EELC

EUROPEAN EMPLOYMENT LAW CASES

OFFICIAL JOURNAL OF THE EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION EELA

2014 | 2

Netherlands: back to *Spijkers*

Italy: all unions are equal

Belgium: blue and white collars finally equal, no more Claeys

Finland: how far may law restrict use of temps?

UK: illegally recorded conversation admissible as evidence

Sdu UITGEVERS

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EELC

European Employment Law Cases (EELC) is a legal journal that is published four times per year and that has been endorsed by the Board of the European Employment Lawyers Association (EELA) as the official journal of EELA. Its principal aim is to publish judgments by *national* courts in Europe that are likely to be of interest to legal practitioners in other European countries. To this end, EELC has a *national correspondent* in almost every country within the EU (plus Norway), who alerts the Editorial Board to such judgments within his or her own jurisdiction. A case report describes the facts of the case and the main aspects of the judgment and it includes a Commentary by the author and, in many cases, Comments on the case by national correspondents in other jurisdictions. Every member of EELA is invited to submit case reports, preferably through the national correspondent in his or her jurisdiction. Guidelines for authoring a case report are available from the Editorial Board. The names and contact details of the national correspondents are listed on the inside of the back page.

EELC also publishes summaries of recent judgments by the Court of Justice of the EU that are relevant to European practitioners of European employment law, as well as the occasional article.

The full text of all editions of EELC since its launch in 2009, including an index arranged according to subject matters, can be accessed through the EELA website www.eela.org.

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EELA

The European Employment Lawyers Association (EELA) started in 1996. Its aims are:

- to bring together practising employment lawyers across the European union
- to improve the implementation and understanding of the social dimension
- to exchange views on the manner of such implementation
- to strengthen links between EU employment lawyers

EELA currently has approximately 1,275 members. Of these, 470 attended the most recent annual conference, which was in Cracow, Poland. The next annual conference is to be held from 4 to 6 June 2015 in Limassol, Cyprus. The next joint EELA-ERA seminar is to be held in Brussels on 28 November 2014.

Information on EELA and how to become a member is available at www.eela.org.

EELC
European Employment Law Cases

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Sdu UITGEVERS

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INTRODUCTION

EELA held its annual conference in Kraków, Poland on 12-14 June. The conference was attended by approximately 470 delegates. A special feature of this year's conference was the keynote address. It was delivered by Lech Wałesa, the legendary leader of Solidarity and former President of Poland. The encounter with Mr Wałesa was emotional for many attendees. The programme of the conference included many employment law topics of international interest, such as:

- the legal issues surrounding "BYD" (bring your own device)
- compliance versus employment law
- the concept of "employment" across continents
- the employment law aspects of establishing a European company
- recent decisions and current cases before the ECJ and the ECtHR
- remuneration in the financial sector and the Capital Requirements Directive
- termination of employment for performance related issues
- transfer of undertakings, recent developments

Next year's EELA conference will be held in Limassol, Cyprus, on 4-6 June 2015 (see the back cover of this issue of EELC). Before that – on 28 November 2014 – the second EELA-ERA seminar on European Labour Law will be held in Brussels.

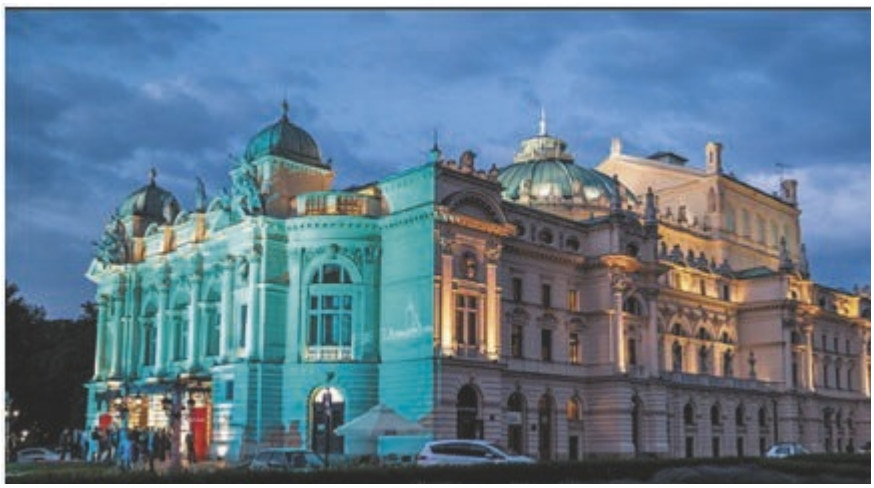
Information on the Kraków conference (including the power point presentations and hand-outs) and on the EELA-ERA seminar is available on the EELA website.
This issue of EELC includes 20 case reports and one brief article from 14 jurisdictions, including five from new Eastern European Member States, with comments from many more jurisdictions. This issue also includes summaries of nine recent ECJ judgments, and two recent Advocate-General opinions and summaries of 17 references for a preliminary ruling.

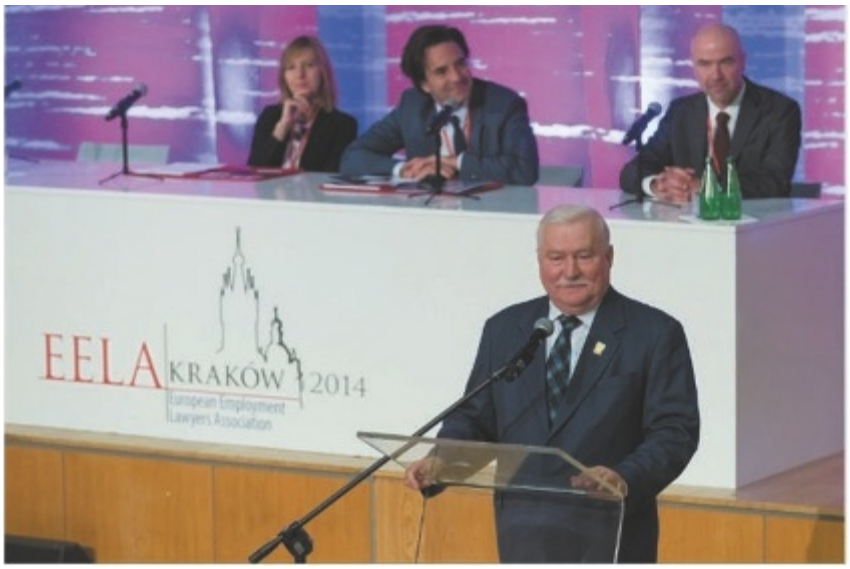
Starting with this issue, all members of EELA are able to read the contents of EELC without having to submit an access code. This improvement is part of a series of improvements aimed at increasing the cooperation between the Board of EELA end the EELC Editorial Board.

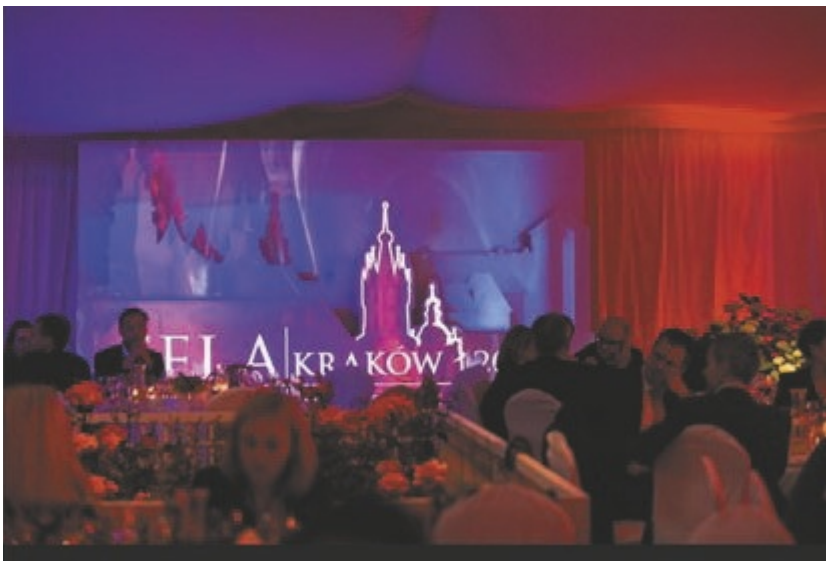
Peter Vas Nunes, general editor

SUMMARY OF EELA CONFERENCE IN KRAKOW

EELA has recently held its subsequent annual conference. It took place in Kraków, Poland on 12-14 June. The conference was attended by approximately 470 delegates. A special feature of this year's conference was that the key note speech was delivered by Lech Wałesa, the legendary leader of Solidarity and former President of Poland. The encounter with Mr Wałesa was very emotional for many attendees. The programme of the conference included many employment law topics of international interest, such as the legal issues related to employee's use of their own electronic devices for business purposes, CRD, i.e., restrictions on remuneration in the financial sector and many others. The social programme was also found exciting; it included a concert of Polish opera music and a gala dinner in the beautiful gardens of the Archeological Museum with a view to the Wawel castle.







TRANSFER OF UNDERTAKINGS

DISCRIMINATION

MISCELLANEOUS

2014/14

Distinction asset-intensive/labour intensive not decisive; all Spijkers criteria relevant (NL)

CONTRIBUTOR ZEF EVEN*

Summary
The transfer of part of a business under the transfer of undertakings rules can occur without assets being transferred from one party to the other. The Dutch Supreme Court recently found such a transfer to have occurred without assessing whether the business in question was asset-reliant or labour-reliant. The other 'Spijkers criteria' took precedence.

Facts
This case involves a family of entrepreneurs: siblings X and Y and their parents. The parents own a piece of land. This land accommodated three businesses: a garden centre, a shop selling fishing gear and a camera security shop. A third party operated the garden centre, which also sold pet supplies. The garden centre went bankrupt in 2007. The fishing shop was originally run by the father, but in January 2008 was taken over by X. Upon taking over this business, X decided to also sell pet supplies in the fishing shop. To that end, he hired an employee, previously employed by the garden centre, where she was in charge of the sale of pet supplies. X decided to discontinue selling pet supplies in 2009. Shortly thereafter, the employee fell ill., X gave the employee notice of termination of her employment contract, ending on 1 May 2010. In the meantime, Y decided that besides running a camera security shop, he also saw opportunities in running a garden centre. The greenhouses on the land where the bankrupt garden centre had formerly been were demolished and a new garden centre was built. This new garden centre, named "Welkoop 't Rijpje" and operated by Y, started its business as of October 2009. Welkoop 't Rijpje was part of a bigger garden centre organisation, applying its own Welkoop business formula. Welkoop 't Rijpje also sold pet supplies. The employee took the view that Welkoop 't Rijpje should be regarded as the transferee of the "pet supply business" previously run by X and that, in consequence, her employment agreement had been transferred to Y as a result of a transfer of undertaking.
The Appellate Court assumed for the sake of argument that the pet supply business could be regarded an economic entity. According to the Appellate Court, this entity could not have retained its identity due to the fact that the operation of the business had been discontinued. The Appellate Court substantiated this by pointing out that (i) Y had not bought any of the pet supplies (assets) from X, (ii) Y operated its business from different premises than X, and (iii) Y used, as being part of the larger Welkoop organisation, a different business strategy ("formula") than X.

Judgment
The Supreme Court took a different view and held that the Appellate Court should have taken into consideration all the relevant facts and circumstances at hand. The mere fact that no pet supplies were bought by Y; the business was operated from a different building and a different business strategy was used, did not of themselves warrant the conclusion that there was no transfer. After all, according to the Supreme Court, these elements considered in isolation, could not support the conclusion that the entity had lost its identity. Following the Spijkers case, (ECJ 18 March 1986, C-24/85) the question of whether or not the identity was retained should be decided by assessing whether the operation of the entity was continued or resumed by another party. Other factors should be taken into consideration as well when making that assessment. These include the fact that the businesses of X and Y were situated on the same piece of land; the new garden centre of Y had been portrayed by the family in the local media as a continuation of the previous garden centre; the employee had been introduced in the past as a future employee of the new garden centre and other employees from X had been taken over by Y. The case was referred by the Supreme Court to another Appellate Court in order to decide, based on all the facts, whether or not the employment agreement of the employee had been transferred from X to Y as a result of a transfer.

Commentary
It is noteworthy that the Supreme Court, when judging whether the entity retained its identity, did not assess whether the business involved was asset or labour intensive. If the business involved was regarded as (fully) asset intensive, the fact that no assets at all were transferred from X to Y, should have led the court to decide that there cannot have been a transfer of the undertaking (ECJ 25 January 2001, C-172/999, *Oy Liikenne*). It seems that the Supreme Court may have regarded the business as neither genuinely asset nor labour reliant, but somewhere in between. Alternatively, it might have felt that the distinction should not be overemphasized. In any event, the issue was not decisive. The advocate general took a similar, though more explicit approach. He said he found the ECJ's rulings inconsistent as to when a business should be regarded asset or labour reliant. He held that the distinction between the two would not provide a valuable contribution to the matter, and continued assessing the case based on the other criteria set out in *Spijkers*.
In my view, two points can be drawn from this case. First, the difference between asset-intensive companies and labour-intensive companies is not black and white. There are many shades of grey that can cause the other criteria put forward in the *Spijkers* case to take precedence. The Advocate General's criticism of ECJ's case law on this point is noteworthy and does impede companies in practice. The emphasis that is laid on the type of business in cases such as *Oy Liikenne* and *Süzen* (ECJ 11 March 1997, C-13/95) is difficult to reconcile with the remark made by the ECJ in *Spijkers* that all factors (including the type of business) should be taken into consideration in order to assess whether a business has retained its identity and that they are: *"merely single factors in the overall assessment which must be made and cannot therefore be considered in isolation"*. Second, it seems that in some cases very little is needed to tip the Supreme Court towards the conclusion that a transfer has occurred, given the emphasis it places on protecting employees. Both lower instance courts in this case had found insufficient grounds to establish a transfer had taken place, but they were overruled by the Supreme Court.

Comments from other jurisdictions
Austria (Daniela Krömer): The Austrian High Court takes into account all factors, including but not limited to the type of business transferred. The discontinuity of a business, even if it lasts for a couple of weeks or months, does not affect the transfer of undertaking if the same or a similar business activity is then resumed. Also, if no material assets are transferred, that does not in itself rule out a transfer. That said, it is likely but by no means sure that the Austrian High Court would have come to the same conclusion on the transfer as the *Hoge Raad*.

Germany (Elisabeth Höller): European case law regarding the concept of 'independent business unit' has fundamentally influenced German High Court jurisprudence. The ECJ defines 'economic entity' as an organised grouping of persons and assets. In its judgment of 22 May 1997, the German Federal Labour Court (BAG), fundamentally changing its former case law regarding the terms 'business' and 'business unit', followed ECJ case law. Since that time, German labour law no longer provides a definition of 'business' and 'business unit'.
As in the Netherlands, the unclear expression 'economic entity' causes substantial legal uncertainty. The ECJ has, of course, set out certain criteria to be used to assess the existence of a transfer. Following this, German jurisprudence holds that an overall analysis must be made to evaluate whether or not the identity of the business unit has been retained. The following items must be assessed:

- type of business;
- transfer of material assets, such as commercial property and mobile assets;
- value of intangible assets at the time of transfer;
- takeover of the majority of employees by the transferee;
- takeover of the customers;
- degree of similarity between the work before and after the transfer;
- duration of a potential break in the activities.

The Dutch case reported above again shows that in order to assess whether the entity has lost its identity, each of the above items should be considered, rather than concentrating on a specific item.

Ireland (Orla O'Leary): A recent Irish case mirrors the methods used by the Dutch Supreme Court in *Employee - v - Welkoop 't Rijpje* to assess whether a transfer of undertakings took place.
In the case of *Paul Winters and Veronica Bagnall – v - Strategic Arts Management Company Limited and Riverbank Arts Centre Limited* 2012 23 ELR 286 the Employment Appeals Tribunal considered whether a transfer of undertakings had taken place where a theatre underwent a change of management. The first respondent management company of the theatre made the two applicant employees redundant and subsequently wound up, paving the way for a new company, the second respondent, to take over the management of the theatre. The employees claimed that a transfer of undertaking had occurred and they were unfairly dismissed.
The Tribunal echoed the Dutch Supreme Court's application of *Spijkers*, in particular the Dutch Supreme Court's assertion that an "overall assessment" of the circumstances must be made. The Tribunal ruled that it *"must look at the circumstances of the case in their totality and not make a decision based on one single factor."* The Tribunal found that the theatre was the economic entity in question, and that it retained its economic identity throughout the changeover period, despite the theatre not being used for a few months during the changeover. The Tribunal found that the essential function of the theatre remained the same and the same assets were used to run it. The two employees were found to have been unfairly dismissed.
It would appear that the Dutch Supreme Court's expansive assessment of whether a transfer of undertakings took place, which went beyond considering individual factors under *Spijkers*, is echoed in this Irish case where the Tribunal looked to the totality of circumstances in making its assessment.

The Netherlands (Peter Vas Nunes): Several Dutch authors adhere to the theory that the sharp distinction between asset-heavy and labour-heavy business only comes into play in "loss of contract" situations, i.e. where one contractor loses a contract to another contractor, and that in all other situations – such as in this case – the ECJ never departed from its "all *Spijkers* criteria" doctrine. It is interesting to have a view from other jurisdictions.

United Kindom (Lucy Lewis): The Acquired Rights Directive is implemented in the UK by the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE). Those Regulations provide that there will be a qualifying transfer in the following situations:

- a business transfer (which requires there to be an economic entity which transfers and retains its identity following the transfer);
- a service provision change (which applies when a client outsources/ insources a service or changes a service provider).

If the Welkoop 't Rijpje case had been heard in the UK, it would have been necessary to determine whether the "pet supply business" was an "economic activity". That is defined in the UK Regulations as an "*organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary*". It is certainly possible that the "pet supply business" could be an "economic activity" and the use of the word "resources" means that a UK Tribunal is not expected to assess whether the business was *either* asset *or* labour intensive. In fact, it is usual for questions of "economic entity" to be considered assessing all the facts, as the court in the Netherlands proposes in this case.
Assuming the UK Tribunal found that there was an "economic entity", it would then need to satisfy itself that the economic entity transferred and retained its identity. As in the Netherlands, these are fact sensitive questions, but the UK Regulations are clear that a transfer may take place whether or not any property is transferred.
In assessing whether there was a qualifying transfer, a UK Tribunal is likely to want to understand exactly what led X to discontinue pet supplies and Y to start selling them and would certainly be influenced by the factors identified as important by the court in the Netherlands. A UK Tribunal may also want to explore the reasons for the employee's dismissal by X to determine whether it was an attempt by the family to avoid TUPE.
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Subject: Transfer of undertaking
Parties: *Employee – Welkoop 't Rijpje*
Court: *Hoge Raad* (Supreme Court)
Date: 4 April 2014
Case number: ECLI:NL:GHAMS:2012:4029
Hardcopy publication: JAR 2014/124
Internet publication: www.rechtspraak → zoeken in uitspraken → ECLI:NL:GHAMS:2012:4029

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2014/15

Court interprets ETO exception narrowly (NL)

CONTRIBUTOR PETER VAS NUNES*

Summary
Shortly after the department where the plaintiff worked was sold to another company, he was told that he earned too much, that the department would be restructured and that he would be made redundant. The plaintiff argued successfully that the real reason for his dismissal had nothing to do with restructuring but was the sale of the department, and that therefore his dismissal violated the statutory prohibition against dismissal based on transfer of undertakings, and was void.

Facts
The plaintiff was originally employed in the Netherlands by the American company Syncsort Inc. His employer was satisfied with his performance and in 2013 awarded him a bonus of € 38,000.
On 4 October 2013 Syncsort sold the department in which the plaintiff worked (the 'Department') to another American company, the private equity firm SS DP Acquisition Corp. ('SS DP'). The sale qualified as a transfer of the undertaking.

On 13 November 2013, the shareholder of SS DP informed the plaintiff that he was to be dismissed. One month later, SS DP applied to the UWV (the Dutch authority responsible for issuing dismissal permits) for a permit to dismiss him, as required under Dutch law. The reasons given in the permit application were (i) reduced amount of client work and (ii) new management structure, as a result of which the plaintiff's position would become redundant as of 1 January 2014. The plaintiff contested the application but was unsuccessful, and on 28 January 2014, the UWV issued a dismissal permit. It reasoned that SS DP had decided to reduce one management layer, which was its prerogative as an employer, and that there was no alternative suitable position for the plaintiff. Accordingly, on 30 January 2014, SS DP gave notice of termination of the plaintiff's contract, giving two months' notice, so that the plaintiff's last day of employment would be 31 March 2014. SS DP offered the plaintiff a severance payment of € 16,500 gross (under the circumstances, a meagre amount by Dutch standards). Meanwhile, the plaintiff was put on (involuntary) garden leave.

