary the employee earned before his or her parental leave started.

ECJ's findings

1. Clause 2.4 of the Framework Agreement ("Member States shall take the necessary measures to protect workers against dismissal on the grounds of an application for, or the taking of, parental leave") may not be interpreted restrictively (§ 30-36).
2. The Belgian legislation entitling workers on parental leave who have been dismissed without a compelling or sufficient reason to a protective award equivalent to six months' salary may be classified as a 'measure' within the meaning of clause 2.4. However, that protective measure would lose a great part of its effectiveness if it meant that the award was to be calculated on the basis of the worker's salary during parental leave (§ 37-38).
3. Moreover, such an interpretation would not sit well with clause 2.6 of the Framework Agreement, which provides that "Rights acquired or in the process of being acquired by the worker on the date on which parental leave starts shall be maintained as they stand until the end of the parental leave" (§ 42-45).

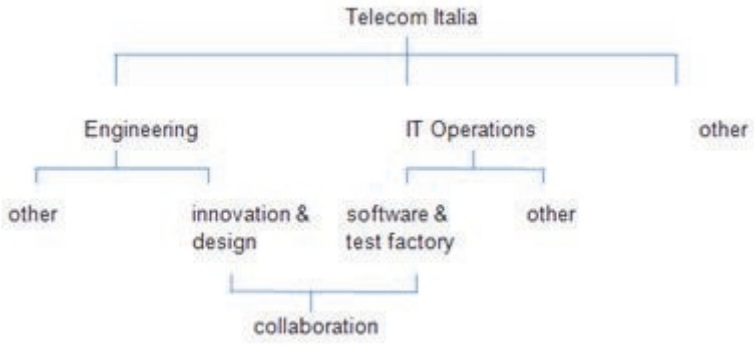
Ruling (judgment)

On a proper construction of clause 2.4 of the Framework Agreement on parental leave, which is set out in the annex to Council Directive 96/34/EC, read in the light both of the objectives of that Framework Agreement and of clause 2.6 thereof, it is contrary to that provision that the fixed-sum protective award payable to a worker on part-time parental leave (where the employer unilaterally and without compelling or sufficient reason terminates that worker's full-time contract of indefinite duration) should be determined on the basis of the reduced salary earned by that worker at the date of the dismissal.

ECJ 6 March 2014, case C-458/12 *(Lorenzo Amatori and others – v – Telecom Italia SpA and Telecom Italia Information Technology Srl)* **("Amatori")**, Italian case (TRANSFER OF UNDERTAKINGS)

Facts

In February 2012, Telecom Italia carried out an internal reorganisation. Before the reorganisation the company had a section called 'Information Technology', which covered the following activities: innovation, design, implementation, operations, applications and operation of infrastructure. During the reorganisation, this section was subdivided into a dozen sections, including 'IT Operations' and 'Engineering'. The IT Operations Section included a unit called 'Software and test factory'. The Engineering Section included the innovation and design activities. The Engineering Section and the Software and test factory continued to collaborate with one another. Further, the Software and test factory received specific instructions from Telecom Italia. The foregoing can be summarized in the following diagram:



In April 2010, Telecom Italia transferred the IT Operations, where Mr Amatori and the other plaintiffs worked, to its subsidiary Telecom Italia Information Technology (TIIT). Telecom Italia and TIIT considered this to constitute the transfer of an undertaking and acted accordingly. The plaintiffs took a different view. They brought proceedings before the *Tribunale di Trento*, seeking a declaration that their employment relationship with Telecom Italia had continued.

National proceedings

The plaintiffs argued that, before April 2010, IT Operations had not constituted a functionally autonomous subdivision within the structure of Telecom Italia. It had not even existed as a section. They also argued that the overriding power exercised by the transferor (Telecom Italia) over the transferee (its subsidiary TIIT) prevented the legal transfer from being classified as a transfer of undertaking. Moreover, TIIT continued to carry out the greater part of its activity for Telecom Italia.

The court decided to stay the proceedings and to refer two questions to the ECJ. The first question was, essentially, whether Directive 2001/23 precludes national legislation, such as that at issue in the main proceedings, that, on the transfer of part of an undertaking, allows the transferee to take over the employment relationships from the transferor, if that part does not constitute a functionally autonomous economic activity which already existed at the time of its transfer. The second question was, essentially, whether the Directive precludes national legislation which allows the transferee to take over the employment relationships from the transferor if, after the transfer of part of the undertaking concerned, the transferor exercises extensive, overriding powers over the transferee.

ECJ's findings

1. The decisive criterion for determining whether there is a transfer of undertaking within the meaning of Directive 2001/23 is whether the entity in question retains its identity. An 'entity' is any organised grouping of persons and assets enabling the exercise of an economic activity pursuing a specific objective, and which is sufficiently structured and autonomous. It follows that the economic entity concerned must have a sufficient degree of functional autonomy, the concept of autonomy referring to the powers granted to those in charge of the group of workers

concerned, to organise, relatively freely and independently, the work within that group and, more particularly, to give instructions and allocate tasks to subordinates within the group, without direct intervention from other organisational structures of the employer (see *Scattolon*, case C-108/10, at § 51) (§ 29-32).
2. This finding is supported by Article 6(1) of the Directive, which distinguishes between a part of an undertaking that does and a part that does not preserve its autonomy. The use of the word 'preserve' means that the independence of the entity transferred must exist before the transfer (§ 33-34).
3. Thus, in the main proceedings, if it should prove that the entity transferred did not, before the transfer, have sufficient functional autonomy, (which it is for the national court to ascertain), that transfer would not be covered by Directive 2001/23 (§ 35).
4. None the less, the Directive does not prohibit a Member State from providing for the safeguard of employees' rights in the situation described in the previous paragraph. Therefore, the mere lack of functional autonomy of the entity transferred cannot, in itself, prevent a Member State from providing in its national law for the safeguarding of employees' rights after a change of employer (§ 36-41).
5. Directive 2001/23 is intended to cover any legal change in the person of the employer if the other conditions it lays down are also met. The Directive can, therefore, apply to a transfer between two subsidiary companies in the same group, which are distinct legal persons each with specific employment relationships with their employees. The fact that the companies in question not only have the same ownership but also the same management and the same premises and that they are engaged in the same work makes no difference in this regard (§ 47-51).

Ruling (judgment)

1. Article 1(1)(a) and (b) of Council Directive 2001/23/EC must be interpreted as meaning that it does not preclude national legislation, such as that at issue in the main proceedings, which, on the transfer of part of the undertaking, permits the transferee to take over the employment relationship from the transferor, if that part of the undertaking does not constitute a functionally autonomous economic entity existing before the transfer.
2. Article 1(1)(a) and (b) must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which enables the transferee to take over employment relationships from the transferor if, after the transfer of part of an undertaking, it exercises extensive, overriding powers over the transferee.

ECJ 6 March 2014, case C-595/12 *(Lorredana Napoli – v – Ministero della Giustizia)* **("Napoli")**, Italian case (SEX DISCRIMINATION)

Facts

Ms Napoli was successful in a competition for appointment as deputy commissioner of the prison service corps and was admitted to the training course for this position. The course was scheduled to start on 28 December 2011. On 7 December 2011 she gave birth and was placed on compulsory maternity leave until 7 March 2012. She was informed that she would be excluded from the course and that payment of her salary would be suspended. However, she would be admitted to the next course organised.

National proceedings

Ms Napoli brought an action against the Justice Department before the local administrative tribunal. It held that the relevant provision of Italian law was incompatible with Directive 2006/54 and it ordered the Justice Department, by way of an interlocutory order, to readmit Ms Napoli to the course once her maternity leave was over (i.e. as from 8 March 2012). The court referred five questions to the ECJ.