On 3 February 2014, the plaintiff sent SS DP an email, claiming that his dismissal was invalid, given that the reason for his dismissal was the sale of the Department and that Dutch law prohibits - and declares voidable - dismissal 'on account of' (the Dutch word is *wegens*) the transfer of an undertaking. The relevant provision of Dutch law is Article 7:670(8) of the Civil Code ('Article 670(8)'). It transposes Article 4(1) of Directive 2001/23 as follows:

"The transfer of the undertaking [...] shall not in itself constitute grounds for dismissal by the transferor or the transferee. This provision shall not stand in the way of dismissals that may take place for economic, technical or organisational reasons entailing changes in the workforce."

SS DP replied that the dismissal was perfectly valid, having been given for an economic, technical or organisational (ETO) reason.

The plaintiff applied to the court for injunctive relief in the form of an order (i) to allow him to continue performing his work, (ii) for him to continue to be paid his salary of € 14,386 per month (plus all other benefits) and (iii) informing staff that a previous announcement regarding his departure from the company was erroneous.

SS DP did two things. It raised a defence in the injunction proceedings and it applied to the (same) court for conditional termination. By way of explanation: under current Dutch law, in the event an employee refuses to leave voluntarily, an employer can terminate his employment contract in either of two ways. It can apply for a dismissal permit and then, if and when the permit has been granted, give notice of termination. This is what SS DP did. Alternatively, an employer can apply to the court for termination. This can, and frequently is, done conditionally, the condition being that a previous termination was invalid.

In summary, there were now two court cases pending more or less simultaneously: one in which the plaintiff applied for a provisional order for continuation of his terms of employment despite having been given notice, and one in which SS DP asked the court to terminate the plaintiff's contract in case its termination dated 30 January 2014 was invalid.

In the injunction proceedings, the plaintiff argued that the real reason for his dismissal was not that there was insufficient work, nor that the shareholder had decided to remove one management layer as alleged, but the acquisition of the Department, i.e. the transfer of the undertaking. The plaintiff provided *prima facie* evidence in support of this argument by pointing out that SS DP had not done a proper investigation into the existing management structure, that there was no written reorganisation plan and that there was no formal board resolution to restructure the company. Moreover, prior to the acquisition by SS DP, the plaintiff had never received any indication of a need to restructure the Department, but almost immediately after the acquisition he was told that he was "overqualified" and would need to leave.

SS DP, as the defendant in the injunction proceedings, argued that Article 670(8) should be interpreted as meaning that dismissal is only prohibited where the sole reason for dismissal is the transfer. If there is any other or any additional reason, the dismissal is covered by the exception for dismissal for an ETO reason. That exception applied in this case, so the defendant argued, given that prior to the acquisition of the Department, the management of Syncsort had already considered a restructuring and a change in the reporting lines. Had the Department not been sold, the plaintiff would also have been dismissed. The defendant submitted to the court a statement to this effect, signed by a manager of Syncsort in the U.S.

Judgment
An employee who is dismissed shortly after a transfer of undertaking can invoke the protection of Article 670(8), except where (i) the dismissal would have taken place even in the absence of a transfer and (ii) there is an ETO reason. Given the far-reaching protection Directive 2001/23 aims to give employees, courts must be very critical when examining whether the reason for a dismissal is in actual fact the transfer of an undertaking. The court is in no way bound by the opinion of the UWV but must form its own, independent opinion.

It is common ground in this case (i) that the plaintiff was told soon after the acquisition of the Department that he would have to leave the

company; (ii) that before that transfer there was never any mention of a need to restructure management (the statement to the contrary by US management was drawn up after the transfer and therefore does not carry much evidentiary weight); (iii) that the decision to dismiss the plaintiff was linked to the size of his salary; (iv) that no investigation was done into the organisation or into the plaintiff's duties and responsibilities; (v) that there is no restructuring plan; and (vi) that SS DP has not investigated whether there was a possibility of offering the plaintiff an alternative job within the company. Admittedly, the number of employees reporting to the plaintiff had been reduced, but that in itself was insufficient to yield an ETO reason.

In view of the foregoing, SS DP was ordered (i) to allow the plaintiff to return to his work within 48 hours following the service of the judgment on SS DP, on pain of a penalty of € 1,000 for every day that SS DP failed to comply, to a maximum of € 150,000 and (ii) to continue paying the plaintiff € 14,386 gross per month, and to continue his other employment benefits, beyond 1 April 2014 for as long as his contract of employment continued in force.

Commentary

Judgments on ETO are scarce. This judge made a courageous, but risky decision. Courageous, because there is almost no precedent in Dutch case law of a serious ETO defence being rejected and it would have been easier for the judge to rule in favour of the defendant. Risky, because these were injunction proceedings, where the court was asked to provide temporary, provisional relief pending a more thorough investigation of the facts and the arguments in the 'main' proceedings. What if, for example, in nine months' time, the outcome of a 'main' case is that the plaintiff's dismissal was indeed for an ETO reason, and therefore valid? The damage done to SS DP's business will be hard to undo.

Comments from other jurisdictions

Austria (Daniela Krömer): Given the facts of the case, the Austrian Courts would likely have come to the same conclusion - and in their rare decisions on ETO reasons, sometimes do, albeit in a different procedural setting. Austrian employers are free to terminate employment contracts without having to seek the permission of the courts (except in the case of specifically protected employees, such as pregnant mothers, or works council representatives). In general, employees then challenge their termination in court - hence there are no injunction proceedings.

If a termination based on ETO reasons has taken place despite a transfer of undertaking, Austrian courts accept the ETO argument. ETO arguments have to be sufficiently based on facts, e.g. plans and reasons for restructuring, such as loss of clients, etc. (OGH, 9 Ob A 206/98d). ETO arguments are successful if the restructuring takes places after the transfer in order to reduce an unnecessarily large workforce (this argument cannot be used by the transferor, following OGH 9 ObA 97/02, et al). The cost of the workforce is not a valid ETO argument in that respect (OGH, 9 ObA 97/02h). Taking the facts of the case - the timely link to the transfer of the undertaking, the lack of a substantial plan or sufficient reason for the need to restructure both before and after the transfer, and the link between the decision to terminate and the size of the plaintiff's salary - the ETO argument would not have been accepted by Austrian Courts either.

Croatia (Dina Vlahov): According to Croatian law, the transfer of an undertaking, business or part thereof does not in itself constitute grounds for dismissal. An employee whose employment agreement has been transferred retains rights in relation to, *inter alia*, dismissal protection, the notice period, severance pay, etc. unaltered in form and scope from what existed prior to the transfer date. Nevertheless, nothing in the law prohibits a dismissal if the employer can justify this on the basis of economic, technical or organisational reasons arising in connection with the business transfer. Whether there are ETO grounds for dismissal will depend on the facts of each case.

However, this does not guarantee that there is no abuse in practice. Croatian employers have a habit of persuading employees to agree to termination prior to a transfer, arguing that the employees will in any case, after the transfer, lose their right to severance pay, notice period and other benefits. Employees generally accept these offers, as they are uninformed about the legal provisions regulating employment transfers. That said, in line with the rules, the courts have the ultimate responsibility for making sure that employees have been treated justly.

Nevertheless, even though the courts in Croatia tend to favour employees in their rulings, they generally take the view that it is the right of each employer to decide upon the structure and schedule of employment and that neither the courts nor the employees are entitled to interfere with this. In line with this, it is very likely that a Croatian court would have applied the same reasoning as the Dutch court – however, it would only have done so if there was sufficiently strong evidence to support the notion that the dismissals were the result of an abuse of the employer's right to rationalise its business.

Germany (Elisabeth Höller): According to German labour law, a dismissal by reason of a business transfer is invalid. This is provided in the first sentence of section 613a(4) of the German Civil Code (BGB). This provision establishes an autonomous prohibition against dismissal within the meaning of the Law on Protection against Unfair Dismissal (KSchG). It is not limited to situations in which the dismissal is found unfair. Therefore, even employees who are not protected by the KSchG may invoke this prohibition against dismissal. However, the right of the employer to dismiss an employee for other reasons remains unaffected. The prohibition against dismissal contained in section 613a(4) BGB is not relevant if there is an operational reason besides the transfer that in itself justifies a dismissal. In such cases, the transfer is simply a surrounding, external event but not the main reason for the dismissal. Section 613a BGB does not protect against risks that are independent from transfer of undertakings, but does allow organisations to take necessary rationalisation measures.

In cases of this kind, the employer must provide evidence of its restructuring plans, in a similar way to the Dutch case. However, the employee must also provide evidence to support the allegation that the dismissal took place by reason of the transfer.

Latvia (Andis Burkevics): Latvian law basically copies Article 4(1) of Directive 2001/23 and so far there have been no relevant cases before the Latvian Supreme Court in which a dismissed employee has successfully argued that a termination that took place shortly after a business transfer was in fact connected to the transfer.

However, if my understanding of the case report is correct, where there is a dispute, the employer must prove both that (i) the dismissal would have taken place even in the absence of a transfer and (ii) there is an ETO reason for it. In Latvia it is quite common for the transferor's managers to be terminated a few months after a transfer because of the introduction of a new management structure. If in this kind of case the Latvian courts were to follow the approach of the Dutch court in the case reported above, it seems to me that it would be very difficult for the employer to prove that the dismissal would have taken place even in the absence of the transfer.

Luxembourg (Michel Molitor): In general, employees' rights are safeguarded in the event of a business transfer. However, after the transfer, the employer may dismiss its employees for ETO reasons provided that these reasons are justified, i.e. real and serious (Labour Court of Luxembourg, 9 March 2012, n° 1107/2012). But these reasons should not be merely an excuse to terminate the employment contract following the transfer. Some collective agreements, for example in the banking sector, even exclude dismissal for ETO reasons for two years after a transfer of undertaking takes place.

In relation to ETO reasons, Luxembourg case law considers that the employer has a margin of discretion to take measures to reorganise its business. ETO reasons should be based on objective criteria and should not constitute a pretext to dismiss employees. If the dismissal results directly from the transfer, it will be declared unfair.

In October 2013, the Court of Appeal of Luxembourg tried to overturn the traditional case law on ETO by imposing an obligation to reclassify roles prior to dismissal (Court of Appeal, 7 November 2013, n° 38.931). But this was a solitary case and the courts have not followed this precedent. Quite the reverse: they have reaffirmed their prior judicial self-restraint in matters of ETO (Labour Court of Esch/Alzette, 29 November 2013; Court of Appeal, 12 December 2013).

Subject: Transfer of undertaking - ETO
Parties: *X - v - SS DP Acquisition Corp*
Court: *Rechtbank* (Lower Court) in Amsterdam
Date: 7 April 2014
Case number: KK 14-389
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"Temps" entitled to same benefits as user undertaking's own staff, even where not derived from statute (CR)

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Summary
Croatia has gold-plated its transposition of Directive 2004/108, entitling temporary agency workers to all benefits accorded to the user undertaking's own staff, rather than merely to the same pay, working time and holidays. The judgment reported here has broader relevance and must be seen in the context of a pending overhaul of Croatian law on temporary agency work that aims to increase labour flexibility.

Facts
On 1 January 2010 the Labour Act was amended. One of the aims of the amendment was to transpose Directive 2008/104/EC on temporary agency work. Article 5(1) of this directive provides that:

"The basic working and employment conditions of temporary agency workers shall be, for the duration of their assignment at a user undertaking, at least those that would apply if they had been recruited directly by that undertaking to occupy the same job."

Article 3(1) defines "basic working and employment conditions" as:

"Working and employment conditions laid down by legislation, regulations, administrative provisions, collective agreements and/or other binding general provisions in force at the user undertaking relating to:

(i) the duration of working time, overtime, breaks, rest periods, night work, holidays and public holidays;
(ii) pay."

The Labour Act as it stood before 1 January 2010 (the '2004 Act') entitled temporary agency workers ('temps') to at least the same salary as that of comparable staff in the employment of the user undertaking ('user staff'), but not to other terms and conditions of employment. The Labour Act as amended on 1 January 2010 (the '2009 Act') entitles temps to no less favourable treatment than comparable user staff with respect to all terms and conditions of employment.
The plaintiff in this case was a temp. He was employed by two successive temporary employment agencies, which assigned him to one and the same user undertaking from 1 July 2009 to 30 September 2010. The user undertaking was bound by, and applied to its own staff, a collective agreement for workers in the telecoms industry. This collective agreement provided for a number of fringe benefits, such as a Christmas bonus, an Easter bonus and a tax-free vacation bonus. The plaintiff was not paid these benefits. He brought proceedings against his former employers (the temporary agencies) before the local court, seeking payment of Christmas, Easter and vacation bonuses.
The court of first instance denied the claim. It reasoned that the defendants were not a party to the collective agreement applied by the user undertaking and that Christmas, Easter and vacation bonuses are not included in the definition of "basic working and employment conditions" in Directive 2008/104. The plaintiff appealed.

Judgment
The Court of Appeal upheld the lower court's judgment inasmuch as it related to the period before
1 January 2010, when the 2004 Act was in force. As for the period from 1 January 2010, the Court of Appeal held that the 2009 Act went beyond the minimum required by Directive 2008/104. This is in line with Article 9(1) of the Directive:

"This directive is without prejudice to the Member States' right to apply or introduce legislative, regulatory or administrative provisions which are more favourable to workers or to promote or permit collective agreements concluded between the social partners which are more favourable to workers."

The intention of the Croatian legislator when adopting the 2009 Act was clearly to make use of this possibility. Therefore, the plaintiff was eligible for Christmas, Easter and vacation bonuses for the period 1 January – 30 September 2010.

Commentary
This is the first such judgment passed by Croatian courts. There are, however, several more cases on similar facts currently pending before the Croatian courts. The judgment has received significant attention in the media, has attracted considerable debate and has influenced an ongoing legislative effort to introduce a new Labour Act. To explain the judgment, some explanation needs to be given about the Croatian labour market.
Croatia was a communist country until 1989. The lifting of the iron curtain was followed by a devastating war (1991-1995). The transformation from a war-torn socialist economy into a market-driven economy based on private property and an open market has not come easily. It is being achieved in the face of ignorance by employers and employees of their rights and obligations, not to mention fraud and corruption. The transformation was difficult enough before the 2008 financial crisis struck, but is even harder now that unemployment has skyrocketed from under 10% in the first quarter of 2009 to 22.4% in January 2014, the highest since Croatia became independent.
Croatian law in the area of employment protection for permanent employees is amongst the strictest in Europe. This is often perceived as a reason for the lack of competitiveness of the Croatian economy and for its low level of job creation. Both the IMF and the World Bank have advised the government to consider measures to make labour regulations more flexible, for example by removing legal restrictions on fixed-term contracts, making the procedures for lay-offs less complicated and encouraging part-time and temporary agency work. Currently, a new Labour Act is being debated in the National Assembly aimed at enhancing flexibility and reducing the cost of workforce restructuring. The proposed new law includes provisions on exemption from the principle of equal treatment of temporary employment agency employees so as to encourage temporary agency work by reducing temporary agency costs.
Although temporary agency work has existed in Croatia since 1989, it was not regulated by law until 2003. Since that time, the phenomenon has gradually become more common. Nevertheless, temporary agency work is still comparatively rare, presumably because of negative ideas about temporary labour ("dumping"), lack of knowledge of the legal options, a large informal sector and "envelope payment". According to an unofficial assessment of the temporary agency sector, at present there are 56 agencies in Croatia, employing approximately 8,000 temps.

Under Croatian law, "temps" are seen as employees of the temporary

employment agency. When the assignment to a user undertaking of a temp who is a permanent employee of the agency ends, the agency must pay him or her, for the time during which he or she is not assigned to any user undertaking. The amount due to the employee is salary compensation equal to the average salary paid in the previous three months. To avoid paying this compensation, many agencies hire temps only for the duration of their assignment, i.e. they synchronise the employment contract with their contract with the user undertaking.

The main aim of the government is to reduce the high unemployment rate and the ways it is choosing to do that include the encouragement of temporary employment as a means of creating more flexibility on the labour market. The government's idea is to provide legal incentives for temporary staffing agencies to hire temps on the basis of permanent rather than fixed-term contracts, thus providing them with income security between assignments. This might be seen as an attempt to improve the position of temps, but behind this lies a government proposal that the salary payable between assignments could be agreed by the agency and the temp (with no minimum number of hours for which the temp should be paid). However, this could result in temps being paid less than they would have been entitled to if unemployed. Moreover, the proposed Labour Act introduces an additional exception to the general rules on equal treatment. This concerns the possibility for the trade unions and temporary agencies to conclude collective agreements that provide for less favourable working conditions for temps, provided these are within the bounds of the applicable special regulations.

Comments from other jurisdictions

Germany (Dagmar Hellenkemper): In Germany, the use of temporary workers has become increasingly popular over the last ten years, their numbers rising from approximately 250,000 in 2003 to approximately 820,000 by the end of 2013 and therefore, the whole issue has continued to be well-debated since the transposition of Directive 2004/108 into the German Temporary Work Act (*Arbeitnehmerüberlassungsgesetz*).
A temporary worker in Germany is an employee of the temporary work agency, not the user undertaking. The employment contract is solely between the worker and the agency and does not involve the user undertaking. The agency is considered to be the employer, is responsible for meeting all legal requirements and deals with making the necessary deductions for social benefits (retirement, unemployment, health insurance etc.) and income tax. Wages are paid by the employer. In general, the Temporary Work Act provides that temps must be treated equally with the employees of the user undertaking concerning all work conditions – equal pay for equal work. The Croatian judgment is therefore not surprising from a German point of view. In reality, collective agreements that bind the temporary workers' agency (not the user undertaking), allow them to pay their employees as agreed upon in the collective agreement, therefore undermining the equal pay rule which – incidentally - would include Christmas bonuses, holiday payments or other bonuses that the user undertaking pays to its own employees.
As in Croatia, the expectation was that the transposition of Directive 2004/108 would make it possible for a greater number of unemployed individuals to secure employment in the labour market. The steep decline in temporary agency work during the economic crisis, the replacement of full-time staff with lower-paid temporary agency workers and the permanent discrepancies in pay between full-time staff and temporary agency workers in long-term client placements have contributed to a change in public perceptions concerning temporary agency work.

In order to reverse the wide discrepancies in pay, several German trade unions and staffing industry confederations have agreed to so-called "*Branchenzuschlagstarifverträge*" – or, roughly, sector-specific surcharge collective labour agreements. These agreements, which will be effective until 2017, provide for the gradual equalisation of wage differences between agency workers and permanent staff in the most important sectors served by temporary work agencies. Whether or not these collective agreements will help to create wider equality between temps and core workers remains to be seen. It does not seem unlikely that – as in Croatia – the legislature or judiciary will step in at some point.

Ireland (Orla O'Leary): In Ireland the Protection of Workers (Temporary Agency Work) Act 2012 (the 'Irish Act') implemented the terms of the Directive on Temporary Agency Work 2008/104. The Irish Act entitles agency workers to the same "basic working and employment conditions" enjoyed by employees employed directly by the end-user.
As such, the Irish Act provides narrower protection than the expansive protections implemented by the amendments to the Labour Act 2010 in Croatia which provide that all terms and conditions of employment are covered.

Three recent cases interpreting the Irish Act are worth consideration:

1. In one case in November 2013 before a Rights Commissioner (the first-instance adjudicator under the Irish Act) a lorry driver sought to claim bonus payments that he said were 'pay' for the purposes of the Irish Act. Similar to the Croatian case of *M.M. - v - Centar Poslova Ltd and Electus DGS Ltd* the Rights Commissioner held that the right to equal pay under the Irish Act does not entitle an agency worker to bonuses that an employee of the end user is paid.
2. A recent case before the Irish Labour Court, *Stafford – v - Isaacson and ors* (Labour Court Determination AWD142), provides useful guidance to employment agencies and hirers in relation to agency workers' rights to equal pay under the Irish Act. In this case agency workers working for a removals and storage company argued that the agency was in breach of the equal pay provision as they were not being paid the same rate of pay as directly-hired employees of the end-user. The agency, in their defence, submitted that the agency workers should only be entitled to a lower, notional rate of pay that would apply if the end-user was to directly hire employees at that moment in time, to factor in the end-user's weakened financial circumstances. However, the Labour Court ruled that the correct entitlement is simply the "going rate" of pay that "applies generally" to current employees, rather than a "notional rate that would be paid to workers" on the particular date suggested by the agency.
3. Another recent case, *Team Obair Limited v Mr Robert Costello* (Labour Court Determination AWD134), provides useful guidelines on the use of comparators in such claims, and the obligations end-users to inform agencies on what the correct rate of pay should be. The case concerned an agency worker who worked as a forklift driver.

On the issue of establishing comparisons to employees of the end-user, the Labour Court said that although the agency worker is not required to point to an actual comparator employed directly by the end-user, such a comparator was an "important evidentiary tool".
On the issue of determining the correct rate of pay, the Labour Court said that the end-user was obliged to provide sufficient, up-to-date

information on basic pay and employment conditions to the agency. The Labour Court made a significant award of € 20,000 to retrospectively satisfy the equal payment entitlements of the claimant.

Luxembourg (Michel Molitor): The ruling of the Croatian Court of Appeal regarding temporary workers' benefits would most likely be similar under Luxemburg law. Directive 2008/104/EC did not need to be specifically implemented, as there was already a provision in the Labour Code protecting the status of temporary workers. Article L.131-13(1) of the Luxemburg Labour Code provides that temporary workers' salary paid by temporary work agencies cannot be lower than the amount that might be granted to an employee with the same or equivalent qualifications hired on the same conditions as a permanent employee of the user company, after any trial period.
A judgment issued on 11 October 2012 by the Luxembourg Court of Appeal clarified the status of temporary employees' benefits, especially bonuses. The Court pointed out that Article L.131-13(1) of the Labour Code establishes equal pay and equal treatment between temporary workers and permanent employees of the user company. It also recalls what needs to be understood as "salary", by application of Article L.221-1 of the Labour Code, as follows:

"the total compensation of the employee, including, not only basic pay, but, other benefits and possible additional compensation, such as ex gratia payments, product discounts, bonuses, free accommodation and others benefits of a similar kind."

This means that temporary workers are eligible for all types of payment that could be granted to an employee with similar or equivalent qualifications hired on the same conditions as a permanent employee of the user company and not only specific bonuses linked to the qualifications of the temporary worker. Therefore, whenever the collective agreement applicable to the employees of a company entitles them to receive Christmas or Easter bonuses, the Luxemburg courts would rule that the same benefit should be given to all temporary workers as well.

Romania (Andreea Suciu): In Romania, as with Croatia, temporary agency work has traditionally not been significant. This has tended to be because of the existing inflexible regulations, even though temporary agency work is actually very interesting for companies, as it enables them to provide short-term coverage of workplace shortages, for example to handle temporary increased workloads or to fill temporary requirements for specialised workers.
However, in 2011, some interesting changes were made in relation to temporary agency work. These were enacted in accordance with Directive 2008/104 on temporary agency work and may simultaneously promote the employment of temporary agency workers ("temps"). What is new is that temporary work agencies can now sign permanent contracts of employment with temps. In addition, temps can now be freely assigned for both specified tasks and temporary activity, whereas under previous rules, temporary agency work was only permissible in certain cases. Further, the new legislation has also altered the maximum duration of assignments from 12 to 24 months or – in the case of an extension – to 36 months.
Also, pursuant to the 2011 amendments of the Labour Code, temps are free to negotiate their salary directly with the temporary work agency, provided that it is not lower than the statutory minimum of (currently) 900 Lei (approximately € 200) per month. This means that temps are no longer entitled to at least the same salary as that of comparable employees of the user undertaking. This, in our opinion, grossly neglects the principle of equal treatment provided in Article 5(1) of the Directive (*"The basic working and employment conditions of temporary agency workers shall be, for the duration of their assignment at a user undertaking, at least those that would apply if they had been recruited directly by that undertaking to occupy the same job"*). Admittedly, Article 5(2) of the Directive provides: *"As regards pay, Member States may, after consulting the social partners, provide that an exemption be made to the principle established in paragraph 1 where temporary agency workers who have a permanent contract of employment with a temporary-work agency continue to be paid in the time between assignments."* However, this provision was intended as a way to vary the terms of compensation in specific cases, not as a general rule of law.
Nevertheless, almost all other working and employment conditions laid down by legislation, regulation, collective agreements and other binding general provisions in force at the user undertaking relating to the duration of working time, overtime, breaks, rest periods, night work, holidays and public holidays, also apply to temporary agency workers.
Interestingly, statistics show that in 2013, the average monthly net salary of temporary workers varied between 1,153 Lei and 2,441 Lei (depending on the industry and area). By comparison, last year's recorded average monthly net salary for the economy as a whole was 1,622 Lei.
The market for temporary agency work exceeds € 200 million per year, consisting of salaries paid by temporary work agencies and the commissions received by them from user undertakings.

Slovakia (Beata Kartiková): Slovakia introduced a licensing system for temporary agency work in 2004. Following the enactment of Directive 2008/104 on temporary agency work, the Slovakian legislator implemented it into the Labour Code. The implementation was based on the principle of equal treatment and that temps should enjoy the same employment conditions as workers recruited by the user undertaking.
Although Directive 2008/104 allows Member States to regulate temporary agency work in order to avoid abusing temporary workers, our legislator has failed to take the necessary measures. We consider taking legal action in this field an efficient way of preventing abusive temporary work. From our point of view it would be appropriate, for example, to limit the maximum number of temporary workers in each company and to tighten up conditions for obtaining a temporary work agency licence (because nowadays it is sufficient to have simply a full secondary education in any specialisation and no criminal record).
The only notable restriction in connection with the temporary assignment of staff is contained in section 29(2) of the Employment Services Act, effective from 1 May 2013. It provides that in certain situations a contract of employment between a temporary work agency and a temp automatically converts into a permanent employment contract between the temp and the user undertaking. This situation occurs under the following conditions, stipulated by the Employment Services Act:
(i) Where, after the first temporary assignment of the employee, his or her temporary assignment to the same user employer is repeated more than five times (the number of repeated temporary assignments is monitored for a period of 24 consecutive months and 24 months starts to run after the end of first temporary assignment);
(ii) Where there is no break between two temporary assignments of more than six months;
(iii) There is no interruption between the original temporary assignment and the next five temporary re-assignments to a single user employer (e.g. by temporary assignment to another user employer).These restrictions were made with the purpose of preventing chains of

temporary assignments by user employers.
Unfortunately, to our knowledge there is no case in Slovakia that is similar to the one reported. The unwillingness of temporary employees to enforce their legal right to equal treatment is most likely caused by the high unemployment rate in Slovakia, as well as the excessive duration of lawsuits.

Subject: Temporary agency work – equal treatment
Parties: *M.M. – v – Centar poslova Ltd. and Electus DGS Ltd.*
Court: *Zupanijski sud u Zagrebu* (Court of Appeal in Zagreb)
Date: 17 December 2013
Case number: Gžr-1357/13-2
Internet publication: www.iusinfo.hr→fill incase number in second space next to *Trazi po*

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Italian law on facilities for unions discriminatory and unconstitutional (IT)

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Summary
When the car manufacturer Fiat terminated the national collective agreements to which it was a party and entered into a new, company-level collective agreement for one of its factories, a large trade union, FIOM, refused to sign up to it. Fiat applied section 19 of the Workers' Statute to deny FIOM certain benefits, such as the right to call meetings with staff during working hours and the right to use company facilities. The Constitutional Court declared the section unconstitutional on the basis that it discriminated unreasonably against unions that are not a party to a collective agreement despite representing a large segment of the workforce.

Background
A *Rappresentanza Sindacale Aziendale* (RSA) is a company-level employee-representative body. The law does not specify how many members an RSA should have, nor how the members are appointed by their unions, nor what the duties of an RSA are, nor how it is to function. Basically, all the law does is to confer certain rights on RSAs and their members, such as:

- special protection against dismissal or other detrimental actions by the employer;
- the right to a certain amount of time off work in order to perform union activities;
- the right to call meetings with the staff during working hours;
- the right to use company facilities, such as conference rooms;
- the right to post messages on the employer's (physical or digital) bulletin board.

Obviously, these rights can be burdensome for the employer. For this reason, not every union has the right to establish an RSA. Only unions that have signed a collective agreement applied within the company have this right. This is provided in section 19 of the Workers' Statute (Law 300/1970) ("section 19"). Thus, within one company, there can be some unions that benefit from these rights and unions that do not. Those that do not, of course, do have constitutional rights concerning freedom of industrial action.

Facts
In 2010 Fiat decided to invest hundreds of millions of euros in its car factory in the Naples suburb of Pomigliano. The decision was conditional on the willingness of the unions to agree to certain changes that Fiat considered necessary to achieve an adequate return on its investment. The changes concerned matters such as overtime, breaks and the ability to go on strike. These changes were not possible under the existing collective agreements to which Fiat was bound. These were collective agreements at the national level that had been negotiated between, on the one hand, Federmeccania, the employer's association of which Fiat was a member, and, on the other, the largest unions active in the industrial sector belonging to national confederations of unions, FIOM, UILM and FILM, as well as two other unions, FISMIC and UGL.
In order to introduce the changes, Fiat needed to free itself from the existing national collective agreements to which it was bound and to enter into a collective agreement specifically for its Pomigliano plant. It did this in two steps. The first was to resign from Federmeccanica and to terminate the existing collective agreements. The second consisted of (i) establishing a new legal entity (FIP) that took over the management of the Pomigliano plant from Fiat and (ii) negotiating a new company-specific collective agreement for FIP.
FIP reached agreement with four out of the five unions. It failed to reach agreement with one of the largest, and definitely the most combative and least flexible union in the industrial sector, FIOM. The agreement paved the way for the investment to go ahead, and now the new factory is in operation and the employees are bound only by the new collective agreement. The same agreement has meanwhile been extended to many different production plants within the Fiat group.
As already mentioned, section 19 bestows rights on unions that are a party to a collective agreement that is applied in the company in question. Thus, the four unions UILM, FILM, FISMIC and UGL had the right to establish an RSA, with all the rights associated with that, whereas FIOM, one of the largest and most representative unions, did not have those rights. FIOM did not accept this state of affairs. This led to a large number of court cases throughout Italy between FIOM as plaintiff and Fiat subsidiary companies as defendants.

Lower court judgments
Some local tribunals, applying section 19 strictly, ruled in favour of Fiat. Other tribunals reasoned that a strict interpretation of section 19 would be unfair and illogical, seeing as it would exclude one of the most representative of the unions from the statutory protection of union representation. These tribunals interpreted section 19 as bestowing rights, not only on unions that are a party to a relevant collective agreement, but also to unions that, although they are not a party to such an agreement, have been "active in the bargaining process".
Three tribunals – those in Turin, Modena and Vercelli – took an intermediate view. They reasoned that the wording of section 19 is clear and that it stands in the way of a broad interpretation. However, they also noted that a strict interpretation of section 19 could be at odds with the constitutional principles of equality, freedom of association and freedom of industrial action, given that:

- it effectively allows employers (who can choose with which unions to enter into a collective agreement) to determine which unions

benefit from the statutory rights relating to RSAs;
- it could more or less force unions to accept terms with which they disagree, for fear of losing their RSA facilities;
- the criterion "party to a collective agreement" does not reflect the degree to which a union represents the staff and is therefore not a reasonable criterion.

For this reason, these three tribunals applied to the Constitutional Court for guidance.

Judgment

The Constitutional Court agreed with the view of the said three tribunals that the wording of section 19 is clear and does not allow for a broad interpretation. However, it also held that section 19 is unconstitutional. Article 3 of the constitution enshrines the principle of equal treatment. Unequal treatment can be lawful, but only if it is reasonable. The criterion of being a party to a collective agreement is not a reasonable criterion, seeing that it does not in any way reflect how representative a union is within a company. Therefore, treating a union less favourably than other unions that are active in a company violates the principle of equal treatment.

Article 39 of the constitution guarantees freedom of union association. The criterion of being a party to an applicable collective agreement interferes with this freedom, given that it provides an incentive to accept employers' demands, or rather, a disincentive to resist those demands. On these grounds, the court held section 19 to be unconstitutional and held that it is sufficient for a union to have actively participated in the bargaining process (with respect to the terms and conditions applying to the workforce) to benefit from the statutory rights relating to RSAs.

This means that FIOM, which strongly challenges the new collective agreement, will have the right to establish an RSA within each single company of the Fiat group with all the facilities provided by the Worker's Statute.

Commentary

The Italian system for the representation of employees in the workplace is based on a model which provides different levels of protection.

The basic level of protection, which is an expression of the constitutional principle of freedom of union association (Article 39), includes the right to establish organisations of workers and to perform union activity in the workplace. This level of protection is conferred to any kind of association.

The second level of protection concerns not only freedom of association and activity, but confers specific rights obliging the employer to 'cooperate' with and help its traditional and institutional antagonists (unions) by conferring on them several additional powers and protections, which are: the right to organise assemblies during working hours; the right for its members to perform union activity during working hours; special protection for union members against transfers and dismissals, the right to post messages of union interest on the company's bulletin boards and the right to have a room within the company for union meetings (all rights provided under section III of the Workers' Statute).

This second level of protection – which, from a practical point of view, is extremely important – is not conferred on all unions, but only to those selected by means of section 19 of the Worker's Statute. The reason for this is to restrict access to such rights to well-established and genuinely representative unions, given the burden on employers.

At the time the Worker's Statute came into force, section 19 provided that the higher level of protection was to be conferred to associations (a) affiliated with the most representative confederative trade unions and b) which have signed collective bargaining agreements applied within the company at the national or local level, but not to associations that have signed collective bargaining agreements only at company level. These rules changed after a national referendum in 1995. After the referendum, requirement a) was cancelled and requirement b) was extended to all associations that had signed any kind of collective agreement (including agreements at company level).

The model resulting from the referendum, therefore, was entirely centred on the signing of at least one collective bargaining agreement applied within the company. The logic behind this model was that the signing of a collective bargaining agreement was the key way to distinguish between a union that was 'strong' and representative (and, therefore, had the power to impose its views on the employer), and one which was not. Only a strong association would have the power to sit at the negotiation table and to force the employer (or employers' association) to come up with an agreement - that was the idea.

This model worked without difficulty for as long as the major Italian unions (the three confederative ones and the associations affiliated with them) worked together, pursued the same interests and agreed together on the signing of collective bargaining agreements. All collective bargaining agreements in Italy had, historically, been signed by all the unions affiliated to the three major confederations. The problems began when this unity of action ceased, and they reached their zenith in the Fiat case described in this case report. In this case, as explained, FIOM (a union of the industrial sector affiliated to CGIL), refused to sign the agreement although it was signed by all the other unions involved. The result was that FIOM, which is one of the most major and representative unions in the industrial sector, was left without access to the rights provided by the Worker's Statute. Until, that is, the Constitutional Court ruled in its favour.

Although the decision has logic to it in some ways, in others it is not entirely convincing, firstly because the Constitutional Court did not merely state that the provision contravened the Constitution, but it also invented a new criterion (i.e. active participation in the bargaining process) for qualifying for the higher level of protection. Secondly, this new criterion introduces more uncertainty than the previous one (the signing of a collective bargaining agreement) and this means it will be hard to determine what level of participation in the bargaining process is required to confer access to the special protection.

Thirdly, the ruling does not solve a particular legal problem that arose in the case, in that the employer was not only refusing to sign a collective bargaining agreement with one of the relevant unions, but also refused to negotiate with it – yet there is no legal obligation on it to negotiate, other than in specific circumstances (i.e. collective dismissals and transfer of undertakings).

Finally, the criterion set out by the court does not incentivise the conclusion of bargaining agreements, and this is likely to increase social conflict. In the past, collective bargaining agreements often served not to acquire better working conditions for employees, but to distribute the pain as fairly as possible so as to secure the survival of the enterprise. The old criterion worked in this context as a form of stimulus to the unions to find consensus, often in the face of conflicting workers' interests. The new criterion totally removes this effect.

Beyond that, what is really interesting about this decision is that in ruling as it did, the Constitutional Court reversed its previous decisions. Before this case, the Court had already ruled several times on the legitimacy of section 19, and twice since the referendum. In those decisions, the Court had stated that the criteria (i.e. the signing of a collective bargaining agreement) pursuant to which section 19 guaranteed the rights provided under section III of the Workers' Statute was entirely in line with the Constitution. However, these rulings were given at a time

when the most important and representative unions used to cooperate and tended to agree to the signing of collective bargaining agreements. Thus, in practice, all of the most representative unions had access to the second level of protection.
The court based its reversal on changes in the dynamics of industrial relations and their practical consequences, notably the different approaches taken by some of the major unions. These had the effect of excluding a highly representative union from the protection granted by the Worker's Statute and this, in the court's opinion, was in conflict with the spirit of the law. In the court's view, section 19 was not unlawful in itself, but had become untenable in the context of the new industrial relations in which it had come to operate.

Comments from other jurisdictions

Germany (Paul Schreiner): Germany does not have a legal framework comparable to the Italian one. Trade unions have strong rights resulting directly from the German Constitution. Until now there has been no legislation at state level that grants different trade unions different rights and obligations. Therefore, in principle, all trade unions still have the same rights with regard to the workforce of a certain employer, regardless whether or not they have concluded a collective bargaining agreement.
However, as in the Netherlands, there are certain issues that are comparable to the situation in Italy. In Germany, traditionally, the case law of the federal employment court for labour and employment matters stated that there can be no more than one collective agreement for any one organisation. Once a collective bargaining agreement had been concluded, it was almost impossible for a different trade union to conclude a different collective agreement. In consequence, it was very hard for new trade unions to gain new members and increase their influence.
Newer case law, however, points in a different direction. Now, the federal court holds that an unlimited number of collective agreements can be concluded within one organisation. The reason behind this is that every trade union has the constitutional right to conclude collective agreements and must not be hindered in doing so. With that new framework, new German trade unions have risen to the occasion and concluded lots of collective bargaining agreements. To force an employer to conclude such an agreement, they are allowed to go on strike. Therefore, every larger German employer runs the risk that different unions in different parts of the workforce will go on strike at different times of year.
To limit this risk, there have been various attempts at providing a legal basis for re-establishing the principle of one collective agreement per organisation. But this raises a question that is analogous to the Italian situation: which trade union should be the one that is allowed to conclude a collective agreement? Representation of workforce could be one answer to that question. Probably the majority of German legal authority currently tends to favour that option. But if a new law were to follow that path, would it be necessary, for constitutional reasons, to allow a second trade union also to conclude a collective agreement, if it represented a significant minority of the workforce? These questions are as yet unanswered.

Ireland (Orla O'Leary): Irish industrial relations law is based on a voluntarist tradition. According to latest official statistics, 31% of workers in Ireland are members of trade unions. Trade union membership in the public sector is significantly higher at 68.7%, than the private sector at 24.9%. Although workers have a constitutional right to join a trade union, employers are not obliged to negotiate with the union, nor is there any legislative equivalent to the secondary rights afforded under section 19 of the Italian Workers Statute.
A ruling of the Irish Supreme Court in May 2013 declared a legislative scheme for setting minimum terms of employment within certain industries unconstitutional. The ruling bears similarities to the Italian Constitutional Court's ruling in *FIOM - v - Fiat*.
In *McGowan v Labour Court* 2013 IESC 21, the Irish Supreme Court ruled that Registered Employment Agreements, which are legally-binding agreements setting minimum wages and terms of employment in certain industries, were unconstitutional. The abolition of Registered Employment Agreements has affected workers in the construction, electrical contracting and retail sectors, amongst others. Trade unions had previously been heavily involved in negotiating Registered Employment Agreements, which were generally regarded as an important means of providing improved terms and conditions for workers in those industries. The ruling has parallels to the FIOM ruling in Italy – both the Irish and Italian courts' views were that the respective legislative schemes were seen as untenable in the context of modern industrial relations in the two jurisdictions.

The Netherlands (Peter Vas Nunes): In Dutch practice, trade unions play a less dominant role than in countries like Italy. The strong position of works councils (whose members are elected by and from all employees in an organisation, not merely union members) may have something to do with this. Union membership has declined over the years to the present level of just over 20%. In many companies, no more than a handful of employees are members of a union and sometimes none at all. Despite this, the legislator continues to reserve important prerogatives for unions. As a result, the vast majority of Dutch employees are covered by a collective agreement setting out their salary and many other terms of employment. This can be either an industry-wide agreement (e.g. one for hospitals, restaurants or metallurgical companies) or an agreement specifically for one company (e.g. Philips or KLM). Most industry-wide collective agreements have been declared erga omnes, meaning that all companies within the relevant sector must apply them, regardless whether they are a member of an employers' association.
Remarkably, there is no statutory requirement for a union to be 'representative'. A union with no more than a small minority of its members being employees within a company, or even none at all, may enter into a collective agreement with that company and that agreement will, in principle, be binding on all of its employees. There have even been cases where the union doing so was a bogus or "yellow" union (although the courts have invalidated such agreements). This has occasionally led to an employer negotiating a collective agreement with one small union against the wishes of one or more other larger unions. Thus, although the Dutch and Italian systems differ markedly, some of the issues raised in the dispute reported above, such as competition between unions and the changing nature of collective agreements in economically challenging times, seem familiar.

Subject: Discrimination – other grounds
Parties: *FIOM - v – Fiat* and others
Court: *Corte Costituzionale* (Constitutional Court)
Date: 23 July 2013
Case Number: 231/2013
Publication: www.cortecostituzionale.it →Giurisprudenza→Ricerca sulle Pronunce →Anno+Numero

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2014/18

Discrimination on grounds of personal belief includes trade union membership and activities of employees on behalf of the union (IT)

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Summary

When the car manufacturer Fiat brought back the production of PANDA cars from Poland to Italy beginning in 2010, it terminated the national collective agreements to which it was a party and entered into a new, company-level collective agreement for one of its factories. There were certain key differences between the new agreement and the old, and the largest trade union, FIOM-Cgil ('FIOM'), vigorously opposed the changes and refused to sign up to the agreement. Fiat had had approximately 4,000 members laid off (but still counted as part of the workforce), but now brought 1,893 of them back to work on the production of PANDA cars. However, not one was a member of FIOM. FIOM and 19 activist-employees brought an action against Fiat and the court ruled that Fiat had discriminated against FIOM members on grounds of their personal beliefs.