ECJ's findings

1. The first two questions relate to Articles 2(2)(c), 14(1)(c) and 15 of Directive 2006/54. Article 2(2)(c) provides that 'discrimination' includes "any less favourable treatment of a woman related to pregnancy or maternity leave". Article 14(1)(c) prohibits sex discrimination in employment and working conditions. Article 15 provides that: *"A woman on maternity leave shall be entitled, after the end of her period of maternity leave, to return to her job or to an equivalent post on terms and conditions which are no less favourable to her and to benefit from any improvement in working conditions to which she would have been entitled during her absence."* The exclusion of Ms Napoli from the course that started on 28 December 2011 and the fact that she was subsequently prevented from participating in the examination at the end of that course resulted in her losing a chance of benefiting from an improvement in working conditions. The other workers admitted to the course had the opportunity to attend that course in its entirety and, if they were successful in the examination at the end of the training, they might also have been promoted. Therefore, Ms Napoli was discriminated against on the grounds of her sex (§ 32-33).
2. This finding is not called into question by the fact that only candidates who have been adequately prepared to perform their new functions should be allowed to participate in the examination. Depending on the circumstances, even though national authorities have a certain degree of discretion when adopting measures which they consider to be necessary in order to guarantee public security, they are nevertheless required, when they lay down measures which derogate from a fundamental right such as equal treatment of men and women, to observe the principle of proportionality (§ 34-35).
3. A measure such as that at issue, which merely grants a woman who has taken maternity leave the right to participate in a training course organised at a later, but uncertain date, does not appear to comply with the principle of proportionality, particularly given the fact that the prison authorities are under no obligation to organise courses at specified intervals. Those authorities could, for example, provide, for a worker returning from maternity leave, a parallel remedial course allowing her to be admitted to the examination within the prescribed period (§ 36-38).
4. The referring court's third question relates to Article 14(2) of Directive 2006/54:
   "Member States may provide, as regards access to employment including the training leading thereto, that a difference of treatment which is based on a characteristic related to sex shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that its objective is legitimate and the requirement is proportionate."
   This provision does not apply to the Italian legislation at issue, which does not limit specific activities to male workers (§ 40-43).
5. The referring court's fifth question is whether Articles 14(1)(c) and 15 of Directive 2006/54 are sufficiently clear, precise and unconditional to have direct effect. The ECJ replies in the affirmative (§ 45-50).

Ruling (judgment)

1. Article 15 of Directive 2006/54 [...] must be interpreted as precluding national legislation which, on grounds relating to the public interest, excludes a woman on maternity leave from a vocational training course which forms an integral part of her employment and which is a requirement for definitive appointment to a post as a civil servant and for benefitting from an improvement in her employment conditions, even though she is guaranteed the right to participate in the next training course organised, albeit at an uncertain date.
2. Article 14(2) of Directive 2006/54 does not apply to national legislation, such as that at issue in the main proceedings, which does not limit a specified activity to male workers but which delays access by female workers to that activity, as they have been unable to receive full vocational training as a result of compulsory maternity leave.
3. The provisions of Article 14(1)(c) and Article 15 of Directive 2006/54 are sufficiently clear, precise and unconditional to have direct effect.

OPINIONS

Opinion of Advocate-General Wathelet of 13 February 2014 in joined cases C-53/13 and C-80/13 *(Strojírny Prostejov a.s. – v – Odvolací financní reditelství and ACO Industries Tábor s.r.o. – v – Odvolací financní reditelství)* **("Strojírny Prostě jov")**

Facts

The plaintiffs in the main proceedings are two Czech companies that hired the services of temporary agency workers ('temps') from Slovakian agency employers. Czech law provides that companies must pay income tax (at source) on the salaries it pays workers provided to them by foreign employment agencies, even where the foreign agency (i.e. the employer) has an office in the Czech Republic. Moreover, 60% of the employment agencies' invoices shall be presumed to consist of salary unless the hiring company can prove that less than 60% of the invoice is for salary. The plaintiffs had not paid said tax and were therefore assessed for tax on the basis of the 60% presumption. They claimed that this obligated them to pay double income tax: once in Czech Republic and again in Slovakia, given that the agencies' invoices already included wage tax.

National proceedings

The plaintiffs brought proceedings. The two courts in question referred questions to the ECJ regarding the compatibility of the Czech tax rules at issue with Articles 18, 45, 49 and 56 TFEU on free movement, in light of the fact that if the plaintiffs had hired the services of workers employed by a domestic Czech agency, that agency and not the plaintiffs would have had to pay the tax.

Opinion

1. The plaintiffs argue that the Czech tax rules at issue restrict the freedom to provide services by making it more expensive and more administratively burdensome for Czech companies to hire temporary labour from a foreign-based agency than from a domestic Czech agency. The Czech government argues that foreign employment agencies are not in a comparable situation with, and do not compete against, Czech employment agencies. The Danish government argues that the correct comparison is not the cost of hiring agency staff from a foreign employment agency versus the cost of hiring staff from a domestic agency, but the earnings of a worker hired from a foreign agency versus the earnings hired from a domestic agency (§ 26 – 32).
2. The ECJ has ruled in several cases on the compatibility of withholding tax with the freedom to provide services within the EU. In three of those cases – FKP *Scorpio Konzertproduktionen* (C-290/04), *Commission – v – Belgium* (C-433/04) and *X* (C-498/10) – the court held that the situations being compared were comparable and that the withholding obligation was at odds with the rules on free movement. In one case, however – *Truck Center* (C-282/07) – the ECJ held otherwise. The Advocate-General analyses each of these cases, distinguishing the present case from *Truck Center*. The conclusion is that the situation of a Czech company hiring the services of a foreign employment agency is comparable with that of a Czech company hiring the services of a Czech employment agency, and that the right to free movement of services (Article 56 TFEU) has been restricted (§ 33 – 51).
3. The next question to be addressed is whether the restriction is objectively justified. The Czech government points out that many Czech companies hire foreign agency staff for under 183 days in any year (which has the effect that they remain subject to the tax system of their home country) and that the rules at issue are necessary to combat abuse of this practice and tax evasion. Following an analysis of this and other arguments justifying the rules at issue, the Advocate-General concludes that those rules, in particular the 60% presumption, are disproportionate (§ 52 – 82).

Proposed reply

Article 56 TFEU precludes a national rule such as that at issue, under which Czech companies that hire temporary staff from a foreign employment agency must pay a withholding tax (on the basis of the presumption that 60% of the agency's invoices represent wages), whereas that obligation does not exist where temporary staff are hired from a domestic employment agency.

Opinion of Advocate-General Sharpston of 13 February 2014 in case C-476/12 *(Österreichischer Gewerkschaftsbund – v – Verband Österreichischer Banken und Bankiers)* **("ÖFAB")**, Austrian case (PART-TIME WORK)

Facts

A collective agreement for the Austrian banking sector provides that employers must pay an allowance to those of their employees who have a dependent child. Part-time employees are eligible for a prorated allowance.

National proceedings

The trade union ÖGB brought proceedings before the *Oberster Gerichtshof* on behalf of a number of part-time employees, seeking a declaratory judgment that those employees were entitled to a full, rather than a prorated, allowance. The court referred three questions to the ECJ. The questions related to the Framework Agreement on part-time work annexed to Directive 97/81. Clause 4 of the Framework Agreement provides:

"1. In respect of employment conditions, part-time workers shall not be treated in a less favourable manner than comparable full-time workers solely because they work part-time unless different treatment is justified on objective grounds.

2. Where appropriate, the principle of pro rata temporis shall apply."

The referring court's first question was whether Clause 4(2) means that the pro rata temporis principle applies to child allowances such as those in the main proceedings. Questions 2 and 3 were, essentially, whether prorating the benefits is objectively justified in the event question 1 is answered in the negative.