Facts

Fabbrica Italiana Pomigliano ('FIP'), a Fiat-controlled company, decided in 2010 to bring the production of PANDA cars back from Poland to Italy, and restructure the Pomigliano premises to operate a new production process. At same time it decided to leave the metallurgical employers' association so that it was no longer bound by the national collective agreements signed by that association. It then unilaterally terminated all existing lower level collective agreements; introduced a new production method to trade unions and proposed a new company-level collective agreement linked to that production method.

As the new collective agreement would increase mandatory overtime from 40 to 120 hours annually, per employee (with possible peaks of up to 200 hours); exclude sick pay in some cases on a discretionary basis; and might result in some workers not having work breaks for lunch or dinner as these would be left to the end of the shift, FIOM, the largest trade union at Pomigliano and in the metallurgical sector as a whole refused to sign the agreement. By contrast, four other unions went ahead and signed.

The new agreement was voted in by 62.2% of the employees. However, this did not satisfy Fiat, as it had been looking for a larger majority to justify bringing PANDA production back to Italy. It would also, as part of the process, need to recall a large number of laid off employees back to work under the law on layoffs, 'CIGS'.[1]

Before, during and after the employees' vote, FIOM had lost a number of its members. This may have been because FIP said it would have pursued the development plan further if the trade unions had fully supported it. In January 2011, FIOM had roughly 900 members amongst the 4367 Pomigliano employees but was still the main trade union at FIP. The following year, Fiat re-hired roughly 50% of the original 4367 Pomigliano employees and had called 1893 employees back to work from CIGS suspension. As such, they were entitled to full salary.

However, not one of the 1893 employees was a FIOM member or representative, whereas Fiat had rehired 11 representatives of other trade unions, particularly the large unions, FIM and UILM, but also the minor independent associations FISMIC and UGL. All of these had signed the controversial company-level collective agreement and supported the new production system.

FIOM brought urgent proceedings against Fiat based on Legislative Decree 150 of 2011 (as amended by legislative decree 216 of 2003) on behalf of 19 employees and on behalf of the collective interests of any other FIOM employee who might have been discriminated against by FIP's behaviour.

Notably, the trade unions did not bring their action on the basis of section 28 of law no. 300 of 1970 (the so-called 'Workers' Statute'). This law serves to protect workers from discrimination and, in particular, discrimination by means of 'anti-trade union behaviour' defined as "any behaviour which restricts the freedom of trade unions activity and the exercise of the right to strike" and so could have been used in this case. However, in the event, the Court of Appeal found Legislative Decree 150 of 2011 to have been a suitable vehicle for a case involving discrimination during re-hiring as a result of trade union affiliation, as described below.

Judgment

During the proceedings, FIP raised a number of technical and procedural objections relating to the specific laws invoked and to the type of proceedings brought – all of which the court rejected.

On the substantive issue, the court found that 'personal beliefs' includes being a member or representative of a trade union at company level and that personal beliefs are protected under both EU and Italian anti-discrimination law. FIOM hired a professor of statistics as an expert witness in the proceedings and in his view the chances were lower than one in a million that no FIOM member should have been included among the laid-off employees who were recalled back to work with full salary entitlement.

FIP's defence was that the selection had not been made by FIP themselves but by external companies and by 'team leaders'. The team leaders were the first to be rehired and they were then entitled to pick their teams by identifying the employees they deemed "necessary" in the new premises.

The court judge decided that since personal belief included trade union activity and that there was evidence of discrimination, FIP should:

- hire the 19 FIOM members that had personally claimed against FIP within 40 days of the decision;
- hire at least 2.87% of the FIOM members, equal to 145 workers within a further 180 days.

1 'Cassa integrazione guadagni straordinaria', or 'CIGS' is an Italian law that enables companies to retain employees as part of the workforce, whilst they are not working. Whilst on CIGS, employees are entitled to a kind of unemployment benefit from the state, capped at 1,000 per month and are prevented from working for other employers, since their employment agreement remains in force. Theoretically, CIGS should only be used in cases of restructuring where there is a reasonable chance that the employee will return to work. However, in practice, CIGS has been requested by and granted to the largest industrial groups by successive Italian Governments, with the aim of avoiding or mitigating the social problems that would be caused by large numbers of workers being made redundant at same time. Specific measures have meant that this tool can be used over a period of years, and this has served to protect the manufacturing sector - once the biggest sector of industry in Italy – for a long time. By contrast, the services sector, for example, has benefitted from it to a much lesser extent and for shorter periods.

The case then went to the Court of Appeal in Rome and it upheld the lower court's ruling that the concept of personal belief includes trade union membership and activity, and confirmed that discrimination had taken place.
The Court of Appeal also rejected further objections by FIP, such as that it had not been directly responsible for selecting employees for rehiring. In the Court's view, FIP was clearly complying with Fiat's obligations in relation to (re)hiring. It also noted that FIP had failed to provide evidence to counter FIOM's expert witness in relation to the likelihood that any new workforce of the required size would not include FIOM members.
FIP also tried to argue that not hiring FIOM members should be an option available to it. The Court of Appeal was unconvinced. It particularly noted that a former FIOM member (who may have left FIOM as a result of pressure from Fiat) had been rehired despite belonging to a group carrying out an activity that was yet to be transferred - whereas none of the current FIOM members had been recalled. The Court said that FIP had supplied no evidence as to why this was not discriminatory.
The Court of Appeal confirmed both the order to rehire the 19 immediately and the order to conduct the future rehiring's it was required to undertake in a way that respected the ratio between FIOM and non-FIOM members. As before, this was set at 2.87% of the total number of employees.

Commentary
This decision has been widely reported in the national and international press, as it touches on how far the freedom to conduct business in the way a company wishes can fairly be taken.
On the one hand, when investing in a country, it may be in the company's interests only to invest in certain projects if they are sufficiently supported by the trade unions – and no judge can require a company to develop business in Italy if it does not wish to.
However, the question was, did this freedom (and, more generally, the freedom of private economic private initiative protected by section 41 of the Italian Constitution) include the right for the employer to decide, not only the terms and conditions of work in the company, but also which employees (with reference to their trade union membership) should be hired, in circumstances where the company was aiming to operate a new production process under new working rules - and those rules were not accepted by the largest trade union? More specifically, when deciding who should come back from CIGS, was it discriminatory to leave out employees who were company-level representatives of FIOM, for example? The representatives in question had already been appointed beforehand and retained their role as representatives, despite being suspended in CIGS. The case clarified that not allowing them back to work was discriminatory, as it was based on FIOM's opposition to the collective bargaining agreement proposed and supported by Fiat.
The idea that certain employees could be prevented from working at a particular employer is also contrary to the Italian Constitutional principles relating to trade union activity and the seeking of new membership. Trade union activity is protected by Italian law in all workplaces, whether or not trade unions are present, and is only restricted to the extent that it must not prevent normal production activity. Union activity and the seeking of new members are protected both at individual and collective level: this means that individuals are fully entitled to conduct union-related activities in the workplace, whether or not they are members of a specific trade union. And crucially, neither the trade union nor the employer is entitled to select employees based on their trade union affiliation (or lack of it).
In my view, the exclusion FIOM employees from the new plant, is reminiscent of the 'closed shop'. This arrangement existed in the US, the UK and Canada and gave unions – or sometimes a specific trade union – the right to veto the presence of specific non-unionised employees in a particular company or in a specific workplace. In other words, only members of certain trade unions could work there, or sometimes, workers had to join a particular trade union in order to be allowed to work there. This arrangement was often based on an agreement signed between the employer and that union. The UK abandoned closed shop agreements after joining the EU, this practice being contrary to European principles, as the civil law jurisdictions (as opposed to the common law ones) regarded such arrangements as unconstitutional. It is not known, but is possible that some kind of unofficial arrangement had been reached with the remaining four unions – those that did sign up to the new collective bargaining agreement. It is certainly noteworthy that none of them protested against the discrimination suffered by FIOM.

Subject: Discrimination related to trade union activity
Parties: FIP s.p.a., - v - FIM-CGIL nazionale, on behalf of 19 employees (from first instance) + 3 additional employees
Court: *Corte di Appelo di Roma* (Rome Court of Appeal)
Date: 19 October 2012
Case Numbers: 5080 and 5204/2012
Hardcopy publication: Guida al Lavoro, n. 46, 2012, p. 28

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2014/19

Eligibility for widow's pension conditional on marriage predating termination of late employee's employment: no age or sex discrimination (GE)

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Summary
The *Bundesarbeitsgericht* has confirmed its previous case law, according to which it is neither sex nor age discriminatory if a company pension scheme excludes surviving spouses from pension benefits who married the pensioner after termination of his employment relationship. Even if such provision implies indirect discrimination on the grounds of age or sex, the employer has a legitimate interest in limiting financial risks in relation to company pension.

Facts
The plaintiff was born in 1958. Her husband was born in 1933 and died in 2010. They married in 1987. The husband had been employed by the defendant and its predecessors for more than 20 years and left the firm in 1979, at age 46. Since 1992 (age 59) he had received pension benefits pursuant to the defendant's company pension scheme.

With regard to widows´ pension the company pension scheme provided that widows of pensioners are only entitled to pension benefits under certain conditions:

- the pensioner married before reaching the age of 60;
- the marriage was concluded before or during the employment relationship;
- on 1 June prior to the pensioner's death, the marriage had existed for at least one year.

Following fruitless requests for payment, the plaintiff filed a lawsuit against the defendant, claiming payment of widow's pension benefits under the company pension scheme.

Judgment

The *Bundesarbeitsgericht* found that the plaintiff was not entitled to any widow's pension benefits under the company pension scheme. Her claim failed because the requirement that the marriage was concluded before the employment relationship ended was not fulfilled. The marriage had been concluded in 1987, by which time the employment relationship had already ended.

The plaintiff claimed that the restriction of widows´ pension entitlements to cases where the marriage had been concluded before the end of employment was invalid for being discriminatory on grounds of age and sex.

The BAG ruled that the requirement, as set out in the company pension scheme, was valid and in particular, did not breach the German General Equal Treatment Act (*Allgemeines Gleichbehand-lungsgesetz*, 'AGG') which transposes Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation.

According to the AGG, employees may not be discriminated against on grounds of their race, ethnic origin, sex, religion or beliefs, disability, age or sexual orientation. Both direct and indirect discrimination are prohibited.

The BAG ruled that the case did not represent direct discrimination, since neither age nor sex were addressed or relied on in the way the conditions of eligibility were described. There was no indirect discrimination either, according to the BAG, because, if there was different treatment on grounds of age or sex in the first place, there was good reason for it.

Indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion, belief, disability, age, or sexual orientation at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

The court left open the question of whether the requirement of being married before the employment terminated was indirectly age discriminatory because it went on to find that age discrimination was justified unequal treatment in this case.

In the court's view it is appropriate and justifiable to exclude surviving spouses from pension benefits where the marriage was not concluded until after the pensioner left the firm as a means of limiting the employer's obligation to those risks that stem from the time when the employment relationship existed. This condition does not meet any of the goals set out in Article 6(1) of Directive 2000/78, namely that justification could be based on legitimate employment policy, labour market conditions, and vocational training objectives. However, the court held that it is sufficient if the condition in question is aimed at protecting a legitimate interest recognized by law.

Such a legitimate interest was to be found in the fact that it is a matter for the employer to decide, at its sole discretion, whether or not to establish a company pension scheme. If it decides to do so, it is free to determine the kind of pension benefits it wants to grant, along with the financial structure of the scheme. It is under no obligation in law to offer benefits to surviving spouses. For this reason, the employer is generally entitled to make any such benefits dependent upon addi-tional conditions and to exclude from the company pension scheme those who do not meet the conditions it sets.

Therefore, the BAG held that no indirect discrimination, either on the grounds of sex or age had occurred and it rejected the appeal.

Commentary

This judgment is in line with the BAG's previous case law on the company pension entitlements of surviving spouses. In 2010, the BAG decided in a similar case that an employer was free to make the pension entitlements of surviving spouses dependent on certain conditions, in particular on the condition that the employee had married prior to or during the employment relationship. The reason for this was that the employer needs to have some ability to limit its financial risk exposure. Since the size of a pension scheme is largely dependent on the number of pensioners on its books, the employer's aim of deciding who it will include as a beneficiary is legitimate provided this is reasonable and appropriate.

Comments from other jurisdictions

The Netherlands (Peter Vas Nunes): The pension scheme in this case contained - inasmuch as relevant - three requirements in respect of survivors' benefits:

a. married before 60;
b. married before or during employment;
c. married one year before death.

The dispute was limited to requirement b. As the BAG noted, this requirement does not discriminate directly. The BAG apparently saw no indirect age discrimination either, but I would argue that there is indirect discrimination, as older employees are more likely than their younger colleagues to (re)marry after having left their (former) employer. In my understanding, the BAG reasons as follows. Even if requirement b. discriminates indirectly, it is objectively justified, because the employer was not under an obligation to establish any pension scheme at all and, therefore, had the discretionary right to set conditions. If this is indeed the BAG's reasoning, I do not find it convincing.

Requirement c. is disadvantageous for young employees. They are more likely than older employees to have been married for less than one year upon death. It would have been interesting to see how the BAG had dealt with a dispute on the validity of requirement c.

The most obviously age discriminatory of the three requirements is a. The exclusion from survivors' benefits of widows/widowers who have married an employee aged 60 or over is directly dis-criminatory on the basis of age. I find it hard to think of an objective justification for this exclusion that is more than purely financial.

Requirement a. brings to mind the case law on provisions in pension regulations that exclude spouses who are over ten years younger than a (former) employee who has died from eligibility for survivors' benefits. Such a provision was at issue in *Bartsch* (ECJ 23 September 2008, case C-427/06). In that case, the ECJ did not pronounce on the compatibility of the provision with Directive 2000/78 because the allegedly discriminatory treatment predated the Directive and was held to have no link to EU law. The Dutch Equal Treatment Commission, as well as several Dutch courts, including two at the appellate level, have ruled on the justifiability of such 'over-ten-years' age difference' provisions. Unfortunately, their opinions and judgments point in different directions.

Subject: Age and gender discrimination in relation to pension
Parties: Not published
Court: *Bundesarbeitsgericht* (Federal Labour Court)
Date: 15 October 2013
Case number: 3 AZR 653/11
Hardcopy publication: NZA 2014, 308
Internet publication: www.bundesarbeitsgericht.de → Entscheidungen → Aktenzeichen + case number

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2014/20

Equal pay for 'temps' - how to substantiate a claim (GE)

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Summary
German law entitles 'temps' to equal payment unless there is a collective bargaining agreement that provides for a different salary for temps. To assert a claim regarding a difference in payment, the plaintiff needs to fulfil certain requirements. In three recent decisions, the BAG clarified how to substantiate such a claim.

Facts
The facts of each of the three cases are comparable. In each case a temp employed by a commercial temporary employment agency worked in a manufacturing company and was paid an hourly wage of € 6.40 plus certain additional payments for work during the night, on Sundays and on public holidays. This wage was agreed upon in a collective bargaining agreement. However, the agreement was declared to be invalid, because the trade union that signed it was not recognized as a union by the courts.
In the absence of a valid collective bargaining agreement, each plaintiff was entitled to equal pay in accordance with section 10(4) of the Temporary Employment Act (*Arbeitnehmerüberlassungsgesetz*, 'AÜG'), which is the German transposition of Directive 2008/104 on temporary agency work.

Judgment
The most interesting aspect of the three cases is to be found in the requirements the court determined for validly asserting a pay discrimination claim. It concluded that a temp not only needs to show that a comparable employee of the user undertaking has a certain salary, but must also compare this salary and his own salary, and must demonstrate how the difference between the two is calculated.
Salary within the meaning of the AÜG comprises not only base salary, but every element of remuneration. This includes all bonus payments, holiday pay, sick pay and other benefits, not including the reimbursement of expenses.

In one of the cases, the plaintiff received an hourly wage while working for the temporary employment agency, whereas the employees of the user undertaking received a monthly salary. The court clarified that in such a case the plaintiff does not need to compare a notional hourly remuneration at the user undertaking with the rate paid by the temporary employment agency, but only need compare the total received per month under normal employment conditions.
If the user undertaking applies collective terms of employment (usually resulting from a collective bargaining agreement) which describe the remuneration owed to its own employees, a leased employee can substantiate his or her equal pay claim by applying the scheme to the position worked in during the lease. This is also possible where the user undertaking does not employ its own staff in a particular position.
In each of the cases the plaintiff had failed to make the necessary calculations and to integrate them into the writs of summons. To substantiate the claim it was necessary to set out the total compensation for one month received at the temporary employment agency, the hypothetic total compensation awarded for the same work at the user undertaking and the difference between both figures. In this calculation the plaintiff needs to specifically refer to sick leave and holidays, if he or she is claiming equal pay for such times.

Commentary
The decisions deserve approval, as the main arguments can be concluded directly from the law itself. However, it is worth observing that the BAG again pointed out the somewhat strict requirements for making a claim. Nevertheless, as the AÜG gives information right to employees regarding the salary of comparable employees at a user undertaking, plaintiffs should be in a position to meet those requirements. If the plaintiff is able to obtain all the required information, he or she must then set out the basis of the claim clearly, as required by section 130 Code of Civil Procedure.
That said, it seems that in practice these requirements can often be so difficult to meet, that they can preclude temporary agency workers from asserting valid claims, if they have no trade union or lawyer to assist them.

Subject: Temporary employment
Parties: not published
Court: *Bundesarbeitsgericht* (Federal Labour Court)
Dates: 19 February 2014, 20 November 2013 and 19 February 2014
Case number: 5 AZR 700/12; 5 AZR 365/13; 5 AZR 680/12
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2014/21

Caste discrimination might amount to race discrimination (UK)

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Summary
An Employment Tribunal has allowed a claim for caste discrimination to proceed on the basis that the definition of 'race' in the Equality Act 2010 is broad enough to include discrimination on grounds of caste.

Background
The caste system is a system of social stratification, as the explanatory notes to section 9(5) of the Equality Act 2010 (EqA) explain:
"The term 'caste' denotes a hereditary, endogamous (marrying within the same group) community, associated with a traditional occupation and ranked accordingly on a perceived scale of ritual purity."

Caste is considered immutable and hereditary, often linked to geographic origin and language. Caste status can determine occupation, education and marital opportunities.
Under the EqA there are a number of protected characteristics, including race and religion. Currently caste discrimination is not expressly prohibited. However, the definition of 'race' is broad and includes 'colour, nationality, ethnic or national origin'. It is therefore arguable that there is scope for caste to fall within the definition of race, particularly within the concept of ethnic origin.
The EqA has recently been amended to give Parliament power to provide specifically that caste is an aspect of race (section 9(5) EqA). However, a draft Order is not expected until the summer of 2015.
The case of *Ms P Tirkey v Mr and Mrs Chandok ET3400174/2013* considered whether caste could fall within the definition of race under the law as it currently stands.

Facts
Mr Chandok originates from Afganistan and is a practicing Hindu. Mrs Chandok was born in new Delhi to an Afghan Hindu family and is a practicing Buddhist. Whilst living in India, Ms Tirkey began her employment with Mr and Mrs Chandok (the Respondents) in domestic service, looking after their children and carrying out a number of domestic chores.
Ms Tirkey is of the Adivasi people, who can either be Christian or Hindu; she is a Christian. Ms Tirkey asserted that the Adivasi people are regarded as a 'servant caste'. Ms Tirkey alleged that the Respondents would have known she was of a poorer caste because of her dialect, her dark skin and the clothes she was wearing.
When Ms Tirkey began her employment for the Respondents in India she was not invited into the Respondents' house. Ms Tirkey's case was that she lived in the Respondents' house as a servant but in separate living quarters and was not allowed to sit on the same furniture or use the same cutlery or plates as the Respondents. Traditionally, higher caste people would not touch crockery used by those of a lower caste.
When the Respondents relocated to the UK, Ms Tirkey moved with them. Ms Tirkey claimed that whilst working in the UK she was overworked and underpaid. Her complaints included that her movements were restricted, she was not allowed to speak to people outside of the family (other than to say hello and ask how they were) and she was not allowed to attend church (despite being a practising German Catholic).
Ms Tirkey brought claims of discrimination on grounds of race, based on her Indian nationality, ethnicity and national origin, and religion. At a case management discussion on 30 May 2013, Ms Tirkey was permitted to amend her claim to add a complaint of caste discrimination as part of her race discrimination claim. She alleged that *"the reason she was recruited and treated in the manner alleged was that the Respondents concluded she was of a lower status"*. Ms Tirkey's case was that the features of race, religion and caste overlapped and are the reasons for the treatment she alleged.
The Respondents refuted any claims of caste discrimination (as well as the original allegations). At a preliminary hearing on 26 September 2013, the Respondents applied to strike out Ms Tirkey's claim of caste discrimination on the basis that it had no reasonable prospects of success.