Opinion

1. Clause 4(2) does not simply provide that the principle of *pro rata temporis* shall apply: it provides that this principle shall apply where appropriate. This implies that the principle may be applied somewhat more flexibly. It is obvious that some conditions of employment cannot be prorated (§ 24-25).
2. The ECJ's approach thus far has been that whatever qualifies as 'pay' may be prorated: see *Landeskrankhäuser Tirols* (C-486/08) and *Heimann* (C-229/11) in respect of paid leave and several other judgments regarding equal treatment of men and women (§ 27-32).
3. Although the dependent child allowance is only paid to workers with dependent children without reference to the workers' need, it manifestly forms part of what is paid to employees by virtue of their contract of employments. Given that the allowance thus constitutes 'pay', it follows that it is 'appropriate' to apply the *pro rata temporis* principle. The fact that the allowance serves a social objective is praiseworthy but does not alter its legal classification as pay (§ 34-40).
4. This conclusion might have been different had there been a statutory obligation on the employer to pay the allowance, which would then be a social benefit (§ 41).
5. Although Clause 4(2) is couched in mandatory terms ("Where appropriate, the principle of *pro rata temporis* **shall** apply"), this does not mean that it **must** be applied. An employer may be more generous. The words "shall apply" merely mean that, where it is appropriate to apply the *pro rata temporis* principle, that principle shall apply without the need for any **further** objective justification (§ 42).
6. Given the above, questions 2 and 3 need not be addressed (§ 44-52).

Proposed reply

It is appropriate to apply the principle *pro rata temporis* to a dependent child allowance provided for in a collective agreement, where there is no statutory obligation on the parties to make provision for such an allowance.

PENDING CASES

Case C-407/13 *(Francesco Rotondo and others – v – Rete Ferroviaria Italia SpA)*, reference lodged by the Italian *Corte Suprema di Cassazione* on 17 July 2013 (FIXED-TERM WORK)

Is the framework agreement on fixed-term work implemented by Directive 1999/70 applicable to maritime labour and, in particular, does clause 2(1) thereof also cover workers engaged for a fixed term on ferries making daily crossings?

Does the framework agreement, in particular clause 3(1), preclude national legislation that provides that the "duration" of the contract, rather than its "term", is to be indicated, and is it compatible with that directive to provide for the duration of the contract by indicating a terminating point that is definite as regards the question of whether it exists ("a maximum of 78 days") but indefinite as regards the question of when it occurs?

Does the framework agreement, in particular clause 3(1), preclude national legislation in which the objective reasons for a fixed-term contract are expressed simply in terms of the voyage or voyages to be made, in essence equating the purpose of the contract (the service provided) with its cause (the reasons for fixing the term)?

Does the framework preclude national legislation that, in the event of the use of successive contracts (in such a way as to be considered abusive for the purposes of clause 5) excludes the transformation of those contracts into contracts of indefinite duration?

Case C-413/13 *(FNV Kunsten Informatie en Media – v – The Netherlands)*, reference lodged by the Dutch *Hoge Raad* on 22 July 2013 (COMPETITION LAW)

Must the competition rules of EU law be interpreted as meaning that a provision in a collective labour agreement concluded between associations of employers and associations of employees, which provides that self-employed persons who, on the basis of a contract for professional services, perform the same work for an employer as the workers who come within the scope of that collective labour agreement must receive a specific minimum fee, falls outside the scope of Article 101 TFEU, specifically on the grounds that the provision occurs in a collective labour agreement?

If the answer to this question is in the negative, does the provision then fall outside the scope of Article 101 TFEU if it is (also) intended to improve the working conditions of the employees who come within the scope of the collective labour agreement? Is it also relevant in that regard whether those working conditions are thereby improved directly or only indirectly?

Case C-416/13 *(Mario Vital Pérez – v – Ayuntamiento de Oviedo)*, reference lodged by the Spanish *Juzgado Contencioso-Administrativo de Oviedo* on 23 July 2013 (AGE DISCRIMINATION)

Do Directive 2000/78 and Article 21(1) of the Charter of Fundamental Rights of the European Union, inasmuch as they prohibit all discrimination on grounds of age, preclude the fixing, in a notice of competition issued by a municipality expressly applying a regional law of a Member State, of a maximum age of 30 for access to the post of local police officer?

Case C-417/13 *(ÖBB Personenverkehr – v – Gottland Starjakob)*, reference lodged by the Austrian *Oberster Gerichtshof* on 23 July 2013 (AGE DISCRIMINATION)

1. Is Article 21 of the Charter of Fundamental Rights, in conjunction with Articles 7(1), 16 and 17 of Directive 2000/78/EC, to be interpreted as meaning:

(a) that an employee for whom the employer initially sets an incorrect increment reference date based on an age-discriminatory accreditation of previous periods of service as prescribed by law, is in all circumstances entitled to payment of the difference in salary based on the non-discriminatory increment reference date; or

(b) that the Member State has the option of eliminating the age-based discrimination by way of a non-discriminatory accreditation of

previous periods of service without financial compensation (by setting a new increment reference date and at the same time extending the period for advancement to the next salary step), in particular where such a solution, having a neutral effect on pay, is intended to preserve the employer's liquidity and avoid unreasonable expense resulting from recalculation?

2. If Question 1(b) is answered in the affirmative:
(a) may the legislature also introduce non-discriminatory accreditation of previous periods of service retroactively; or
(b) does such accreditation take effect only from the point in time at which the new accreditation and incremental advancement rules are enacted or promulgated?

3. If Question 1(b) is answered in the affirmative:
Is Article 21 of the Charter of Fundamental Rights, in conjunction with Article 2(1) and (2) and Article 6(1) of Directive 2000/78/EC, to be interpreted as meaning:
(a) that a legislative rule which provides for a longer period for incremental advancement for employment at the start of a career, thereby making it more difficult to advance to the next salary step, constitutes an indirect difference in treatment based on age; and
(b) if this is the case, that such a rule is appropriate and necessary in the light of the limited professional experience of an employee at the start of a career?

4. If Question 1(b) is answered in the affirmative:
Are Article 7(1) and Article 8(1), in conjunction with Article 6(1), of Directive 2000/78/EC to be interpreted as meaning that the maintenance of an old, age-discriminatory rule simply in order to protect an employee from being disadvantaged in terms of income by a new, non-discriminatory rule (salary safeguard clause) is permissible and justified in terms of preserving existing rights and legitimate expectations?

5. If Question 1(b) and Question 3(b) are answered in the affirmative:
(a) May the legislature provide that the employee has a duty (or obligation) to cooperate for the purpose of establishing previous periods of accreditable service and make transfer to the new accreditation and incremental advancement system dependent on fulfilment of that obligation?
(b) Can an employee who fails to cooperate as may reasonably be expected in setting the new increment reference date under the new, non-discriminatory accreditation and incremental advancement system, and who therefore deliberately does not avail himself of the non-discriminatory rule (remaining of his own volition under the old, age-discriminatory accreditation and advancement system), invoke age discrimination under the old system, or does his remaining under the old, discriminatory system simply in order to be able to bring monetary claims constitute an abuse of rights?

6. If Question 1(a) or Questions 1(b) and 2(b) are answered in the affirmative:
Does the EU-law principle of effectiveness under the first paragraph of Article 47 of the Charter of Fundamental Rights and Article 19(1) TEU require that the period of limitation for claims founded in EU law cannot start to run until the legal position has been conclusively clarified by the pronouncement of a relevant decision by the Court of Justice of the European Union?

7. If Question 1(a) or Questions 1(b) and 2(b) are answered in the affirmative:

Does the EU-law principle of equivalence require that a restriction, provided for in national law, of the period of limitation for bringing claims under a new accreditation and incremental advancement system (Paragraph 53a(5) of the *Bundesbahngesetz*, the Austrian Law on Federal Railways) must be extended to claims for differences in pay resulting from an old system involving age discrimination?

Case C-418/13 *(Carla Napolitano and others – v – Ministero dell'Instruzione, dell'Università e della Ricerca)*, reference lodged by the Italian *Corte Constituzionale* on 23 July 2013 (FIXED-TERM WORK)

Must clause 5(1) of the Framework Agreement on fixed-term work annexed to Directive 1999/70 be interpreted as precluding the application of an Italian statutory provision adopting urgent provisions concerning school employees which, after laying down rules on the allocation of annual replacements for "posts that are in fact vacant and free by 31 December", goes on to provide that this is to be done by allocating annual replacements "pending the completion of competition procedures for the recruitment of permanent members of the teaching staff" – a provision that permits fixed-term contracts to be used without a definite period being fixed for completing the competition, and in a clause that provides no right to compensation for loss?

Do the requirements of the organisation of the Italian school system set out above constitute objective reasons within the meaning of clause 5(1) of Directive 1999/70 of such a kind as to render compatible with the law of the EU, legislation such as this Italian legislation, that does not provide a right to compensation for loss in respect of the appointment of school staff on fixed-term contracts?

Joined **Cases C-464/13 and C-465/13** (*Europäische Schule München* – v – respectively, *Silvana Oberto* and *Barbara O'Leary*), reference lodged by the German *Bundesarbeitsgericht* on 27 August 2013 (MISCELLANEOUS)

This case concerns the interpretation of the Statute of the European Schools.

Case C-477/13 *(Hans Angerer – v – Eintragungsausschuss bei der Bayerischen Architektenkammer)*, reference lodged by the German *Bundesverwaltungsgericht* on 5 September 2013 (RECOGNITION OF PROFESSIONAL QUALIFICATIONS)

This case concerns the interpretation of Directive 2005/36 on the recognition of professional qualifications, in this case that of an architect.

Case C-515/13 (*Ingeniørforeningen i Danmark*, acting on behalf of *Poul Landin – v – TEKNIQ*, acting on behalf of *ENCO A/S – VVS*), reference lodged by the Danish *Østre Landsret* on 25 September 2013 (AGE DISCRIMINATION)

Is the prohibition of direct discrimination on grounds of age contained in Articles 2 and 6 of Directive 2000/78/EC to be interpreted as precluding a Member State from maintaining a legal situation whereby an employer, upon dismissal of salaried employees who have been continuously employed in the same undertaking for 12, 15 and 18 years, must, upon termination of their employment, pay an amount equivalent to one, two or three months' salary respectively, unless the salaried employee, upon termination of employment, is entitled to receive a

State retirement pension?

Case C-523/13 *(Walter Larcher – v – Deutsche Rentenversicherung Bayern Süd)*, reference lodged by the German *Bundessozialgericht* on 3 October 2013 (FREE MOVEMENT, SOCIAL INSURANCE)

Does the principle of equality preclude a national provision under which it is a condition of entitlement to an old-age pension following part-time work for older employees that the part-time work for older employees was pursued under the legislation of that Member State, and not of another Member State?

If so, what requirements does the principle of equal treatment impose on the assimilation of part-time work for older employees completed under the legislation of the other Member State as a condition of entitlement to a national old-age pension?

(a) Is a comparative examination of the conditions for part-time work for older employees needed?
(b) If so, is it sufficient that the part-time work for older employees in both Member States is essentially the same in content, in terms of its functioning and structure?
(c) Or must the conditions for part-time work for older employees in both Member States be identical in content?

Case C-527/13 *(Lourdes Cachaldora Fernandez – v – INSS and TGSS)*, reference lodged by the Spanish *Tribunal Superior de Justicia de Galicia* on 7 October 2013 (SEX DISCRIMINATION)

Is a national provision contrary to (a) Article 4 of Directive 79/7 on the progressive implementation of the principle of equal treatment for men and women in matters of social security or (b) clause 5(1) (a) of Directive 97/81 concerning the Framework Agreement on part-time work, if it affects a group comprising mainly women and there are contribution gaps in the period for calculating the reference base of their permanent invalidity contributory pension following periods of part-time work, and these have been covered using the minimum contribution bases applicable at the time (reduced as a result of the partiality coefficient of the employment before the contribution gap), whereas if the employment is full-time, there is no reduction?

Case C-529/13 *(Georg Felber – v – Bundesministerin für Unterricht, Kunst und Kultur)*, reference lodged by the German *Verwaltungsgerichtshof* on 8 October 2013 (AGE DISCRIMINATION)

Does it constitute (direct) unequal treatment on grounds of age for the purposes of Article 21(1) of the Charter and Articles 2(1) and (2) (a) of Directive 2000/78 if periods of study at an intermediate or secondary school are credited as pensionable previous periods only if they were completed after a public servant reached the age of 18, where those pensionable previous periods are important not only for pension entitlement but also for the amount of that pension, and the total pension is regarded in national law as the continued payment of remuneration in the context of a public law employment relationship which still exists even after the civil servant has retired?

If so, may a civil servant – in the absence of a justification – rely on the direct applicability of Article 21 of the Charter and Article 2 of the directive in proceedings concerning an application for the crediting of pensionable previous periods even if he has not yet retired at that time, especially since under national law – if the legal position has not changed upon his retirement – the legal force of the rejection of such an application could be held against him in a pension assessment procedure or in the case of a fresh application for the crediting of those periods?

If so, is this unequal treatment for the purposes of Article 52(1) of the Charter and Article 6(1) and (2) of the directive:

(a) justified in order to accord the same conditions to persons whose date of birth lies after the date on which school began in the year they started school or to persons who attend a type of school with an extended upper stage and, for that reason, have to attend school after the age of 18 in order to complete their studies, as to persons who complete intermediate or secondary school before the age of 18, even if the eligibility of periods of school attendance after the age of 18 are not restricted to the abovementioned cases;

(b) justified in order to exclude from the entitlement periods in which, generally, no gainful activity takes place and accordingly no contributions are paid? Does such a justification exist irrespective of the fact that at first no contributions are payable in respect of periods of attendance of intermediate or secondary schools after the age of 18 and, if such periods of school attendance are subsequently credited, a special pension contribution is payable in any event?

(c) justified because the exclusion of the crediting of pensionable previous periods completed before the age of 18 is to be regarded as equivalent to setting an "age for admission to an occupational social security scheme" within the meaning of Article 6(2) of the directive?

Case C-530/13 *(Leopold Schmitzer – v – Bundesministerin für Inneres)*, reference lodged by the German *Verwaltungsgerichtshof* on 8 October 2013 (AGE DISCRIMINATION)

1. Does it constitute (direct) unequal treatment on grounds of age for the purposes of Article 21 of the Charter and Articles 2(1) and (2)(a) of Directive 2000/78 if, upon the introduction of a non-discriminatory system of salary advancement for new civil servants, an old civil servant who suffered discrimination under the former legal situation (as a result of the ineligibility, for advancement purposes, of periods completed before the age of 18) may make a request to opt in to the new system and thereby obtain an advancement reference date calculated on a non-discriminatory basis, but the effect of granting such a request under national law is that, because of the slower advancement provided for in the new system, his remuneration status (and thus ultimately the salary payable to him) does not improve, despite the improvement of the advancement reference date and this means that he acquires the same remuneration status as an old civil servant afforded favourable treatment in a discriminatory manner under the former legal situation - who is not required to demonstrate comparable periods before, but after the age of 18, which were already credited to him under the former legal situation and who does not feel compelled to opt in to the new system?