Judgment
The Employment Tribunal declined to strike out Ms Tirkey's case.
Employment Judge Sigsworth (the Judge) began his analysis by noting that there was no exhaustive definition of race in the EqA, but that it included ethnic origin. Similarly, he considered Article 14 of the European Convention on Human Rights (ECHR) which gives a right to enjoy convention rights free from discrimination on grounds of:
"sex, race, colour, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status".

The Claimant also relied on Article 9 (right to freedom of thought, conscience and religion) and Article 4 (nobody shall be held in slavery or servitude) of the ECHR. The Human Rights Act 1998 (HRA) incorporates certain articles of the ECHR. Pursuant to section 3(1) of the HRA, so far as it is possible to do so, primary and subordinate legislation must be read and given effect in a way which is compatible with ECHR rights. However, it is not possible for an individual to make a claim in the UK courts for a breach of the ECHR nor could anyone bring a claim for a breach of the HRA against a private individual (but only against public bodies).
The Judge considered that Article 14 was wide enough to include caste discrimination and therefore concluded that the EqA should be construed in such a way as to include caste as part of the protected characteristic of race.
The Judge also considered domestic UK case law, which provides authority for the proposition that discrimination by descent is direct race discrimination. In particular the Judge considered the House of Lords decision in *Mandla v Dowell Lee* [1983] 2AC 548 (Mandla) which held that Sikhs were a racial group based on their 'ethnic origins'. In *Mandla*, it was determined that Sikhs had a historically determined social identity, in both their own eyes and those outside the group. The essential conditions were a long shared history and a cultural tradition of their own. Other relevant characteristics included a common geographical origin or descent from a number of common ancestors.

In addition, the Judge referred to the Supreme Court's decision in *R(E) v Governing Body of JFS and another [2010] 2AC 728* (JFS) which both reaffirmed and extended the decision in *Mandla*. JFS concerned a masorti Jew (M) who was refused entry to the Jewish Free School on the basis that his mother was not orthodox Jewish, whether by matrilineal descent or by conversion, at the time of M's birth. The Supreme Court held that applying a test of matrilineal descent amounted to direct discrimination on grounds of race. A test of a religion that focuses on descent is a test of ethnic origin.

The Judge noted that the Race Directive (Council Directive 2000/43/EC of 29 June 2000) and the International Convention for the Elimination of all forms of Racial Discrimination 1965 (to which the UK is a signatory) also prohibited discrimination on grounds of descent.
In light of the reasons set out above, the Judge concluded that he accepted Ms Tirkey's case that she was of a lower caste by birth, and therefore descent. As such, the Judge allowed Ms Tirkey's claim for caste discrimination to proceed to a merits hearing.

Commentary
As previously mentioned, the UK Government has decided to legislate to provide specifically that caste is an aspect of the protected characteristic of race. The Judge determined that this was not relevant to whether or not Ms Tirkey could bring a claim based on the law as it currently stands.
A draft Order is not anticipated until the summer of 2015 and, in the interim, this case will be useful for any claimants who believe they have been discriminated against on grounds of caste. However, it should be borne in mind that this is only a first instance decision and not binding on other courts and, also, that there has been a conflicting first instance decision. In *Naveed v Aslam and others ET/1603968/11* a tribunal rejected a caste discrimination claim on the basis that the government had not yet made an Order to extend the EqA to provide for caste as an aspect of race.
The issue will be resolved when the anticipated changes to the EqA come into force, until then the position still seems somewhat unclear. We may see an appeal by the Respondents in this matter or there may be more first instance decisions which shed further light on whether caste discrimination is prohibited under the current law. If further courts agree with the decision in *Tirkey*, it is also questionable whether an amendment to the EqA is necessary.

Comments from other jurisdictions:
Austria (Martin Risak): The Austrian Act on Equal Treatment (*Gleichbehandlungsgesetz*) also does not mention caste as a distinct forbidden ground of discrimination but – of course as it transposes the Race Directive 2000/43/EC – it includes a prohibition against discriminating on the basis of "ethnic origin". Unlike the Directive it does not explicitly mention 'race'. As appears from the parliamentary deliberations, the reason is that the legislator did not want to even hint that it might accept any notion of race. However, racist discrimination is considered a form of discrimination on ethnic grounds and therefore forbidden in any event. In line with the mainstream of the Austrian literature that interprets 'ethnic origin' rather extensively, I would expect the Austrian courts to consider discrimination based on caste to be covered by this.

Germany (Paul Schreiner): The German anti-discrimination law (AGG) includes a prohibition against differentiating on the grounds of ethnic origin. The definition of ethnic origin includes belonging to a segment of the population that stems from a specific region, shares a specific history or culture and is bound by a common feeling. The plaintiff was apparently a member of the Adivasi people. Being the member of a certain people also qualifies as having a certain ethnic origin. Therefore, under German law, the case at hand would probably have qualified as a different treatment on the basis of different ethnic origin without any justification, and therefore discriminatory.
However, not every case of caste discrimination in Germany would necessarily be seen as discrimination on grounds of ethnic origin. In the case at hand, the plaintiff's caste simply coincided with a certain ethnic origin and only this factor made a claim for discrimination possible. Had the plaintiff belonged to a different caste there may not have been prohibited discrimination for the lack of a prohibited criterion, because a different treatment on the basis of a certain caste is not prohibited by the German AGG. To my knowledge there has never been an attempt to integrate a separate prohibition of caste discrimination into German law.

Subject: Discrimination
Parties: Ms P Tirkey - v - Mr & Mrs Chandok
Court: Huntingdon Employment Tribunal
Date: 24 January 2014
Case Number: ET/3400174/13

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2014/22

How to compensate part-timer for lacking company car (NL)

CONTRIBUTOR PETER VAS NUNES*

Summary
Employees of CBR with a workload of 80% or over are eligible for a company car. The plaintiff was a 40% part-time employee and was not eligible for a company car. Instead he received financial compensation. The compensation was designed to represent 40% of the value of the company car benefit for a full-time (80-100%) employee. The Human Rights Commission found that 40% was not enough. The plaintiff should have received 50%, being half of the value of the use of a company car by an 80% employee.

Facts
The plaintiff in this case was employed by the Dutch organisation that is responsible for issuing and withdrawing driving licences, CBR. His position was that of part-time (40%) examiner.
CBR has a policy of providing its full-time (100%) examiners with a company car, which they may use for private purposes without limitation. All expenses related to the car (road tax, insurance, maintenance, petrol, etc.) are for CBR's account. The same applies to examiners with a part-time contract of between 80% and 100%. In other words, "80-100% part-timers" enjoy the same benefit as full-timers.
Examiners with a contract below 80% are not eligible for a company car. They receive financial compensation instead. This compensation is based on the price CBR pays the company from which it leases its cars. In the relevant period this was a fixed sum of € 160 per car per month plus a certain amount for every kilometre per year driven in excess of a certain contractual maximum. This fixed sum was pro-rated to reflect the employee's part-time percentage.[1]
The plaintiff felt discriminated against. He had two arguments. The first was that he was paid only 40% of value of the benefits enjoyed by an 80 to 100% examiner. Given that his workload was half that of a 80% examiner, he should have been paid half of that value, i.e. 50%. His second argument related to the fact that some of his 80-100%

1 The actual calculation of the compensation was more complicated. This case report omits details that are not relevant to the legal issue.

colleagues used their company car for more kilometres per year than the maximum covered by the fixed sum of € 610. In respect of those colleagues, CBR paid the lease company an additional sum without requiring the employee in question to contribute. The plaintiff argued that this constituted an additional benefit for the value of which he should also be compensated.

The plaintiff applied to the Dutch Human Rights Commission (formerly, the Equal Treatment Commission) for an opinion on whether CBR discriminated against him on the basis of Article 7:648 of the Civil Code ('Article 648'), which transposes Clause 4 of the Framework Agreement on Part-time Work annexed to Directive 97/81. Clause 4 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."

Opinion

The Commission began by examining whether the right to use a company car for private purposes is a term of employment within the meaning of Article 648. Having decided affirmatively, it proceeded to address two questions: has the plaintiff been discriminated against on the basis of working part-time and, if so, is that unequal treatment objectively justified?

In previous cases, the Commission held that it is impossible to quantify exactly the advantages of a 'company car benefit' for the employee or the cost of such a benefit for the employer. When comparing (i) a company car benefit with (ii) a benefit consisting of compensation in lieu of having the use of a company car (a 'compensation benefit'), the criterion is whether the benefits are 'equivalent' in value. An exact comparison is neither possible nor necessary.

The comparator for the purpose of Article 648 need not be a 100% examiner. The plaintiff could compare himself to an 80% examiner. Given this fact, it must be concluded that the plaintiff is treated less favourably than a 80% examiner (i) by the fact that he receives compensation equal to 40% instead of 50% of what an 80% examiner receives and (ii) by the fact that the value of being able to drive more than the annual maximum mileage at CBR's expense is not taken into account for the purpose of calculating the value of the company car benefit.

The Commission held that CBR failed to provide adequate justification for the unequal treatment and that, therefore, it was in breach of the law.

Commentary

Car arrangements frequently attract disputes. Employers routinely argue that the right to use a company car does not constitute 'pay', even if the employee may use the car privately. Some courts have accepted this argument, but most do not, rightly so.

This case may provide ammunition to those critics of the equal treatment legislation who decry the 'nit-picking' it sometimes elicits. Categorising not-quite-pro-rata compensation for lacking a company car as a human rights violation seems to be stretching that concept quite far.

This case differs from those where the issue is centred around the employee's 'own use contribution'. It is not unusual for a part-time employee to have the right to use a company car in the same manner as his or her full-time colleagues, with the only difference being the amount deducted from salary in consideration of that use. In one of those cases, a company charged its full-time employees a certain amount by way of 'own use contribution' and charged its part-time employees an additional 12.5% of that amount for every 5% of workload reduction. Thus, for example, an 80% employee had to pay 4 x 5 = 20% extra and a 50% employee was charged 150% of the sum charged to a full-timer. There are many ways to (attempt to) pro rate car benefits, but none of them guarantees exact 'pro-rating'.

Subject: Discrimination - part-time work
Parties: X - v - CBR
Instance: *College voor de Rechten van de Mens* (Human Rights Commission) (not a court)
Date: 6 February 2014
Case Number: 2014-12
Publication: www.mensenrechten→oordeel→case number

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2014/23

Different termination rules for blue and white collar workers finally ended (BE)

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Summary

The Belgian Constitutional Court has judged that the differences in treatment between blue and white collar workers regarding notice periods and sick pay are discriminatory. It gave the legislator a deadline of 8 July 2013 to harmonise the statutes relating to blue and white collar workers in relation to notice periods and sick pay. This eventually led to the Act of 26 December 2013 which provides a thorough modernisation of Belgian termination law and has pensioned off the well-known 'Claeys formula'.

Facts

Georges Deryckere joined SA Bellerose, a chain of clothing stores, on 11 December 2001 as a blue collar worker with a fixed-term contract. On 2 January 2002, his contract was converted into a contract for an indefinite term. SA Bellerose terminated his employment on 3 April 2008 with a notice period of 28 days. He claimed compensation for arbitrary dismissal before the labour tribunal of Brussels and also severance pay worth six months' salary, which is the same as the severance indemnity payable to white collar workers with the same level of seniority. He argued that the different treatment of blue and white collar workers with regard to dismissal violates the anti-discrimination provisions in Articles 10 and 11 of the Belgian Constitution. Finally, he claimed overdue payments for so-called 'carenz days'. A carenz day is the first day of sick leave of a blue collar worker, where the total period of sickness does not exceed 14 days. Carenz days are not remunerated. Mr Deryckere asked the labour tribunal to address two preliminary questions to the Belgian Constitutional Court:

1. Do Articles 59[1] and 82[2] of the Employment Contracts Act (which deal with the notice periods for blue and white collar workers respectively) violate the anti-discrimination Articles 10 and 11 of the Belgian Constitution, in that they provide for different notice periods for blue and white collar workers with the same level of seniority?
2. Do the Articles 52 §1[3] and 70[4] of the Employment Contracts Act (which deal with carenz days) violate the anti-discrimination Articles 10 and 11, in that they provide for the first day of sick leave for blue collar workers to be unpaid, even though a white collar worker in an equivalent contractual position would be paid?

The labour tribunal examined the Constitutional Court's prior jurisprudence. It concluded that the jurisprudence regarding the first question might be revisited and that the second question had not yet been examined by the Court. The labour tribunal thus addressed the two above-mentioned questions to the Constitutional Court, leading to the latter's judgment of 7 July 2011.

Judgment

The Constitutional Court started its analysis with a reference to its judgment 56/93 of 8 July 1993. In this judgment, the Court had concluded that the legislator had adopted differences in treatment of blue and white collar workers based on a criterion (namely, that blue collar workers do manual work, while white collar workers do intellectual work) that was not objective or reasonable.

The Court was now of the view that the criterion was even more unreasonable and less objective today, in particular, with regard to the differences in treatment surrounding notice periods and the carenz day. The Court concluded that these differences in treatment violate the anti-discrimination Articles 10 and 11 of the Belgian Constitution.

The Court stated, however, that in its previous judgment of 1993 it had recognized that the legislator had already taken action to harmonise the protection of blue and white collar workers in the case of dismissal and that harmonisation could only be expected to take place gradually. The fact that it found that it was unjustified to adopt the distinction at the time (i.e. in 1993), did not mean that the existing distinction should suddenly have been abolished and therefore it was not disproportionate for it to have been maintained.

The Court continued that since the judgment of 1993, the legislator had taken further steps to harmonise the two categories of employees. With reference to the decision of the European Court of Human Rights (ECtHR Grand Chamber 12 April 2006, *Stec e.a. - v - United Kingdom*, application nrs. 65731/01 and 65900/01[5]), the Court added that when a reform which aims at equality, has far-reaching and serious consequences, it is not possible to blame the legislator for doing it in a well-thought out and gradual manner. The Court also recollected that the different regulations sometimes favoured blue collar workers and other times favoured white collar workers.

The Court was, however, of the view that the legislator should not have had an unlimited period of time in which to harmonise the law relating to blue and white collar workers. Harmonisation along gradual lines did not justify that the differences in treatment brought before the court should have continued to exist 18 years after the Court had established that the criterion for distinguishing between blue and white collar workers was discriminatory.

On the other hand, the Court considered that a fair balance needed to be found between the abolition of discriminatory legal provisions on the one hand, and the principles of legal certainty and legitimate expectations on the other.

With reference to European Court of Human Rights case-law (ECtHR 13 June 1979, Marckx - v - Belgium and ECtHR 16 March 2000, *Walden - v - Liechtenstein*), the Court felt justified in setting a deadline to the legislator to amend the law, with the unconstitutional provisions remaining in effect in the interim.

The Court considered that an abrupt declaration of unconstitutionality of the law in the case at hand would lead to substantial legal uncertainty and would cause financial difficulties to a large number of employers. The Court added that such abrupt declaration of unconstitutionality could also interfere with the legislator's current harmonisation efforts, emanating from the earlier judgment of 8 July 1993.

Commentary

With its judgment of 7 July 2011, the Constitutional Court put a time-bomb under Belgian termination law. Parliament - and by extension the government - had until 8 July 2013 to abolish the distinction between blue and white collar workers regarding notice periods and the carenz day - a task they had not completed successfully for the last 18 years. As is common in Belgium prior to important changes to employment legislation, the government instructed the social partners[6] to negotiate and agree on harmonised notice periods for blue and white collar workers – and for a long time, it looked as if the new deadline would not be met either.

Finally, on Friday, 5 July 2013, after intervention by the Minister of Labour, the social partners reached a political agreement on "unified status". This agreement was transformed into the Act of 26 December 2013 on the implementation of the unified status of blue and white collar workers regarding notice periods and the carenz day, along with various accompanying measures. The Act of 26 December 2013 is indeed a milestone and certainly one of the most profound changes in our labour law since the adoption of the Law of 3 July 1978 on employment contracts. It represents a thorough redesign and modernisation of Belgian termination law, which is now largely (but

1 Providing for notice periods ranging from 28 days for blue collar workers with less than 20 years' seniority to 56 days for blue collar workers with at least 20 years' seniority to be respected by the employer.

2 Providing for notice periods for white-collar workers of at least three months per period of five years seniority to be respected by the employer.

3 Providing that the first day of sick leave of a blue collar worker is not remunerated when the total period of sickness does not exceed 14 days (the carenz day).

4 Providing that the first 30 days of sick leave of a white collar worker should be remunerated.

5 In this judgment, the ECtHR held: *"In the light of the original justification for the measure as correcting financial inequality between the sexes, the slowly evolving nature of the change in women's working lives, and in the absence of a common standard amongst the Contracting States [...], the Court finds that the United Kingdom cannot be criticised for not having started earlier on the road towards a single pensionable age"* and concluded: *"that the difference in State pensionable age between men and women in the United Kingdom was originally intended to correct the disadvantaged economic position of women. It continued to be reasonably and objectively justified on this ground until such time as social and economic changes removed the need for special treatment for women. The respondent State's decisions as to the precise timing and means of putting right the inequality were not so manifestly unreasonable as to exceed the wide margin of appreciation allowed it in such a field [...]. Similarly, the decision to link eligibility for REA [=* Reduced Earnings Allowance, an earnings-related benefit covering occupational accidents and diseases, Editor*] to the pension system was reasonably and objectively justified, given that this benefit is intended to compensate for reduced earning capacity during a person's working life."*

6 The three official trade unions and most important employers' organisations.

not completely) harmonised. The so-called carenz day was eliminated.

As from 1 January 2014 a uniform redundancy scheme for blue and white collar workers was implemented. The new redundancy scheme with uniform notice periods applies to new employment agreements as well as existing agreements. For the new notice periods there is just one relevant criterion: the number of years of seniority (per calendar year commenced). The new notice periods for employers evolve in accordance with the different phases of the employment relationship:

- During the first five years, the term evolves progressively (from 2 to 15 weeks): first every three months during the first two years and then annually. At the beginning of the employment relationship the terms are very short, in order to eliminate the slowdown of recruitment.
- From the fifth until the nineteenth year, the accrual is regular but significant with three weeks per year of seniority per calendar year commenced (18 to 60 weeks), with the objective of offering job security to employees.
- The twentieth year is a pivotal year in which the progression slows down. The notice period amounts to a total of 62 weeks.
- From the twenty-first year, the accrual is slowed to one week per year. The legislator does this in order not to penalize the employer for retaining employees with many years of seniority.

For employment agreements existing before 1 January 2014 there is a transition scheme which secures the rights accrued under the old scheme. The notice period must be calculated in two separate steps, the results of which must be added up, as follows:

- The first step concerns the accrued years of seniority until 31 December 2013. The length of the notice period associated with this seniority is determined pursuant to the rules that apply to the relevant employee on 31 December 2013 - and thus depends on his or her status as a blue or white collar worker.
- White collar workers accrue their notice period until 31 December 2013 pursuant to the following scheme:
  - Lower-ranked white collar workers (annual salary ≥ € 32,254): three months per started level of five years of seniority;
  - Higher-ranked white collar workers (annual salary < € 32,254): one month per started year of seniority, with a minimum of three months. This specifically means that the well-known Claeys formula, which had in practice been governing notice periods since the late 1970s, has been pensioned off.
- For blue collar workers too, termination rights until 31 December 2013 must be calculated according to the rules applicable to blue collar workers on 31 December 2013. As the redundancy rules for blue collar workers until 31 December 2013 are a lot less favourable than those of white collar workers, the National Employment Office will pay them additional redundancy compensation.
- The second step concerns the employment seniority acquired from 1 January 2014. The length of the part of the notice period associated with employment seniority must be calculated according to the new rules. It is assumed that the new seniority starts on 1 January 2014, therefore time starts to run at 0 for every employee.

Finally, the Act of 26 December 2013 on unified status also provided an obligation on employers to give reasons for dismissals. Belgium has long been one of only a few countries in Europe where employers have generally not been required to justify dismissals. The obligation to do so was supposed to have been made concrete in a Collective Bargaining Agreement of the National Labour Council by 1 January 2014. A little later than planned, the National Labour Council adopted Collective Bargaining Agreement No. 109 concerning the justification of the dismissal, entering into force on 1 April 2014.

The effect is this: every employee in the private sector is now entitled to ask the employer for the reasons for his or her dismissal. If the employer refuses to provide these, it must pay a fine equal to two weeks' salary. Moreover, if an employee finds that the dismissal was manifestly unreasonable, he or she can summon the employer before the Labour Court. If the court judges that the dismissal was not based on reasons related to the suitability or the conduct of the worker or on the operational needs of the company and the decision to dismiss would never have been made by an ordinary and reasonable employer, it will award additional compensation equal to between 3 and 17 weeks' salary.

The Act of 26 December 2013 on unified status has not made blue collar and white collar workers disappear. The distinction between the two still exists in relation to a very large number of important employment topics, such as holiday allowances, economic unemployment, supplementary pensions, the rules with regard to joint industrial committees, social elections, etc.