2. If so, may a civil servant – in the absence of a justification – rely on the direct applicability of Article 21 of the Charter and Article 2 of the directive in proceedings to determine remuneration status even if he has previously obtained an improvement of the advancement reference date in the new system by making a request to that effect?

3. If Question 1 is answered in the affirmative, is a distinction, which continues to be maintained after the introduction of a non-discriminatory system for new civil servants, in respect of the remuneration status of old civil servants who are afforded favourable treatment and who do not opt in, on the one hand, and old civil servants who still suffer discrimination despite opting in, on the other, justified in accordance with Article 52(1) of the Charter and Article 6 of the directive, as a transitional phenomenon, on grounds of procedural economy, or protection of established advantages or legitimate expectations even where:

(a) the national legislature is not, in regulating the advancement system, required to obtain the approval of parties to the collective bargaining agreement and is obliged merely to act within the fundamental limits of the principle of protection of legitimate expectations, which does not necessitate the full protection of established advantages in the form of the complete retention of the earlier system for old civil servants who are afforded favourable treatment and who do not opt in;

(b) the national legislature would also have been free, in this connection, to establish equality among old civil servants by crediting periods before the age of 18 whilst retaining the earlier rules on advancement for old civil servants who had previously suffered discrimination;

(c) the associated administrative burden would be considerable on account of the large number of anticipated requests but, as far as its expenditure is concerned, does not come anywhere near the total amount of earnings lost and to be lost in future by the civil servants who suffer discrimination in comparison with those who are afforded favourable treatment;

(d) the transitional periods with the continued existence of unequal treatment between old civil servants last many decades and will also affect the vast majority of civil servants for a very long time (as a result of the general freeze on the recruitment of new civil servants in a public law employment relationship);

(e) the system that was retroactively introduced had to be implemented between 1 January 2004 and 30 August 2010 and although it worked to the detriment of some civil servants, it favoured others and they requested it be applied to their cases even before the amending law was adopted?

4. If Questions 1 or 2 are answered in the negative or Question 3 is answered in the affirmative:

(a) Does legislation which provides for a longer advancement period for periods of employment at the beginning of the career and thus makes advancement to the next salary grade more difficult, constitute indirect unequal treatment on grounds of age?

(b) If so, is it appropriate and necessary in the light of the small amount of professional experience that employees have at the beginning of their careers?

5. If Question 3 is answered in the affirmative:

(a) Does legislation which credits the full value of "other periods" for up to three years, and half the value of such periods for up to a further three years, even where these are not for the purposes of either school education or gaining professional experience, constitute discrimination on grounds of age?

(b) If so, is it justified in terms of avoiding deterioration in the remuneration status of civil servants (including new civil servants) who do not have suitable eligible periods before the age of 18 even though eligibility also covers other periods after the age of 18?

6. If Question 4(a) is answered in the affirmative and Question 4(b) is answered in the negative and, at the same time, Question 3 is answered in the affirmative or Question 5(a) is answered in the affirmative and Question 5(b) in the negative:

Do the discriminatory characteristics of the new rules which then exist mean that the unequal treatment of old civil servants is no longer justified as a transitional phenomenon?

Case C-533/13 *(Auto- ja Kuljetusalan Työntekijäliitto AKT ry – v – Öljytuote ry, Shell Aviation Finland Oy)*, reference lodged by the Finnish *Työtuomioistuin* on 9 October 2013 (TEMPORARY AGENCY WORK)

(a) Must Article 4(1) of the Temporary Agency Work Directive 2008/104/EC be interpreted as laying down a permanent obligation on national authorities, including the courts, to ensure by the means available to them that national provisions or clauses in collective agreements contrary to that provision of the directive are not in force or are not applied?

(b) Must Article 4(1) of the directive be interpreted as precluding a national provision under which the use of temporary agency labour is permitted only in the cases specially listed, such as to cope with peak periods of work or for work that cannot be given to an undertaking's own employees to do? May the use of agency workers for a lengthy period in the ordinary work of an undertaking alongside the undertaking's own employees be defined as a prohibited use of agency labour?

(c) If the national provision is found to be contrary to the directive, what methods does a court have for achieving the objectives of the directive where a collective agreement to be observed by individuals is concerned?

Case C-566/13 *(Jorge Ítalo Assis dos Santos – v – Banco de Portugal)*, reference lodged by the Portuguese *Tribunal do Trabalho de Lisboa* on 5 November 2013 (DISCRIMINATION)

This case concerns a law requiring the central bank to suspend payment of the 13th and 14th month payments to its retirees. The first two questions relate to Articles 130 and 123 TFEU on autonomy of and financing by central banks. The third question is:

Does the fact that the suspension of payment of the 13th and 14th month payment is restricted to retired workers and does not affect workers in active service infringe the principle of equality, having regard to the prohibition against discrimination laid down in Articles 20 and 21 of the Charter of Fundamental Rights of the European Union?

Case C-586/13 *(Mertin Meat Kft. – v – Géza Simonfay* and others*)*, reference lodged by the *Hungarian Pesti Központi Kerületi Bíróság* on 20 November 2013 (POSTING DIRECTIVE)

The first question is whether there is a posting of workers under European law where a contractor processes sides of beef, using its own workforce, in premises rented from the client in the client's slaughterhouse and packages them in market-ready packs, and a price is payable to the contractor per kilogram of processed meat, where, if the processing is of insufficient quality the contractor must accept a deduction from the price for meat processing, bearing in mind that in the host State the contractor supplies the service exclusively to that client and the client also monitors the quality of the meat processing

work?

The second question relates to transitional provisions under the Accession Treaties for the Member States that joined the EU on 1 May 2014.

Case C-683/13 *(Pharmacontinente Saúde e Higiene SA* and others – *v – Autoridade para as Condições do Trabalho)*, reference lodged by the Portuguese *Tribunal do Trabalho da Covilhã* on 23 December 2013 (DATA PROTECTION)

(a) Is Article 2 of Directive 95/46/EC to be interpreted as meaning that the concept of 'personal data' covers the record of working time, that is to say, an indication in relation to each worker of the times when work begins and ends, together with the times of related breaks and intervals?

(b) If the answer to Question (a) is in the affirmative, is the Portuguese State obliged, under Article 17(1) of Directive 95/46/EC, to adopt appropriate technical and organisational measures to protect personal data against accidental or unlawful destruction or accidental loss, alteration, unauthorised disclosure or access, in particular where the processing involves transmission of data over a network?

(c) If the answer to Question (b) is in the affirmative, if a Member State does not adopt any measures pursuant to Article 17(1) of Directive 95/46/EC and an employer (data controller) adopts a system of restricted access to the data which does not allow automatic access by the national authority responsible for monitoring working conditions, is the principle of the primacy of European Union Law to be interpreted as meaning that the Member State cannot penalise the employer for such behaviour?

(d) If the answer to Question (c) is in the negative, while it has not been shown or argued that information from the record has been altered, is the requirement that a record be immediately available, enabling all parties to the employment relationship to have general access to the data, proportionate?

Note: see the ECJ's ruling of 30 May 2013 in case C-342/12 (*Worten*).

Case C-688/13 *(Gimnasio Deportivo San Andrés, S.L. – v – Gemma Atarés París and Agencia Estatal de la Administración Tributaria)*, reference lodged by the Spanish *Juzgado Mercantil de Barcelona* on 27 December 2013 (TRANSFER OF UNDERTAKINGS)

Given that insolvency proceedings give rise to protection at least equivalent to that provided for in the Community directives, must the guarantee that a transferee acquiring an undertaking or a production unit of an undertaking that is in administration will not take on liability for social security debts be considered to relate uniquely and exclusively to debts directly linked to employment contracts or employment relationships or, in the framework of overall protection of the rights of employees and the safeguarding of employment, must that guarantee be extended to employment-related or social security debts incurred before the award to a third party?

In the same context of guaranteeing the rights of employees, can the purchaser of the production unit obtain the award of a guarantee from the court dealing with the insolvency, not only in relation to rights arising from the employments contracts but also in relation to debts incurred before the award that the insolvent company may owe to employees whose employment relationship has already been terminated or in relation to earlier social security debts?

Does a person who acquires an insolvent undertaking or a production unit and undertakes to safeguard all or some of the contracts of employment, accepting liability for them by subrogation, obtain a guarantee that no other obligations of the transferor connected to the contracts or relationships will be claimed against him or transferred to him if he accepts liability, particularly for earlier employment risks or social security debts by subrogation,?

In brief, as regards the transfer of production units or undertakings that have been judicially or administratively declared insolvent and put into liquidation, can Directive 2001/23 be interpreted not only as permitting the safeguarding of contracts of employment but also as making it certain that the purchaser will not be liable for debts incurred before the transfer of the production unit?

Does the wording of Article 149(2) of the *Ley Concursal Española* (Spanish Law on Insolvency), in referring to the transfer of an undertaking, constitute the provision of national law required by Article 5(2)(a) of Directive 2001/23 for the exception to operate?

And, if this is so, must the award order issued by the court conducting the insolvency proceedings containing these guarantees and safeguards in all circumstances be binding on all other courts and administrative procedures that may be brought against the transferee in respect of debts incurred before the date of purchase, with the result, therefore, that Article 44 of the Workers' Statute cannot render ineffective Article 149(2) and (3) of the *Ley Concursal*?

If, on the other hand, it were to be considered that Articles 149(2) and (3) of the *Ley Concursal* do not operate as an exception under Article 5 of the Directive, the Court of Justice is asked to make it clear whether the rules laid down in Article 3(1) of the Directive affect only the employment-related rights and obligations that are laid down in the contracts in force, so that rights or obligations such as those arising from social security contributions or other obligations in respect of employment contracts already terminated before the insolvency proceedings were initiated are not, in any circumstances, to be regarded as being transferred to the purchaser.

RUNNING INDEX OF CASE REPORTS

TRANSFER OF UNDERTAKINGS

Status of Directive 2001/23

Is there a transfer?

Cross-border transfer

Which employees cross over?

Employee who refuses to transfer

Termination

Which terms go across?

Duty to inform

ETO

Miscellaneous

DISCRIMINATION

General

2009/29 (PL) court must apply to discriminated group provision designed for benefit of privileged group
2010/9 (UK) associative discrimination (*Coleman* part II)
2010/11 (GE) attending annual salary review meeting is term of employment
2010/12 (BE) *Feryn*, part II
2010/32 (CZ) Czech court applies reversal of burden of proof doctrine for first time
2010/62 (GE) court asks ECJ to assess compatibility of time-bar rule with EU law
2010/78 (IR) rules re direct discrimination may be applied to claim based solely on indirect discrimination
2010/83 (UK) employee barred from using information provided "without prejudice"
2011/26 (GE) statistics alone insufficient to establish presumption of "glass ceiling"
2011/65 (GE) dismissal for marrying Chinese woman unfair
2012/24 (FR) *Cour de cassation* applies indirect gender discrimination for first time
2012/52 (UK) illegal alien cannot bring race discrimination claim
2012/46 (GE) incorrect information may include discrimination
2013/6 (UK) volunteers not protected by discrimination law
2013/20 (FR) secularism principle not applicable in private sector
2013/28 (DK) less TV-coverage for female sports: no discrimination
2013/52 (AT) discrimination despite HR ignoring real reason for dismissal

Information

2013/3 (FR) employer must show colleagues' pay details

Gender, vacancies

2009/27 (AT) employer liable following discriminatory remark that did not influence application
2009/28 (HU) what can rejected applicant claim?
2010/84 (GE) court asks ECJ whether rejected applicant may know whether another got the job and why
2013/22 (NL) presumptive discrimination disproved
2013/25 (IR) how Kelly ended in anti-climax
2013/36 (GE) failure to disclose pregnancy no reason to annul contract

Gender, terms of employment

2009/13 (SE) bonus scheme may penalise maternity leave absence
2009/49 (SP) dress requirement for nurses lawful
2010/47 (IR) employer to provide meaningful work and pay compensation for discriminatory treatment
2010/48 (NL) bonus scheme may pro-rate for maternity leave absence
2010/65 (UK) court reverses "same establishment" doctrine re pay equality
2011/5 (NL) time-bar rules re exclusion from pension scheme
2012/5 (FR) prohibition of earrings discriminatory
2013/18 (GE) employees leaving before age 35 lose pension rights: sex discrimination

Gender, termination

2009/6 (SP) dismissal of pregnant worker void even if employer unaware of pregnancy
2009/10 (PL) lower retirement age for women indirectly discriminatory
2010/33 (HU) dismissal unlawful even though employee unaware she was pregnant
2010/44 (DK) dismissal of pregnant worker allowed despite no "exceptional case"
2010/46 (GR) dismissal prohibition also applies after having stillborn baby
2010/60 (DK) dismissal following notice of undergoing fertility treatment not presumptively discriminatory
2010/82 (AT) dismissed pregnant worker cannot claim in absence of work permit
2011/22 (UK) redundancy selection should not favour employee on maternity leave
2011/41 (DK) mother's inflexibility justifies dismissal
2012/20 (DK) when does fertility treatment begin?
2012/51 (DK) pregnant employee protected against dismissal
2013/56 (DK) termination during maternity leave was "self-inflicted"

Age, vacancies

2010/31 (P) age in advertisement not justified
2012/3 (DK) no discrimination despite mention of age
2012/26 (UK) academic qualification requirement not age discriminatory
2013/4 (GE) not interviewing applicant to discriminatory advertisement unlawful even if nobody hired

Age, terms of employment

2009/20 (UK) length of service valid criterion for redundancy selection
2009/45 (GE) social plan may relate redundancy payments to length of service and reduce payments to older staff
2010/29 (DK) non-transparent method to select staff for relocation presumptively discriminatory
2010/59 (UK) conditioning promotion on university degree not (indirectly) discriminatory
2010/66 (NL) employer may "level down" discriminatory benefits
2010/79 (DK) employer may discriminate against under 18s
2011/23 (UK) replacement of 51-year-old TV presenter discriminatory
2012/33 (NL) no standard severance compensation for older staff is discriminatory
2012/37 (GE) extra leave for seniors discriminatory, levelling up
2014/7 (DK) under 18s may be paid less

Age, termination

2009/8 (GE) court asks ECJ to rule on mandatory retirement of cabin attendant at age 55/60

Parental leave

2011/29 (DK) daughter's disorder not force majeure

Working time

2010/71 (FR) Working Time Directive has direct effect
2010/85 (CZ) worker in 24/24 plant capable of taking (unpaid) rest breaks
2010/87 (BE) "standby" time is not (paid) "work"
2011/28 (FR) no derogation from daily 11-hour rest period rule
2011/45 (CZ) no unilateral change of working times
2011/48 (BE) compensation of standby periods
2011/51 (FR) *forfait jours* validated under strict conditions
2013/29 (CZ) obligation to wear uniform during breaks: no working time
2013/31 (FR) burden of proof re daily breaks

Privacy

2009/18 (LU) unauthorised camera surveillance does not invalidate evidence
2009/40 (PL) private email sent from work cannot be used as evidence
2010/37 (PL) use of biometric data to monitor employees' presence disproportionate
2010/70 (IT) illegal monitoring of computer use invalidates evidence
2012/27 (PO) personal data in relation to union membership
2012/40 (CZ) valid dismissal despite monitoring computer use without warning
2013/11 (NL) employee not entitled to employer's internal correspondence
2013/13 (LU) Article 8 ECHR does not prevent accessing private emails
2013/57 (UK) covert surveillance to prove unlawful absence allowed