However, now the legislator and the social partners must put their minds to (and perhaps to break their heads over) the significant differences that still exist. It will be interesting to see whether they will need another deadline from the Constitutional Court to make them complete the project.

Comments from other jurisdictions

Czech Republic (Nataša Randlová): In Czech employment law, there has never been a distinction between blue and white collar workers. The new Labour Code adopted in 2007 uses a different approach (which is not considered to be discriminatory in any way) and distinguishes between (i) managerial employees, i.e. those in a superior position to other employees, and (ii) regular employees, i.e. those with no superiority vis-à-vis any others. However, these two categories have not been treated differently in relation to either notice periods or 'carenz days'.

The minimum notice period is stipulated in the Labour Code to be two months commencing on the first day of the month following the month in which the notice was delivered to the other party. The notice period may be extended by agreement, but always must be the same for the employer and the employee. There is no provision stating that the notice period depends on seniority or would be different for managerial and regular employees.

By contrast, the issue of so-called 'carenz days' has been continuously and repeatedly discussed and reviewed. The Labour Code provides that the first three days of temporary unfitness to work are not remunerated. In practice, the employee therefore receives compensation for salary from the employer as of the fourth day of sickness (or as of 25th working hour). After two weeks of being paid by the employer, an unfit employee is then entitled to sickness benefit from the state.

Initially, unpaid sickness was disputed before the Constitutional Court of the Czech Republic in 2010. In 2012, the Court held that it was in accordance with the constitutional rights of employees and, in practice, helped to prevent the employees from claiming they are sick for one or two days whilst still being paid by the employer. Therefore, the ability to make initial days of sickness unpaid helps the employer economically. In Czech labour law, therefore, effective regulation of initial days of sick leave can still be found.

Germany (Klaus Thönißen): From a German perspective it is interesting to see that the Belgian parliament did eventually stop the discrimination of blue collar workers at the end of 2013. In terms of notice periods, Germany also used to have discriminatory rules, but in 1982 the Federal Constitutional Court (*Bundesverfassungsgericht*) ruled that any difference between blue and white collar workers was unconstitutional. In a nutshell: all types of employees must be treated equally.
However, the parties to collective bargaining agreements still have the power to agree on notice period provisions which differ between blue and white collar workers, as long as there is a legitimate reason for the difference.
Note that in Germany there is no such thing as a legally-regulated severance payment or indemnity. In principle, an employer does not have to pay any kind of severance package upon termination. It just needs to pay the employee for the termination period. Under German labour law the notice period is usually between two weeks (during probation) and seven months (employee longevity of 20 years and more), unless a different termination period is agreed in the employment contract or collective bargaining agreement. The statutory termination periods are regulated in section 622 of the Civil Code (the BGB).

Luxembourg (Michel Molitor): Until 1 January 2009, Luxembourg law also distinguished blue and white collar workers. Indeed, both categories of workers were, *inter alia*, represented by different employee chambers and had different health insurance and pension funds.
After negotiations between the government, trade unions and employers' associations, both the statutes relating to each type of worker were repealed and the single employee's statute was enacted by means of the law of 13 May 2008 on the introduction of a Single Statute.
This has introduced many changes to labour law, including severance pay, additional hours and salary during sickness. There have also been many changes to the Luxembourg social security scheme, as the National Health Insurance (*Caisse nationale de santé*) and the National Pension Insurance (*Caisse nationale d'assurance pension*) were created in 2009 and absorbed all former sector-specific types of insurance. The reform aimed to abolish discrimination between blue collar workers and other employees.

Subject: Discrimination between blue and white collar workers
Parties: Mr Georges Deryckere - v - Council of ministers
Court: *Grondwettelijk Hof* (Constitutional Court)
Date: 7 July 2011
Case number: 2011-125
Publication: www.const-court.be → Welcome English →Judgments →enter year →case number

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2014/24

Does Finnish law restrict the use of 'temps' further than allowed under the Temporary Agency Work Directive? (FI)

CONTRIBUTOR JOHANNA ELLONEN*

Summary

The Finnish Labour Court has issued a request for a preliminary ruling to the Court of Justice of the European Union regarding the interpretation of the Directive on Temporary Agency Work (2008/104/EC) (the "Directive"). The Labour Court requests whether the provisions of a national collective bargaining agreement prohibiting the use of temporary agency workers in certain situations are compliant with the Directive, and how the Directive's provisions regarding the obligation to review national prohibitions and restrictions should be evaluated. Further, the Labour Court requests what measures a national court can take to implement the objectives of the Directive.

Facts

Shell Aviation Finland (the 'Company') delivers fuel to airplanes at 18 Finnish airports. At the time of the events, the Company had 28 employees, and in addition to this an agreement regarding the lease of employees from another company. The purpose of the agreement was to provide that employees should be leased to work in the Company during, for example, sick leaves and times of peak workload, and that the Company's staff should be offered additional hours prior to offering these to the leased employees.

The Company is bound by the collective bargaining agreement for the tanker-truck and oil product sector (the 'CBA'). Paragraph 29 of the CBA provides that the companies bound to the CBA must restrict the use of temporary agency workers to peak times and to other duties that cannot be performed by the company's own employees, for example, due to urgency, duration, skills or special equipment requirements of the duties. Further, the use of temporary agency workers is "unhealthy" if the temporary agency workers work under the company's supervision in parallel with the company's own employees for a longer period of time, doing the company's regular duties. Corresponding provisions are included in a federation-level agreement that applies to various sectors, or have been incorporated to some other sector-specific collective bargaining agreements.

The Transport Workers' Union, 'AKT', as plaintiff, claimed that the Company had breached the collective bargaining agreement from 2008 onwards, as it had used leased employees continuously without interruption in parallel with the Company's own employees, performing exactly the same routine duties as the Company's employees, namely, work relating to the fuelling of airplanes. By using leased employees, the plaintiff claimed that the Company had breached paragraph 29 of the CBA.

The defendants, the Oil Product Association and the Company as its member, claimed firstly that the provisions of the collective bargaining agreement had not been breached. In the alternative, the defendants claimed that the provisions of the CBA were not applicable, as they restricted the use of temporary agency workers more than permitted by Article 4(1) of the Directive, which provides that "prohibitions or restrictions on the use of temporary agency work shall be justified only on grounds of general interest relating in particular to the protection of temporary agency workers, the requirements of health and safety at work or the need to ensure that the labour market functions properly and abuses are prevented". The defendants further claimed that, although the Directive does not provide explicitly[1] that unfounded prohibitions and restrictions must be removed, but merely requires review and reporting, the starting point is that such prohibitions and restrictions are not allowed. Therefore the restrictions in the CBA were, according to the defendants, void.

Judgment

The Labour Court considered that it must first resolve what kind of obligation had been imposed on Member States under Article 4 of the Directive. The Labour Court noted that the obligation set out in Article 4 is subject to different interpretations. According to the first of these, the restrictions in section 1 of Article 4 are significant only in connection with the obligation to review national prohibitions and restrictions. For example, the Finnish government has been of the view that the obligation to review the restrictions and prohibitions is only a one-time administrative review duty. After this review has been fulfilled, prohibitions or restrictions that are not in accordance with Section 1 of the Article can be applied. The Labour Court considered that this is supported by the fact that the Directive does not separately obligate Member States to remove restrictions and prohibitions of temporary agency work that are in breach of section 1, whereas such an obligation has been included in, for example, the directives relating to equality and discrimination (2006/54/EC and 2000/78/EC). Also, the draft for the Directive was clearer in this regard.

On the other hand, the Labour Court noted that there is also a contradictory interpretation of Article 4. According to this interpretation, section 1 is an independent provision, setting a permanent obligation on Member States to ensure that their laws do not contain prohibitions or restrictions on temporary agency work. This is supported by the clear wording of section 1 and the objectives of the Directive. Further support can be received from the provisions concerning the free movement of people and services in the Treaty on the Functioning of the European Union.

The Labour Court noted that if the latter interpretation was correct, the Court would have to evaluate how the provisions of the CBA comply with the Directive. This would also raise questions regarding the national effect of the Directive, as Finland has not implemented a provision comparable to section 1 and it is a question of legal relationship between private parties (i.e. parties to a collective bargaining agreement).

Based on the above grounds, the Labour Court referred the following questions to the Court of Justice of the European Union for a preliminary ruling:

a) Should Section 1 of Article 4 of the Directive be interpreted so as to permanently obligate the national authorities, including courts, to ensure through the available measures that national provisions or

1 Article 4(2): *"By 5 December 2011, Member States shall, after consulting the social partners in accordance with national legislation, collective agreements and practices, review any restrictions or prohibitions on the use of temporary agency work in order to verify whether they are justified on the grounds mentioned in paragraph 1."*
Article 4(3): *"If such restrictions or prohibitions are laid down by collective agreements, the review referred to in paragraph 2 may be carried out by the social partners who have negotiated the relevant agreement"*
Article 4(5): *"The Member States shall inform the Commission of the results of the review referred to in para-graphs 2 and 3 by 5 December 2011."*

provisions of collective bargaining agreements that are in contradiction with the Directive shall not be in force or shall not be applied?
b) Should Section 1 of Article 4 of the Directive be interpreted as precluding national regulation according to which the use of temporary agency work is allowed only in the situations specifically listed in the Directive, such as during peak times or in duties that cannot be performed by the company's own employees? Is use of temporary agency workers working alongside the company's own employees for a longer period of time, doing the company's regular duties, an abuse of temporary agency work?
c) If the national provisions are found to be in breach of the Directive, what kind of measures do the courts have to enforce the objectives of the Directive, given that it is a question of a collective bargaining agreement between private parties?

Commentary
Finnish law as such does not contain prohibitions or restrictions on the use of temporary agency workers. However, since 1969 many collective bargaining agreements, especially in the industrial sectors, have provided for or have been bound to a federal level agreement containing restrictions and prohibitions on external labour, such as subcontracting and the use of temporary agency workers.
From a Finnish labour market point of view, the question regarding the restrictions and prohibitions of external labour is a principled and political question. The trade unions' and employer associations' views about it differ deeply and there have been attempts to remove the restrictions and prohibitions before. For instance, in the 1990's the employers' association in question challenged the provisions restricting the use of external labour in the paper industry based on arguments relating to the collective parties' regulatory powers and antitrust law. The Directive appears to be the latest argument against the restrictions on the use of temporary agency workers, and this case now tests it.
The views expressed by the parties in this case summarise well the different views of the Finnish trade unions and the employer associations. The question appears to centre around the question of who should be protected – the temporary agency workers or the company's own employees? In respect of the Finnish restrictions, what should be taken into account in this assessment is that the business environment has changed markedly since the restrictions and prohibitions were adopted in the various collective bargaining agreements, and temporary agency work has become much more common than it was some decades ago. However, the number of temporary agency workers is still quite marginal (1% in 2012) compared to the total workforce.
As regards the review and reporting duty set forth in the Directive, the Directive is not clear whether this is only a one-off duty, or what should be done about possible breaches. In this respect, clarification from the CJEU is in our view needed.

Subject: temporary agency work
Parties: *Auto- ja Kuljetusalan Työntekijäliitto AKT r* (Transport Workers' Union) - *v* - *Öljy-tuote ry* (Oil Products Association) and *Shell Aviation Finland Oy*
Court: *Työtuomioistuin* (Labour Court)
Date: 4 October 2013
Case number: TT: 2013-142
Publication: www.tyotuomioistuin.fi→Ratkaisut→Etusivu→scroll down for TT number

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2014/25

Employer liable for invalid collective agreement (SK)

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Summary
A collective agreement concluded with a works council entitled redundant employees to certain benefits. An employee claimed those benefits. In response, the employer argued that the collective agreement was non-existent, having been concluded on behalf of the employer by an internal unit that lacked legal capacity. The Slovak Labour Code provides that an employer cannot invoke the invalidity of a 'legal act' to the detriment of an employee unless the employee caused the invalidity himself. The issue in this case was whether the conclusion of a collective agreement qualified as a 'legal act' and whether an employee was eligible for damages for loss incurred due to a collective agreement being invalid. The answer was yes.

Facts
The defendant in this case was an employer that had concluded a collective agreement with its works council. The agreement entitled redundant staff to certain benefits (the 'additional benefits') over and above the statutory unemployment benefits provided for by the Labour Code. The plaintiff was an employee who was dismissed. She did not contest her dismissal but did contest the fact that her former employer refused to pay her the additional benefits to which the collective agreement entitled her. In 2003, she brought proceedings, seeking payment of those additional benefits.

In 2005, in the course of its defence, the defendant initiated separate proceedings (the 'separate proceedings') in which it asked the court to declare the collective agreement void. The defendant argued that that agreement had been concluded by an entity (an office within the organisation) that lacked legal capacity and therefore lacked the legal authority to represent the employer for the purpose of concluding a collective agreement. The court accepted this argument and declared the collective agreement invalid. Following this judgment, which was not appealed, the original proceedings in respect of the claim for payment of the additional benefits (which had been suspended pending the outcome of the separate proceedings) continued. According to the defendant, there was no collective agreement and hence no obligation to pay the plaintiff additional benefits. This argument was based on the Civil Code, which provides that a legal act performed by a person who lacks legal capacity is void and has no legal effect. The employee, on the other hand, took the position that, if the collective agreement was invalid, as the court had held in the separate proceedings, then she was entitled to compensation equal to the additional benefits based on Article 17(3) of the Labour Code, which overrules the provision in the Civil Code and which provides:

"Invalidity of a legal act where such invalidity was not caused by the employee must not be to the prejudice of the employee. If the employee incurs a loss as a result of an invalid legal act, the employer shall be required to compensate the loss."

In 2008, after five years of litigation, the court of first instance ruled in the defendant's favour. It declared the collective agreement to be void,

reasoning that, had the defendant paid the plaintiff additional benefits in spite of this invalidity, this would have enriched her unjustly. The plaintiff appealed.
The Court of Appeal noted that the defendant must have known that the collective agreement was defective at the time it was signed. What is more, the defendant informed the entire staff that the agreement had been signed and it applied the agreement to other employees. Thus, the plaintiff had no reason to doubt the validity of the collective agreement. In other words, its invalidity could not be blamed on the employee within the meaning of Article 17(3) and the plaintiff was therefore entitled to compensation of the loss she incurred due to the invalidity. For this reason, in a judgment delivered later in 2008, the Court of Appeal overturned the lower court's judgment and awarded the plaintiff's claim. The defendant appealed to the Supreme Court.

Supreme Court judgment
The debate at the Supreme Court level focused on the concept of 'legal act' within the meaning of Article 17(3) of the Labour Code. The employer argued that a collective agreement is not an agreement between an employer and an employee and that, therefore, its conclusion does not qualify as a legal act. A collective agreement has a legal status akin to that of a law. It binds not only the parties to the agreement (the employer and the union(s) or works council) but also the employer and each of its employees. Thus, like a law, a collective agreement has a 'normative' character. Therefore, according to the employer, there was no invalid legal act by the employer but a non-existent collective agreement. Something that does not exist cannot form the basis of an obligation to compensate.
The Supreme Court did not subscribe to this argument. It observed that the conclusion of a collective agreement is a bilateral legal act by parties that have autonomous status and exercise the principle of contractual freedom. A collective agreement establishes rights and obligations just like any other agreement. The Supreme Court therefore concluded that the act of entering into a collective agreement is a legal act and that, hence, the provisions of the Labour Code regarding (in)validity of legal acts applied. The invalidity of the collective agreement could not be to the detriment of the employee, since she had not caused its invalidity. The end result, therefore, was that the employer had to compensate the employee. For this reason the Supreme Court, in 2010, upheld the Court of Appeal's judgment.

Constitutional Court
The employer brought proceedings before the Constitutional Court, alleging that its constitutional right to a fair trial had been violated. It argued that the Supreme Court's judgment was arbitrary and unreasonable. This argument failed. The Constitutional Court did not find that any constitutional right had been violated. It added that, in view of the employee-protective function of the Labour Code, there is no room for a distinction between legal acts that are 'invalid' and legal acts that are 'non-existent'.
Thus, the end of the story was that, after nine years of litigation, the employee got her additional benefits.

Commentary
Article 17(3) of the Labour Code is but one of the many examples in Slovak employment legislation of provisions that aim to protect the employee, who is deemed to be the weaker party in the contractual relationship. Protection of the weaker party remains the primary and most important aim of Slovak employment law. A claim by an employer that a representation (legal act) on which the employee reasonably relied was invalid and ineffective is something against which employees need to be protected. It is not fair to contest the validity of a legal act when the employee seeks payment of the benefits to which he or she is entitled according to that legal act, let alone to intentionally conclude invalid legal acts with the idea of challenging them later. Such conduct is in serious conflict with the principle that rights and obligations arising from labour relationships must be exercised in good faith. It also goes against the prohibition against abusing rights to the detriment of another party.
We entirely agree with the conclusions of the Supreme Court and the Constitutional Court. In our opinion, employers should consider carefully what they are willing to accept when negotiating a collective agreement rather than conceding more than they really want to concede and then, if and when they are confronted with undesired results, attempting to avoid liability by disputing the validity of the collective agreement they have signed up to.

Comments from other jurisdictions
Austria (Martin Risak/Manuel Schallar): In Austria there are two ways for individuals to obtain legal capacity to negotiate and conclude collective bargaining agreements. Firstly, there is the legal capacity "ex lege", which is given to the statutory representation of both employers and employees (the so called "chambers"). Secondly, every union or employer's association has this legal capacity if they meet specific criteria (certain sphere of action, representative commercial relevance, etc.). Until this capacity is granted to them by a tri-partite administrative body, unions and employer associations cannot conclude collective agreements. Therefore groups, who have not been granted this legal capacity, cannot conclude collective agreements; they would be null and void.
As Austrian law does not include a provision like the Slovak law that forbids the employer to invoke the invalidity of a "legal act" to the detriment of an employee unless the employee caused the invalidity himself, another line of argument would need to be construed to achieve the same result. In the light of long-standing jurisprudence on the binding character of employment practices and so called "free works agreements", it is very likely that the courts would accept the following reasoning: Because the employer informed the entire staff about the conclusion of the "collective agreement" and because he even applied it to other employees, the claimant could trust that the employer wanted to be bound by it. Therefore his actions have to be interpreted that (in the absence of the "normative" character of the collective agreement) he offered to amend the individual contracts. Thus, the worker could base his claim on his individual contract which has been amended tacitly, now including the content of the invalid collective agreement.

Luxembourg (Michel Molitor): In Luxembourg, collective agreements can be negotiated at different levels. In most cases, employees are submitted to a collective agreement that is declared of general obligation. This type of agreement is negotiated by trade unions on the national level in a particular branch of a sector, even for companies that were not initially signatories. A statutory act then declares the rules and rights contained in the agreement to be mandatory applied to the entire sector in question. However, within big companies, the collective agreement is often directly negotiated between the employer and the employees' trade unions, and applied on the company level. Under those circumstances, a matter such as the one that occurred in the Slovak case could have thus theoretically happened in Luxembourg as well.
There is no specific provision in the Luxemburgish Labour Code regulating the invalidity of legal acts in labour matters. However, the

general civil law principles, among which the "apparent mandate" and the "ratification", would have certainly led the judges in Luxembourg to agree with the Slovakian Court. They would have considered that the employer tacitly ratified the agreement and that it should therefore be applied to him, regardless of the invalidity of the collective agreement.

Subject: employer liability
Parties: S – v – Z
Court: *Ústavný súd* (Constitutional Court)
Date: 3 October 2012
Case number: I.ÚS 501/2011
Internet publication: www.concourt.sk →*Vyhľadávanie rozhodnutí* → *Spisová znacka* → case number

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2014/26

French Supreme Court rejects E101 posting certificates (FR)

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Summary
The French Supreme Court has confirmed the criminal convictions of two budget airlines (Vueling and easyJet) for "undeclared work", on the grounds that they wrongfully applied the EU regulations on the posting of workers, thereby illegally keeping their France-based staff out of the French social security scheme. The airline companies argued that they did not declare their employees to the French social security scheme as the employees concerned were posted workers who benefited from the exemption from the French social security system, as confirmed by the delivery of E101 (now A1) posting certificates. The Court held that the airlines' activities were entirely oriented towards national territory, and carried out on a regular, stable and continuous basis or through infrastructures located in national territory. The airlines could not therefore rely on the E101-certificates.

Facts (Vueling)
Vueling is a low cost Spanish airline with its headquarters in Barcelona. In 2007 it opened a branch or office (the exact status was in dispute) at *Charles de Gaulle* Airport in Roissy, Paris. It registered this branch with the local Companies Register. It proceeded to hire over one hundred employees, mainly flight crew, maintenance personnel and commercial staff, but also a Country Manager and a Base Manager. The published documents do not specify the nationality of these employees, but it seems likely that at least some of them were French citizens residing in France.
Vueling applied to the relevant Spanish authority for E101-certificates in respect of its staff based in *Charles de Gaulle*. Under Regulation 1408/71 and the implementing provisions contained in Regulation 574/72, which were in force at the time, an E101-certificate was a document certifying that an individual who is employed in country A (in this case, Spain) and is temporarily posted to country B (in this case, France) continues to be covered by country A's social insurance legislation and is therefore not covered by that of country B. Article 14(1)(a) of Regulation 1408/71 is worded as follows:

"A person employed in the territory of a Member State by an undertaking to which he is normally attached who is posted by that undertaking to the territory of another Member State to perform work there for that undertaking shall continue to be subject to the legislation of the first Member State, provided that the anticipated duration of that work does not exceed 12 months and that he is not sent to replace another person who has completed his term of posting."