Information on terms of employment

2009/55 (DK) employee compensated for failure to issue statement of employment particulars
2009/56 (HU) no duty to inform employee of changed terms of employment
2010/67 (DK) failure to provide statement of employment particulars can be costly
2011/10 (DK) Supreme Court reduces compensation level for failure to inform
2011/11 (NL) failure to inform does not reverse burden of proof

Fixed-term contracts

2010/16 (CZ) Supreme Court strict on use of fixed-term contracts
2010/34 (UK) overseas employee may enforce Directive on fixed-term employment
2011/15 (IT) damages insufficient to combat abuse of fixed term in public sector
2011/27 (IR) nine contracts: no abuse
2011/46 (IR) "continuous" versus "successive" contracts
2013/8 (NL) employer breached duty by denying one more contract
2013/55 (CZ) "uncertain funding" can justify fixed-term renewals

Minimum wage

2014/1 (NL) deduction of expenses not prohibited

Temporary agency work

2011/50 (GE) temps not bound by collective agreement
2012/60 (GE) no hiring temps for permanent position
2014/8 (GE) permanent "temp" not employee of user undertaking

Industrial action

2009/32 (GE) "flashmob" legitimate form of industrial action
2009/33 (SE) choice of law clause in collective agreement reached under threat of strike valid
2010/69 (NL) when is a strike so "purely political" that a court can outlaw it?

Free movement

2010/36 (IR) Member States need not open labour markets to Romanian workers
2013/47 (PL) when is employment "genuine" for social security purposes?

Conflict of laws

2010/53 (IT) "secondary insolvency" can protect assets against foreign receiver
2011/63 (IT) American "employer" cannot be sued in Italy
2012/8 (BE) posted workers benefit from Belgian law
2012/9 (NL) to which country was contract more closely connected?
2012/28 (AT) choice of law clause in temp's contract unenforceable
2013/48 (FR) provisions of mandatory domestic law include international treaties
2014/9 (FR) allowing employee to work from home does not alter place of work

Human rights

2011/30 (IT) visiting Facebook at work no reason for termination
2011/44 (UK) dismissal for using social media
2012/55 (NL) Facebook posting not covered by right to free speech
2013/10 (UK) employee may voice opinion on gay marriage on Facebook
2014/12 (GE) leaving church cause for immediate termination

Miscellaneous

2009/19 (FI) employer may amend terms unilaterally
2009/38 (SP) harassed worker cannot sue only employer, must also sue harassing colleague personally
2009/39 (LU) court defines "moral harassment"
2010/17 (DK) Football Association's rules trump collective agreement

RUNNING INDEX OF ECJ RULINGS SUMMARISED IN EELC

1. Transfer of undertakings

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

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

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

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

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

6 March 2014, C-458/12 (*Amatori*): Directive 2001/23 does not cover transfer of part of undertaking lacking functional autonomy, but national law may (EELC 2014-1).

2. Gender discrimination, maternity

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

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

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

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

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

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

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

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

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

22 November 2012, C-385/11 *(Elbal Moreno)*: Directive 97/7 precludes requiring greater contribution period in pension scheme for part-timers (EELC 2012-4).

28 February 2013, C-427/11 *(Kenny)*; work of equal value, role of statistics, justification (EELC 2013-1).

11 April 2013, C-401/11 *(Soukupová)* re different "normal retirement age" for men and women re rural development subsidy (EELC 2013-2).

12 September 2013, C-614/11 *(Kuso)*: in Directive 76/207, "dismissal" also covers non-renewal of fixed-term contract (EELC 2013-3).

19 September 2013, C-5/12 *(Montull):* Spanish law on transferring right to maternity leave to child's father not in breach of EU law (EELC 2013-3).

12 December 2013, C-267/12 *(Hay)*: employee with civil solidarity pact entitled to same benefits as married employee (EELC 2013-4).

13 February 2014, C-512 and 513/11 (*Kultarinta*): pregnant worker who interrupts unpaid parental leave eligible for same pay as if she had worked (EELC 2014-1).

6 March 2014, C-595/12 (*Napoli*): employee on maternity leave entitled to vocational training (EELC 2014-1).

3. Age discrimination

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

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

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

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

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

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

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

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

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

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

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

7 June 2012, C-132/11 *(Tyroler Luftfahrt)*: Directive 2000/78 allows level of pay to be based on experience gained in the service of current employer to the exclusion of similar experience gained in group company (EELC 2012-2).

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

6 November 2012, C-286/12 *(Hungary)*. Hungarian law on compulsory retirement of judges at age 62 non-compliant (EELC 2012-4).

26 September 2013, C-476/11 *(Kristensen)*: employer's pension contributions may increase with age provided difference is proportionate and necessary (EELC 2013-3).

26 September 2013, C-546/11 *(Toftgaard)*: Danish law denying availability benefits solely because civil servant is able to receive pension incompatible with EU law (2013-3).

16 January 2014, C-429/12 (*Pohl*): EU law does not preclude limitation period under national law (EELC 2014-1).

4. Disability discrimination

11 April 2013, C-335 and 337/11 *(Ring)*: definition of "disability"; working hours reduction can be accommodation (EELC 2013-2).

5. Other forms of discrimination

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

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

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

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

6 December 2012 C-124/11 *(Dittrich)*: medical health subsidy covered by Directive 2000/78 (EELC 2013-1).

25 April 2013, C-81/12 *(ACCEPT)*: football club liable for former owner's homophobic remarks in interview; national law must be effective and dismissive (EELC 2013-2).

5 December 2013, C-514/12 *(Salzburger Landeskliniken)*: periods of service worked abroad must be taken into account for promotion purposes (EELC 2013-4).

6. Fixed-term work

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

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

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

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

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

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

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

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

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

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

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

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

18 October 2012, C-302 - C-305/11 *(Valenza)*: Clause 4 precludes Italian legislation that fails to take account of fixed-term service to determine seniority, unless objectively justified (EELC 2012-4).

7 March 2013, C-393/11 *(AEEG)*: fixed-term service time for public authority must count towards determining seniority upon becoming

civil servant (EELC 2013-2).

12 December 2013, C-361/12 *(Carratù)*: Framework Agreement covers compensation for unlawful fixed-term clause (EELC 2013-4).

12 December 2013, C-50/13 (*Papalia*): sanction for abusing successive contracts must go beyond monetary compensation (EELC 2014-1).

7. Part-time work

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

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

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

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

11 April 2013, C-290/12 *(Della Rocca)*: temporary agency work excluded from scope of Framework Agreement on part-time work (EELC 2013-2).

8. Information and consultation

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

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

20 June 2013, C-635/11 *(Commission - v- Netherlands)*: foreign-based employees of Dutch company resulting from cross-border merger must enjoy same participation rights as their Dutch colleagues (EELC 2013-3).

15 January 2014, C-176/12 (*AMS*): Charter cannot be invoked in dispute between individuals to disapply national law incompatible with Directive 2002/14 (EELC 2014-1).

9. Paid leave

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

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

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

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

3 May 2012, C-337/10 *(Neidel)*: national law may not restrict a carry-over period to 9 months. Directive 2003/88 does not apply to above-statutory entitlements (EELC 2012-2).

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

8 November 2012, C-229 and 230/11 *(Heimann)*: paid leave during short-time working may be calculated pro rata temporis (EELC 2012-4).

21 February 2013, C-194/12 *(Maestre García)*: prohibition to reschedule leave on account of sickness incompatible with Directive 2003/88 (EELC 2013-1).