If a posting exceeded the anticipated duration owing to unforeseen circumstances, the period stated on the E101-certificate could be extended, and this would be confirmed in an E102 – certificate. Such a certificate would be issued by the relevant authority in country A, provided the relevant authority in country B gave its consent. [*Note that Regulation 1408/71 was replaced with effect from 1 May 2010 by Regulation 883/2004, although its contents are by and large similar. In the period covered by the case reported here, the old regulation was still in force.*]
Accordingly, Vueling paid (low) Spanish and not (higher) French social contributions and its employees in *Charles de Gaulle* were covered by the Spanish social insurance schemes rather than the more generous French schemes. This gave Vueling a cost advantage.
As required by French law, Vueling reported the fact that it was employing staff posted from abroad to the French authorities. It stated that it had decided to open an office in *Charles de Gaulle* temporarily by way of experiment. In the event, Vueling closed the office in the summer of 2008.
In 2009, the French public prosecutor initiated criminal proceedings against Vueling. The charge was that Vueling had intentionally undertaken a commercial activity in France with the aid of workers who were not affiliated with the French social insurance schemes (so-called "undeclared work"), having hired those workers with the sole intention of having them work on French territory. Twelve of the employees in question, two unions, a pension fund, a public employment agency and a social insurance agency joined in the proceedings as "civil parties".
The court of first instance (*Tribunal de Grande Instance de Bobigny*) acquitted Vueling. The public prosecutor and most of the civil parties appealed.

On appeal, the *Cour d'appel de Paris* overturned the lower court's judgment and ordered Vueling to pay a fine of € 100,000 as well as damages to the civil parties. The Court of Appeal noted, *inter alia*, that (i) Vueling's presence at Charles de Gaulle was neither temporary nor experimental; (ii) its management there had a wide degree of autonomy; (iii) there was no "organic link" between the employees and the headquarters in Barcelona (a requirement formulated by the ECJ on the basis of the words "*to which he is normally attached*" in Article 14(1)(a) of Regulation 1408/71); (iv) out of the 80 E101-certificates that had been inspected, 41 described the employees as residing at Vueling's office address in Barcelona and 27 stated either an incorrect address or none at all; (v) the issue of an E101-certificate yields no more than a presumption of affiliation with the relevant (in this case, Spanish) social insurance scheme; and (vi) that fact does not stand in the way of the application of French criminal law. The Court of Appeal dismissed Vueling's alternative argument that it had relied on the validity of the E101-certificates and could therefore not be said to have breached French law intentionally, as charged. It also turned down Vueling's request to refer a question to the ECJ on the matter.

Facts (easyJet)
EasyJet is also a low cost airline. It is based in the UK. It developed an activity at Orly Airport in Paris, where it hired almost 200 employees,

the majority of whom were French citizens residing in France. These employees were issued with E101-certificates which stated that they were hired in the UK and posted temporarily to France, as a result of which they were governed by British, not French, social security legislation.
As from 1 January 2007, easyJet stopped doing business in the manner described above. It registered its Orly site with the local Companies Register and had its Orly employees join the French social security schemes.
Like Vueling, easyJet was fined for undeclared work (performed before 2007, i.e. in the period 2004-2006) and it appealed. As in the Vueling case, the Paris Court of Appeal found easyJet to be guilty. It held that easyJet's activity at Orly was not temporary but permanent, given that:

- the pilots and the cabin crew began and finished their flights;
- easyJet advertised its services and offered flights from its Orly site;
- easyJet increased its activities and the number of its destinations from Orly in the course of 2003-2006;
- easyJet hired its Orly staff locally, even though the E101-certificates stated that they were posted workers;
- the "centre of activities" of these employees was in France, where they received their instructions and performed their work.

In view of these circumstances, the Court of Appeal held that the fact that the employees had been issued with E101-certificates was insufficient to exclude them from the French social security system.

Facts (Ryan Air)

Although this case report is limited to the Supreme Court's judgments in the Vueling and easyJet cases, it is useful to note that on 1 October 2013, the criminal court in Aix en Provence convicted a third budget airline company, the Irish company Ryan Air, of intentionally hiring and employing 127 employees at its Marseille base without registering them with the French social security authorities. Ryan Air was fined € 10.2 million. The case was recently heard on appeal and, according to the press, is likely to end up in the ECJ.
As in the Vueling and easyJet cases, the employees were not affiliated with the French social security scheme, Ryan Air having registered them with the (cheaper) Irish social security scheme.

Ryan Air claimed that:

- the Marseille site was not open to the public;
- communications with clients were made exclusively through Internet;
- no information related to a French address, telephone number or contact was provided;
- the offices were used only for administrative tasks;
- none of the local employees had management responsibilities;
- no employee was supposed to remain at this French site;
- the French site was an operating base, whose sole function was the stationing of planes at the airport;
- Ryan Air's activity was limited to the boarding and disembarkation of passengers;
- the contracts of employment of Ryan Air's employees based in Marseille were subject to Irish law, and they did not work mainly in France, but exercised their activity on planes registered in Ireland, where they were paid;
- Ryan Air held E101-certificates;
- only 38 employees were employed by Ryan Air, the remainder being employed by two Irish temporary agency companies.

The court did not accept these arguments, holding that:

- during four years, from 2007 to 2010, Ryan Air organised and increased the number of flights from France to other destinations;
- the activity was stable and continuous and resulted in the hiring of more than 100 employees;
- Ryan Air did not stop this activity until it was prosecuted, and later on it resumed the activity with new flights;
- the flights from Marseille were regularly advertised to French clients.

The court considered also that the choice of Irish law could not deprive the workers from the benefit of the imperative provisions of French law pursuant to the Treaty of Rome on applicable law. Similarly to the easyJet case, the court considered that the centre of activity of the workers was in France, and not in Ireland, based on the facts that:

- workers were hired in France and were under a contractual obligation to reside at a distance of less than 1h30 from the airport;
- the start and the end of their services were always at the French airport, where employees had individual lockers;
- all documents relating to the employment of the workers were held on the French premises;
- the extranet site organizing the workers' activity was located at the French site;
- two employees were located at the site for management responsibilities.

The court also held that the E101-certificates created no more than a presumption, and did not stand in the way of evidence of material facts indicating a breach of French rules.
As regards the employment of the workers through supposed temporary work agencies, the court held that the 56 employees concerned were subject to the same organisation and conditions of work as Ryan Air's own employees, that these 56 employees had no direct or indirect relationship with the temporary work agencies and were directly subordinate to Ryan Air's French manager. The Court held therefore, that the only purpose of the operation was the loan of personnel so as to pay them at a lower level than French employees, which is prohibited by French law.

Judgments

Vueling appealed to the *Cour de cassation* (Supreme Court). It argued, *inter alia*, that the employees' non-affiliation with French social insurance schemes was validated by the fact that it had been issued with E101-certificates in respect of the employees in question, that upon completion of their initial 12 months of employment those employees had either left France or had become affiliated with the French social insurance schemes or - in certain instances - had been issued with E102-certificates with the consent of the relevant French authority (the *Centre des Liaisons Européennes et Internationales de Sécurité Sociale - CLEISS*), that the employees had been properly registered as posted workers with the French authorities, that the *Charles de Gaulle* office lacked autonomy and that therefore the "organic link" between headquarters in Barcelona and the employees had been retained.

The *Cour de cassation* was not impressed with these arguments and upheld the Court of Appeal's conviction. It held, *inter alia:*

- that in order to determine whether the employees in question were genuinely posted from Spain to France within the meaning of Regulation 1408/71, it was necessary to make an overall assessment of all the relevant circumstances;
- that Regulation 1408/71 implies that there was, at the time of

hiring, a direct relationship between the employer and the posted workers, which is maintained during the posting;
- that there was no such direct relationship given (a) that Vueling's presence in *Charles de Gaulle* constituted an "operating base" as defined in the Civil Aviation Code, (b) that Vueling's activity in *Charles de Gaulle* was oriented entirely towards the French territory and (c) that that activity was carried out on a regular, stable and continuous basis or through infrastructures located in France;
- that the delivery by the Spanish social security authorities of E101-certificates does not evidence the legality of the posting of the workers concerned.

The *Cour de cassation* stated that its decision was in line with the ECJ's case law and that therefore there was no need to refer a question to the ECJ.
The *Cour de cassation* ruled in a roughly similar manner in the easyJet case, but there were differences.
The *Cour de cassation* held that easyJet's activities in France were not of a temporary but of a permanent nature. Therefore, those activities should not be judged according to the rules on free movement of workers (now Articles 45-48 TFEU) but according to those on the right of establishment (now Articles 49-55 TFEU). The relevance of this is that where the right of free movement is involved, the basic principle is that the law of the worker's habitual place of residence continues to apply, whereas a business that makes use of the right of establishment is subject to the law of the place where it is established. Although the criminal charge concerned the illegal use of E101-certificates, the fact that in the Supreme Court's opinion the employment relationships of the Orly staff were governed by French employment law played a role in determining the criminal charge.
Regulation 1408/71 has different rules for non-mobile workers (Article 14(1)) and for "travelling or flying personnel" (Article 14(2)). The latter are subject to the social insurance legislation of the Member State where the employer has its registered office, except where the employees in question are employed by a "branch or permanent representation" in the territory of another Member State, in which case they are covered by the legislation of that state. Thus, the rules provided in Regulation 1408/71 are different for pilots and cabin crew on the one hand and for ground staff on the other. This aspect was addressed in the easyJet case.

Commentary
This ruling is of particular interest in the context of the current reinforcement both in Europe and France of the rules on the posting of workers. The EU implemented a set of rules on posting conditions in Directive 96/71/EC concerning the posting of workers in the framework of the provision of services. The purpose of this directive was to provide for the enforcement and extension of the host Member States' minimum terms and conditions of employment to workers posted by their employer to their territory. The directive did not deal, however, with social security treatment. Indeed, according to EU regulations on social security (Article 14.1.a of the Regulation 1408/71/EC and Article 12 of Regulation 883/2004/EC on social security), a posted worker remains affiliated to the regime of the posting company's home country This has resulted in fraud and abuses resulting from the location of the posting company in a country with low social security charges.
In France, the transnational posting of workers has been transposed in the French Labour Code under Articles L.1261-1 et seq. Pursuant to these articles, the transnational posting of workers applies in scenarios where an employer, usually based outside of France, gives a specific assignment to its employees which must be carried out in France, with the intention that, once the assignment has been completed, the employees will resume their work in their home country.
A new EU directive with the aim of reinforcing the application of the 1996 Directive and avoiding social dumping was voted on 16 April 2014. France criticised this new directive, arguing that the text does not go far enough to prevent abuses. In particular it does not deal with social security treatment. To prevent social dumping and reinforce its rules relating to clandestine work, the French Parliament is currently debating a bill that not only incorporates the provisions of the new directive, but goes beyond that in terms of additional regulation.
The Vueling case highlights the position the French courts take in this regard, which is to seek to strengthen posting conditions and to extend French protection to employees working within French territory.
These abuses of the application of Directive 96/71/EC do not only concern the airline industry. The French courts have also convicted companies in other sectors when they have considered that posting was not genuine. This was the case in November 2013 when the Court of Appeal of Chambery convicted the building company Promogin for failure to declare work when it used false subcontracting agreements with companies located in Poland sending Polish employees to work in France in breach of French rules.
It is most likely that the French courts will continue to confirm the same position and to convict companies, whether French or foreign, which abuse posting status.

Comments from other jurisdictions
The Netherlands (Peter Vas Nunes): The issue of whether, and to what extent, the social insurance authorities of an "incoming" State (usually countries with generous and therefore expensive social insurance systems) are bound by an E101 – certificate (since 2010: an A1 certificate) issued by the social insurance authorities of an "outgoing" State (usually a country in Eastern or Southern Europe or, long ago, Ireland) has been adjudicated by the ECJ several times. One of those occasions was in the *Fitzwilliam case* (ECJ 10 February 2000, case C-202/97), which I recall because I acted for the Irish employer. It is worth quoting from that judgment:
"However, the probative force of an E 101 certificate is limited to the competent institution's declaration as to the legislation applicable; it cannot affect the Member States' freedom to organise their own social protection schemes or the way in which they regulate the conditions for affiliation to the various social security schemes, which, as the French Government submits, are matters which remain exclusively within the competence of the Member State concerned.
The principle of sincere cooperation, laid down in Article 5 of the EC Treaty (now Article 10 EC), requires the competent institution to carry out a proper assessment of the facts relevant for the application of the rules relating to the determination of the legislation applicable in the matter of social security and, consequently, to guarantee the correctness of the information contained in an E 101 certificate.
As regards the competent institutions of the Member State to which workers are posted, it is clear from the obligations to cooperate arising from Article 5 of the Treaty that these obligations would not be fulfilled — and the aims of Article 14(1)(a) of Regulation No 1408/71 and Article 11(1)(a) of Regulation No 574/72 would be thwarted — if the institutions of that Member State were to consider that they were not bound by the certificate and also made those workers subject to their own social security system.
Consequently, in so far as an E 101 certificate establishes a presumption that posted workers are properly affiliated to the social security system of the Member State in which the undertaking providing temporary personnel is established, such a certificate is binding on the competent institution of

the Member State to which those workers are posted.
The opposite result would undermine the principle that employees are to be covered by only one social security system, would make it difficult to know which system is applicable and would consequently impair legal certainty. In cases in which it was difficult to determine the system applicable, each of the competent institutions of the two Member States concerned would be inclined to take the view, to the detriment of the workers concerned, that their own social security system was applicable to them.
Consequently, as long as an E 101 certificate is not withdrawn or declared invalid, the competent institution of a Member State to which workers are posted must take account of the fact that those workers are already subject to the social security legislation of the State in which the undertaking employing them is established and that institution cannot therefore subject the workers in question to its own social security system. However, it is incumbent on the competent institution of the Member State which issued the E 101 certificate to reconsider the grounds for its issue and, if necessary, withdraw the certificate if the competent institution of the Member State to which the workers are posted expresses doubts as to the correctness of the facts on which the certificate is based and, consequently, of the information contained therein, in particular because the information does not correspond to the requirements of Article 14(l)(a) of Regulation No 1408/71.
Should the institutions concerned not reach agreement on, in particular, the question how the particular facts of a specific case are to be assessed and consequently on the question whether it is covered by Article 14(1) (a) of Regulation No 1408/71, it is open to them to refer the matter to the Administrative Commission.
If the Administrative Commission does not succeed in reconciling the points of view of the competent institutions on the question of the legislation applicable, the Member State to which the workers concerned are posted may, without prejudice to any legal remedies existing in the Member State to which the issuing institution belongs, at least bring infringement proceedings under Article 170 of the EC Treaty (now Article 227 EC) in order to enable the Court to examine in those proceedings the question of the legislation applicable to those workers and, consequently, the correctness of the information contained in the E 101 certificate.
It is clear from all the foregoing considerations that Article 11 (1)(a) of Regulation No 574/72 is to be interpreted as meaning that a certificate issued by the institution designated by the competent authority of a Member State is binding on the social security institutions of other Member States in so far as it certifies that workers posted by an undertaking providing temporary personnel are covered by the social security system of the Member State in which that undertaking is established. However, where the institutions of other Member States raise doubts as to the correctness of the facts on which the certificate is based or as to the legal assessment of those facts and, consequently, as to the conformity of the information contained in the certificate with Regulation No 1408/71 and in particular with Article 14(1)(a) thereof, the issuing institution must re-examine the grounds on which the certificate was issued and, where appropriate, withdraw it."

In light of this ruling by the ECJ, which to my knowledge has not been repealed or superseded by new legislation, I am amazed and disappointed that the French Supreme Court saw no need to refer a question to the ECJ. Vueling and easyJet will now need to attempt to recover the Spanish and British social insurance contributions they paid.

Subject: International posting
Parties: Vueling Airlines – v – France and easyJet – v - France
Court: *Cour de Cassation Chambre Criminelle* (Supreme Court, criminal division)
Date: 11 March 2014
Case Numbers: 12-81.461 (Vueling) and 11-88.420 (easyJet)
Internet publication: www.legifrance.gouv.fr → jurisprudence judiciaire → cour de cassation + case number

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2014/27

Covert recordings of the private deliberations of grievance and disciplinary panels are admissible as evidence (UK)

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Summary
The Employment Appeal Tribunal ("EAT") has upheld a decision by the Employment Tribunal to the effect that covertly recorded private deliberations at disciplinary and grievance hearings should be admitted as evidence in a claim. The content of the private deliberations fell outside the panels' area of "legitimate consideration". For that reason the Tribunal had been right to distinguish the case from previous case law, which stated that covertly recorded private deliberations should be excluded as evidence on public policy grounds.

Background
There is no general rule preventing covertly recorded evidence from being admitted in the Employment Tribunal. The Tribunal has a wide discretion to admit evidence which is relevant, and the admissibility of covert recordings is normally a question for the Tribunal in each case.
Guidance on covert recordings was provided by the case of *Chairman and Governors of Amwell View School v Dogherty* [UKEAT/0243/06], which was decided in 2006. In that case, the EAT concluded that two questions needed to be asked when considering whether to admit evidence that had been covertly obtained. Firstly, is the evidence relevant? Secondly, if it is relevant, is there any good reason to exclude it?
In *Amwell*, the EAT found that public policy was a good enough reason to exclude certain recorded evidence. In that case, the EAT drew a distinction between the "public" or open part of a disciplinary or grievance hearing (which is attended by both the claimant and the decision-making panel) and the "private" or closed part of the hearing (which takes place when the claimant withdraws to allow the panel to deliberate).
It found that there was no public policy ground on which to exclude a recording of the public part of the hearing, and this should be admitted as evidence. However, it found that there was a public policy reason to exclude recordings of the private part of the hearing. The EAT concluded that it was in the public interest for the parties to a disciplinary or grievance hearing to obey the "ground rules" upon which proceedings are based. The EAT in *Amwell* said:

"No ground rule could be more essential to ensuring a full and frank exchange of views between members of the adjudicating body (in their attempt to reach the "right" decision) than the understanding that their deliberations would be conducted in private and remain private....The failure to maintain respect for the privacy of "private deliberations" in this context would have the important consequences of inhibiting open discussion between those engaged in the task of adjudicating..."

The EAT's view was that it is vital that decision-making panels could be confident that their private discussions would, in fact, remain private, so that they can confidently express their views. For that reason, it ordered covertly recorded private deliberations to be excluded from the Tribunal. This case has been followed since and covert recordings of private deliberations have historically been excluded from Tribunal proceedings.

The EAT in *Amwell* did, however, caveat their finding by saying that their conclusions might have been different if that claim had been for unlawful discrimination and the recordings had shown evidence of that discrimination; or if no reasons for the decision in the grievance or disciplinary matter had been given to the claimant.

Facts

Ms Gosain worked for Punjab National Bank (International) Ltd for just over 18 months. Following her resignation, she brought claims of sexual harassment, sex discrimination and constructive unfair dismissal.[1]

During her time at the Bank, Ms Gosain had attended both a disciplinary hearing and a grievance hearing. She had secretly recorded all of both hearings, including the private deliberations that took place when she was not in the room. When she disclosed the recordings to the Bank, they applied for an order to exclude the private discussions of the panel members.

The Tribunal distinguished between this case and *Amwell*. This was because of the nature of the discussions which took place while Ms Gosain was out of the room. During the private deliberations:

i. one manager commented that he was deliberately skipping the key issues raised in Ms Gosain's grievance letter;

ii. the Managing Director of the Bank instructed the panel to dismiss Ms Gosain; and

iii. a third manager, who was hearing the disciplinary matter, made an extreme misogynistic, sexual comment about Ms Gosain.

The Tribunal found that the comments that were made during the private deliberations fell well outside "the area of legitimate consideration" of the matters which the panel should have been considering. The Tribunal also found that the comments were clearly relevant to Ms Gosain's claims of sexual harassment, sex discrimination and constructive unfair dismissal. On that basis, it found no reason to exclude the "private" part of the recorded evidence and refused to grant the order.

The Bank appealed the decision to the EAT. It said that the Tribunal judge had been wrong to distinguish this case from *Amwell*, and to find that the general rule that relevant evidence should be admitted to a hearing outweighed the public policy interest in preserving the privacy of internal deliberations.

1 "Constructive dismissal" is where an employee resigns, but their resignation has been triggered by such serious and unfair behaviour that the resignation is treated, for legal purposes, as a dismissal by the employer. Employees who have been constructively dismissed are entitled to claim unfair dismissal.

Judgment

The EAT upheld the Tribunal's decision.