13 June 2013, C-415/12 *(Brandes)*: how to calculate leave accumulated during full-time employment following move to part-time (EELC 2013-2).

19 September 2013, C-579/12 *(Strack)*; carry-over period of 9 months insufficient, but 15 months is sufficient (EELC 2013-3).

10. Health and safety, working time

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

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

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

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

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

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

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

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

11. Free movement, social insurance

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

1 October 2009, C-3/08 *(Leyman)*: Belgian social insurance rules in respect of disability benefits, although in line with Regulation 1408/71,

not compatible with principle of free movement (EELC 2009-2).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

19 July 2012, C-522/10 *(Reichel-Albert)*: Reg. 1408/71 precludes irrebuttable presumption that management of a company from abroad took place in the Member State where the company is domiciled (EELC 2012-4).

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

25 October 2012, C-367/11 *(Prete)* re tide-over allowance for job seekers (EELC 2012-4).

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

8 November 2012, C-461/11 *(Radziejewski)*: Article 45 TFEU precludes Swedish legislation conditioning debt relief on residence (EELC 2012-4).
19 December 2012, C-577/10 *(Commission - v - Belgium)*: notification requirement for foreign self-employed service providers incompatible with Article 56 TFEU (EELC 2013-1).

21 February 2013, C-282/11 *(Salgado González)*: Spanish method of calculating pension incompatible with Article 48 TFEU and Reg. 1408/71 (EELC 2013-3).

7 March 2013, C-127/11 *(Van den Booren)*: Reg. 1408/71 allows survivor's pension to be reduced by increase in old-age pension from other Member State (EELC 2013-2).

16 April 2013, C-202/11 *(Las)*: Article 45 TFEU precludes compulsory use of Dutch language for cross-border employment documents (EELC 2013-2).

4 July 2013, C-233/12 *(Gardella)*: for purposes of transferring pension capital, account must be taken of employment periods with an international organisation such as the EPO (EELC 2013-3).

12. Parental leave

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

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

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).

27 February 2014, C-588/12 (*Lyreco*): severance compensation to be determined on basis of full-time employment (EELC 2014-1).

13. Collective redundancies, insolvency

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

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

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

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

17 November 2011, C-435/10 *(Van Ardennen)*: Dutch law obligating employees of insolvent employer to register as job seekers not compatible with Directive 80/987 (EELC 2011-4).

18 October 2012, C-583/10 *(Nolan)* re state immunity; ECJ lacks jurisdiction (EELC 2012-4).

18 April 2013, C-247/12 *(Mustafa)*: EU law does not require guarantees at every stage of insolvency proceedings (EELC 2013-3).

25 April 2013, C-398/11 *(Hogan)*: how far must Member State go to protect accrued pension entitlements following insolvency? (EELC 2013-2).

28 November 2013, C-309/12 *(Gomes Viana Novo)*: Member State may limit guarantee institution's payment obligation in time (EELC 2013-4).

13 February 2014, C-596/12 (*Italy*): exclusion of dirigenti violates Directive 98/159 (EELC 2014-1).

14. Applicable law, forum

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

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

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

12 September 2013, C-64/12 *(Schlecker)*: national court may disregard law of country where work is habitually carried out if contract more closely connected with another county (EELC 2013-3).

15. Fundamental Rights

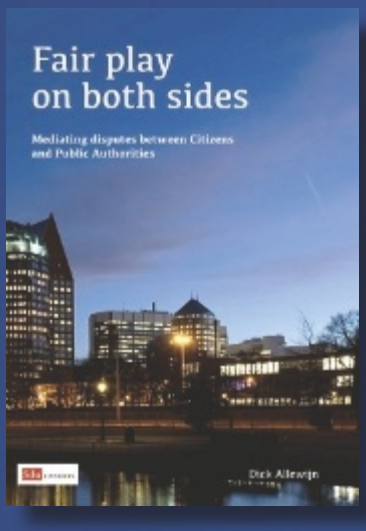
7 March 2013,C-128/12 *(Banco Portugues)*: ECJ lacks jurisdiction re reduction of salaries of public service employees (EELC 2013-2).

30 May 2013, C-342/12 *(Worten)*: employer may be obligated to make working time records immediately available (EELC 2013-4).

Fair play on both sides

Mediating disputes between Citizens and Public Authorities

This book is about mediations involving public authorities. Dick Allewijn draws on his wealth of experience as an administrative judge and mediator in conflicts between public authorities and citizens to explore the distinctive aspects of these conflicts. He provides insights and strategies to help mediators do the best possible job. He analyses the various relationships and explains how mediation can improve them. This book was written primarily for mediators who meet public authorities at their negotiating table. But other professionals will find it useful as well: public sector officials who want to hone their conflict management skills, legal counsels, managers who have to regulate conflict-management procedures in their own organization, and the various people who refer cases for mediation such as administrative judges, chairs of appeal boards, and complaint handlers. And, last but certainly not least, citizens who feel frustrated by the bureaucratic procedures in government agencies and want to do battle with them. Hopefully, they too will realize the benefits that can be gained by 'fair play on both sides'.



Author: Dick Allewijn
Price: € 42,41*

*excl. VAT 6%, shipping- and administration costs

Order via
www.sdu.nl
phone
+31 70 378 98 80

About the author
Dick Allewijn (1952) has spent most of his working life in administrative jurisdiction. Since 2000 he has presided as a part-time judge at the District Court of The Hague and has run his own practice as a registered mediator (outside the jurisdiction of the The Hague District Court). He provides mediation training at the Centre for Conflict Management and the Amsterdam ADR Institute and has published many works on administrative law, jurisdiction and mediation, and the relationship between the three. In 2011 he was awarded a PhD for a thesis entitled Tussen partijen is in geschil... de bestuursrechter als geschilbeslechter ("Regarding the dispute between the parties..., the administrative judge as a dispute settler"), which examines the role of the administrative judge in conflict resolution. He is also member of the Scheltema Commision (advisory commission for the statutory regulation of the general principles of administrative law).

EELA KRAKÓW 2014
European Employment Lawyers Association

Feel invited!

In 2014, the annual EELA Conference
arrives in Kraków, the cultural capital of Poland

Thursday 12th June 2014

07.00 pm – 08.15 pm	Grand Concert of Polish Opera Music at Słowacki Theatre
08.15 pm – 11.00 pm	Gala Banquet at Słowacki Theatre

Friday 13th June 2014

09.30 am – 09.45 am	Welcome by Bartłomiej Raczkowski, Chairman of Organising Committee
09.45 am – 10.45 am	Employment and Industrial Relations in Communist Era, Transfer to Democracy, Personal Experience – keynote speech – President Lech Wałęsa
10.45 am – 11.00 am	Coffee break
11.00 am – 12.30 pm	Contemporary Concept of Employment Across Continents
12.30 pm – 02.00 pm	Lunch
02.00 pm – 03.15 pm	Managing Public Relations and Media Interest in High-Profile Employment Cases
Parallel sessions	Bring Your Own Device
	Termination of Employment for Performance Related Reasons
03.15 pm – 03.45 pm	Coffee break
03.45 pm – 05.15 pm	Employment Law Aspects of Establishment of a European Company
Parallel sessions	Compliance vs. Employment Law
	Remunerations in Financial Sector – CRD
07.30 pm – 02.00 am	Gala Dinner at the Gardens of the Archaeological Museum

Saturday 14th June 2014

07.30 am – 08.30 am	EELA 2014 Cracow Running Tour
09.15 am – 10.30 am	Recent Decisions and Current Cases Before the European Courts
10.30 am – 11.00 am	Coffee break
11.00 am – 12.15 pm	What's New in TUPE?
12.15 pm – 12.30 pm	Coffee break
12.30 pm – 13.30 pm	General assembly

www.eela2014.com