It supported the Tribunal's view that the circumstances in this case were materially different from those in *Amwell*. This was because the comments that the grievance and disciplinary panels were alleged to have made fell well outside the "ground rules" that had been discussed by the EAT in *Amwell*.

Essentially, the EAT held that employees withdraw from disciplinary and grievance hearings in good faith, on the understanding that the purpose and nature of the deliberations undertaken while they are absent will relate to the issues in hand. In this case, the Tribunal judge had found that the private discussions in this case "d*id not constitute the type of private deliberations which the parties would understand would take place in relation to the specific matters at issue."* She also found that, given the nature of what had allegedly been said, there was no public policy reason why those comments should be protected. The EAT supported these views.

The EAT also commented that the EAT in Amwell had explicitly refrained from setting down a firm rule of practice that private deliberations would never be admissible, as shown by their comment that in discrimination cases or cases where no reason was given for a decision their finding might have been different. In this case – a discrimination case in which the private recordings were clearly relevant to the discrimination claim – the Tribunal judge had been right to balance the general admissibility of relevant evidence against the competing public policy interest in preserving the confidentiality of private deliberations.

Commentary

The presentation of covertly recorded evidence from grievance and disciplinary hearings is very common in English and Welsh Employment Tribunals. In practice, advisers should warn employers that there is a danger that disciplinary and grievance panels might be recorded.

However, provided the panel conducts itself properly, any covertly recorded private deliberations are still unlikely to be admitted as evidence. Employers should therefore feel free to discuss the matters at hand with relative freedom.

What was key in this case was that the panels in question had breached the employee's good faith by using their private deliberations to make extreme comments about her – comments that showed a discriminatory attitude and a complete disregard for due process. Because of the nature of those comments, and the fact that they had gone far beyond what the claimant would have expected to have been discussed, public policy protection no longer applied. Panels therefore need to bear in mind the fact that they must justify the claimant's good faith by staying within the expected parameters of discussion when coming to their decision. Failure to do so is likely to waive their protection.

Comments from other jurisdictions

Austria (Martin Risak): Unlike in common law systems, Austrian law on civil procedure does not provide for any exclusion of evidence, even if it has been obtained unlawfully. It is up to the courts to consider freely all the evidence in front of them. Therefore, the evidence described in the case at hand might be submitted in a labour court and would have to be considered by the judges in their ruling.

Germany (Klaus Thönißen): It is very unlikely the case reported here would have been an issue under German labour law. First of all, there is no disciplinary or grievance panel in German labour law and so this particular issue could not have arisen. Secondly, German labour law does not have its own rules of procedure when it comes to the admission of evidence and so the matter is rather one of civil procedure.

However, it is very likely that a German court would not have admitted

the evidence in the case at hand. The basic rule in German civil procedure is that covertly recorded conversations of any kind are inadmissible as evidence in a trial. The highest civil court in Germany, the Federal Court of Justice (Bundesgerichtshof), allows covertly recorded discussions only, when their admission is considered as self-defence – for example, in order to show there was a criminal act or to identify criminals. Therefore, Ms Gosain could not have submitted her covertly recorded deliberations in a German court.

Luxembourg (Michel Molitor): The solution discussed by the Employment Appeal Tribunal is quite interesting to look at from a Luxembourg legal practitioner's point of view, since a judge in Luxembourg would surely not have ruled the same way.
The general principle in relation to evidence is indeed that it must be obtained in a fair manner in all circumstances. This has been reaffirmed many times in Luxembourg's case law, including a case decided on 4 October 2002, in which the Court of Appeal determined that a recording on a magnetic tape was inadmissible, stating that evidence obtained without the knowledge of the parties cannot be a valid proof, as it was obtained unfairly and is therefore irregular.
In a case such as the one presented here, the Luxembourg judges would not have taken into account the reason the evidence was presented - they would simply have rejected it.

Subject: Disciplinary and grievance hearings; covert recordings
Parties: Punjab National Bank (International) Ltd & Others – v – Gosain
Court: Employment Appeal Tribunal
Date: 7 January 2014
Case Number: UKEAT/0003/14/SM
Internet publication: www.bailii.org→ United Kingdom→ UK Employment Appeal Tribunal → year→ January →Punjab

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2014/28

Employer may not delegate duty to have wage records on hand (AT)

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Summary
Any employer established in a foreign country is required to keep readily available, in German, the documents that are required to verify the remuneration of employees pursuant to Austrian law. These documents must be kept at the place of work in Austria during the period when the employee is actually working there. The employer may not delegate this duty to employees by instructing them to keep the documents with them.

Facts
A German cleaning company employed two German national, residents of Germany, to clean the sanitary rooms at a gas station in Austria. When the employees were checked by Austrian tax authority officials, they could not provide the documents required under section 7d (1) of the Austrian Employment Contract Law Adaptation Act (*Arbeitsvertragsrechts-Anpassungsgesetz, 'AVRAG'*). This provision obligates employers established in a foreign country to keep readily available, in German, the documents that are required to verify compliance with the Austrian rules on the minimum wage (the 'pay documents'). These documents must be kept at the place or site of work in Austria during the period in which the employee is actually working there. The pay documents include the employment contract (or a written statement evidencing the terms of employment), the records of hours worked and the pay records or evidence of the employer having paid the employee (e.g. remittance receipts issued by a bank).
Failure to keep the pay documents available is sanctioned by an administrative fine in the amount of € 500 to € 5,000. In the case of recurrence, the fines increase to between € 1,000 and € 10,000. In the case at hand, the competent District Authority (*Bezirkshauptmannschaft)* fined the employer the minimum of € 500 for each employee.
The employer appealed, pointing out that he had instructed the employees to keep available their employment contracts and the proof of registration with the German social security authorities. The remaining pay documents had been available at his office in Germany and could have been sent to the Austrian authority within a short period of time.

Judgment
The Administrative Court Court of Lower Austria (*Landesverwaltungsgericht Niederösterreich*) dismissed the appeal, mainly on the grounds that under the relevant legislation the employer may not delegate his duty to keep the pay documents available at the workplace of the employees. Section 7d (1) AVRAG allows the documents to be kept at another place in Austria if the requirement to make them available at the place of work is not reasonable. In such a case they must be transmitted to the authority upon request within 24 hours. However, in the case at hand, the Court held that it was not unreasonable to keep the pay documents at the place of work, since the gas station had the facility to keep such documents available in an orderly way. Further, according to the submissions of the complainant, the documents were not kept at a place within Austria, but at the employer's office in Germany. Therefore, the conditions of section 7d (1) AVRAG had not been met even if it was not reasonable to keep the pay documents at the workplace.

Commentary
In May 2011, the Act to Combat Wage and Social Dumping (*Lohn- und Sozialdumping-Bekämpfungsgesetz, 'LSDB-G'*) amended the AVRAG and other laws with the aim of enforcing the local minimum wage for workers who were posted to or hired from foreign employers. This principle derives from the Posting of Workers Directive 96/91/EC, implemented in Austria in 1999. Since then, workers posted to or hired out in Austria can sue their foreign employer for failure to pay them the minimum pay established in the relevant Austrian collective bargaining agreement. However, as practice has shown, only very few workers have taken their employer to court. The LSDB-G introduced a system where compliance with the minimum wage set by collective bargaining agreements were to be verified by a public administrative authority, even if that was against the will of the employees concerned.

Underpayment, frustration of the rules around verification of compliance and the failure to keep pay documents readily available constitute administrative offences. If an underpayment affects no more than three employees, the fine is between € 1,000 and € 10,000 for each employee and in the case of repetition, between € 2,000 and € 20,000. If more than three employees are affected, the fine is between € 2,000

and € 20,000 for each employee and in the case of repetition between € 4,000 and € 50,000.
If more than three employees are paid less than the minimum pay level or if underpayment occurs repeatedly, the competent District Administration Authority is required to prohibit an employer established in a foreign country from carrying out work for at least one year and any violation of this prohibition is punishable with a fine of between € 2,000 and € 20,000.
In order to ensure prosecution of these offences and the enforcement of fines, the District Administration Authority may issue an administrative order (Bescheid) enabling collection from the employer's customer or (in the case of temporary agency work) from the user undertaking, of a portion of any outstanding compensation or remuneration as a security deposit. The minimum amount of the security deposit is normally € 5,000, although the amount must not exceed the maximum possible fine.

Comments from other jurisdictions

Germany (Klaus Thönißen): Just as in Austria, every employer is obliged to provide particular documents (under section 19 of the Posted Workers Act and section 17 of the Minimum Wage Act) in the German language if asked by the authorities. But in contrast to Austria, these do not have to be kept at the workplace or worksite unless the competent authority asks an employer to do so. In principle, an employer is simply obliged to keep the documents within German territory.
Note that the German Parliament (Bundestag) recently passed a bill on the minimum wage (see this issue of EELC, nr 34). Therefore, the German authorities are now also checking whether either German or foreign employers are actually paying the minimum wage to their employees. In Germany this monitoring is handled by the Federal Custom Agency and its subsidiary bodies.

The Netherlands (Peter Vas Nunes): In 1993 the British Prime Minister John Major famously observed, *"France can complain all it likes. If investors and business choose to come to Britain rather than pay the costs of socialism in France, let them call it "*social dumping*", I call it dumping socialism"*. This remark illustrates in a nutshell the ongoing debate between the free marketeers and the freedoms of movement enshrined in the TFEU on the one hand, and, on the other hand, the protectionist reaction to the influx of workers from low-wage Member States into the labour markets of higher-wage Member States. At this time, the tide seems to be favouring the latter. On 15 May this year, the EP and the Council of Ministers adopted Directive 2014/67 on the enforcement of the Posting Directive 96/71. The directive is the result of a compromise, particularly on the vexed issue of co-liability of contractors for minimum wages and non-statutory social insurance contributions owed by their subcontractors. Article 12(1) provides that: *"In order to tackle fraud and abuse, Member States may [...] take additional measures on a non-discriminatory and proportionate basis in order to ensure that in subcontracting chains, the contractor of which the employer (service provider) [...] is a direct subcontractor can, in addition to or in place of the employer, be held liable by the posted worker with respect to any outstanding net remuneration corresponding to the minimum rates of pay and/or contributions due to common funds or institutions of social partners [...]."*

Article 9 deals with administrative measures such as those at issue in the Austrian case reported above.
The Member States have until 18 June 2016 to transpose the directive, which is bound to generate a great deal of litigation.

Subject: Cross-border posting
Parties: X (employer) - v - State
Court: *Landesverwaltungsgericht Niederösterreich* (Administrative Court of Lower Austria)
Date: 10 February 2014
Case number: LVwG-BN-12-1373
Hardcopy publication: not yet available
Internet-publication: www.ris.bka.gv.at → Judikatur Landesverwaltungsgerichte → Geschäftszahl → case number

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EELC 2014/29

Withdrawing an opera singer from previously awarded roles infringes her right to work and violates her dignity (SL)

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Summary
A world-famous opera singer rejected an invitation to perform a certain role. As a reprisal, the artistic director of the opera house that of employed her withdrew her from two other roles that had previously been awarded to her. The opera singer challenged this in court, ultimately with success. This case highlights both the right to work and the right to personal dignity.

Facts
This case, which set in motion a chain of proceedings, concerns a world-renowned opera singer. She had concluded an employment agreement with a Slovenian opera house to perform as a soloist in a variety of operatic roles. Her employment contract explicitly allowed her to perform on an occasional basis for third parties outside the opera house. In 1998, after declining an appearance for the employer due to an outside performance, the managing director, who at the time was also the artistic director of the opera house, withdrew the opera singer from two roles that had previously been awarded to her. The opera singer objected, claiming that her explicit withdrawal was a reprisal for her refusal to sing in the performance that had been offered to her. She was hurt and offended by the withdrawal. In response, the public relations office of the opera house publicly stated that the opera singer was merely putting on "the aureole of a martyr" and was not as affected by the withdrawal as she was trying to appear.
The opera singer filed a lawsuit against the opera house before the Labour Court, claiming, *inter alia*, non-pecuniary damages for breach of her right to personal dignity as a result of the unjustified withdrawal from the two already-assigned roles. This resulted in a number of judgments by the Labour Court, the Court of Appeal and, finally, the Supreme Court. The end result of all this litigation was that the case was referred back to the court of first instance. Its new judgment was appealed again and the Court of Appeal's decision on that appeal, delivered in March 2013, finally put an end to the litigation.

Throughout the proceedings, the defence of the opera house was primarily that the artistic director of an opera house is entitled to assign roles at his own discretion, without interference by the courts.

Judgment

The Court of Appeal upheld the (latest) decision of the court of first instance by ruling that the unjustified and maliciously intended withdrawal of the opera singer from her previously assigned opera roles represented a breach of her constitutional right to personal dignity and safety, in particular because the intention behind the withdrawal was to sanction the opera singer for declining to appear in a previous opera performance. The court clearly conveyed that abuse of an artistic director's legitimate power to appoint opera roles is unlawful and that, in this case, the opera house was liable for non-pecuniary damages for breach of the right to personal dignity and security. Consequently, the Court of Appeal upheld the decision of the first instance, awarding the opera singer compensation amounting to € 3,000.

Commentary

Both the Slovenian Constitution and the Employment Relationship Act guarantee the right to personal dignity. The Employment Relationship Act presently obliges employers to provide their employees with the opportunity to perform their work, i.e. they may not be put on involuntary garden leave, except where there is insufficient work. The act as it stood at the time the plaintiff in this case was withdrawn from the two opera roles was even stricter. Although it did not state so explicitly, it was interpreted as more or less prohibiting involuntary garden leave in all circumstances, even where there was a lack of work.

Slovenian law does not prohibit employers from imposing disciplinary sanctions, such as warnings and fines or, in extreme cases, dismissal. The paradox highlighted in this case is that the opera singer's employer could perhaps have penalised her and possibly even dismissed her for her refusal to sing in a production, but it was not allowed to withdraw her from two other roles, at least, not by way of reprisal. The issue of whether the opera house could have penalised the plaintiff was not litigated and the Court of Appeal consciously distanced itself from that issue.

In the end, the Court of Appeal gave precedence to the plaintiff's right to perform in the roles previously awarded to her over the artistic director's right to assign roles at his discretion. It seems the scales of justice tipped in favour of the plaintiff on account of the constitutional right to personal dignity and the inviolability of an employee's right to work.

Comments from other jurisdictions

Poland (Marcin Wujczyk): Just like Slovenian law, the Polish Labour Code guarantees employees the right to protect their dignity and other 'personal interests' (Article 11 of the Labour Code). This Article 11 says that *"the employer is obliged to respect"* those interests and it must prohibit their infringement. This requires the employer to take steps to ensure the best conditions possible to allow employees under which to enjoy those interests. There has been much litigation about the infringement of employees' personal interests. Article 11 requires employers to resolve any doubts in favour of the employee and to act vis-à-vis employees in a way that shows respect for their occupational skills, social position, affiliation with national, religious or racial groups or political beliefs.

Depriving an employee of some of his responsibilities would not be generally treated as an infringement of his dignity, as this does not automatically lead to loss of reputation. The employee might only claim infringement of his dignity if it seemed that the removal of responsibilities was degrading, offensive or groundless and that it called his competency into question.

However, the employee is able to challenge the employer's decision under the Labour Code by invoking the employer's duty to provide work for the employee. The obligation to give work to an employee should be regarded as one of the fundamental rules of labour law, albeit not defined in the section of the Labour Code that is devoted to those rules. The wording of Article 22 of the Labour Code implies that an employer may only be discharged from the obligation to provide work if both parties to the employment relationship agree. Any unilateral departure from the obligation is only permissible in exceptional special circumstances, namely where continued performance of work by the employee may entail significant risk to the employer's interests. Therefore, a unilateral decision to refuse work to an employee (even if the employee continues to be paid) generally provides a basis for the employee to request reinstatement. Thus, the Slovenian opera singer would also have had the opportunity to regain the role she lost under the Polish law.

United Kingdom (Sean Illing): It appears that in Slovenia the employer is under a duty to provide employees with the opportunity to work, but this is not always the case in the United Kingdom. Generally speaking, whereas an employer has an obligation to pay wages, it does not have an obligation to provide work. However, there are certain circumstances in which a right to work will be implied.

The first is where a failure to provide work will affect the employee's pay, such as in the case of piece-work or where pay includes a substantial element of commission. However, even in these circumstances, the right to work will not be absolute. So, for example, in the case of *Devonald – v - Rosser and Sons* [1906] 2 KB 728, the Court of Appeal held that a piece-worker was entitled to be provided with work because he could not earn anything without it; however, there would still be circumstances (such as where the employer's equipment fails) in which the employer does not have to provide work.

The other type of circumstance in which a right to work may be implied is where the nature of the work is such that the employee needs to keep working in order to maintain a public profile or to preserve skills. This is particularly the case for actors or others in the performing arts – such as opera singers. The UK courts have for many years recognised that, for actors, the publicity from performing is as important as the pay. In the 1930 case of *Herbert Clayton and Jack Waller Ltd – v - Oliver* [1930] AC 209 the House of Lords (now the Supreme Court) awarded an actor substantial damages for loss of publicity and reputation as well as loss of salary when he was not cast in leading parts that he had been promised.

This doctrine has been extended recently to other types of work. In the case of *William Hill Organisation Ltd – v - Tucker* [1999] ICR 291, the Court of Appeal held that a senior dealer at a bookmakers, who was responsible for the compiling of odds, had an implied right to work. His skills needed to be regularly exercised, and the contract specifically imposed on the employee the duty to work the hours necessary to maintain his skills. The court therefore held that his employer could not require him to stay away from work, even on full pay, during his notice period (i.e. put him on 'garden leave') without an express contractual right to do so. In contrast, in the case of *Ibe – v - McNally (Inspector of Taxes)* [2005] EWHC 1551, the High Court held that the William Hill case did not support "so sweeping a proposition" that the employer is always obliged to provide work for the employee during the notice period.

In the case of *S G and R Valuation Service Co LLC - v - Boudrais and ors* [2008] IRLR 770, the High Court found that the employees bringing the

claim did, on the correct construction of their contract, have a 'right' to work but that they had demonstrated that they were not ready or willing to work by committing a serious breach of contract. In this case, the employees had stolen confidential information and details of potential business opportunities to pass on to a competitor they were planning to join. This demonstrated such 'hostility' towards the employer that the employer was relieved of its obligation to provide them with work.

In the light of these decisions, if this Slovenian case were to be decided in the UK, the opera singer would be likely to succeed whereas other employees doing different kinds of work would not. As a singer, the claimant is clearly doing the sort of job that carries with it an implied right to work. It is unlikely that she would be regarded as having breached the contract so fundamentally that the employer would be relieved of its obligation to provide work, particularly as her contract allowed her to perform occasionally for others.

The claimant could take one of several approaches to try to enforce her rights. She could bring a breach of contract claim in the county court whilst remaining employed and claim damages for the loss incurred (loss of earnings, reputation and publicity). Alternatively, rather than claiming damages, she might be able to bring a claim in the High Court for an injunction compelling the employer to give her the roles it had promised; this is known as a claim for 'specific performance'. The claimant would only be able to get an injunction if the court decided that damages were not an adequate remedy. The courts have traditionally been reluctant to order specific performance of an employment contract but it has been awarded in exceptional circumstances. Yet another alternative would be to resign and claim constructive dismissal. Constructive dismissal is where the employer breaches the contract so fundamentally that the employee is entitled to resign and treat it as a dismissal, bringing claims relating to the dismissal (wrongful dismissal and unfair dismissal).

Subject: Right to work; right to personal dignity
Parties: not disclosed
Court: *Višje delovno in socialno sodišče* (Higher Labour and Social Court)
Date: 20 March 2013
Case Number: Pdp 1087/2012
Internet publication: "www.sodisce.si" → "napredno iskanje" → "iskanje po sodni praksi" → enter case number in "iskanje po opravilni št. ali št. dokumenta"

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2014/30

Where to sue a foreign airline company? Another Ryanair case (NO)

CONTRIBUTOR ARE FAGERHAUG*

Summary

The case concerns a dispute about whether a Norwegian district court in an employment case is the correct jurisdiction under the Lugano Convention[1] (Article 19(2)(a)) and section 4-5 (4) of the Norwegian Dispute Act.

An Italian employee brought proceedings against Ryanair Limited before a Norwegian District Court claiming that she was a permanent employee of the airline. The District Court concluded that the dispute did not have sufficient links to Norway and dismissed the case. The Court of Appeal overruled the District Court's decision. On appeal, the Supreme Court Appeals Committee upheld the Court of Appeal's decision finding that Norwegian courts have jurisdiction in the case concerned.

Facts

On 28 March 2012 Alessandra Cocca, an Italian citizen, signed an offer of employment with the Irish company Crewlink Ireland Ltd for a period of three years. She was to be hired out to the Irish airline company Ryanair as a Cabin Services Agent. Prior to signing, Ms Cocca had successfully completed Ryanair's cabin crew training programme. Ms Cocca was stationed at Moss Airport Rygge in Norway, and had a duty to live no further than a one-hour journey from where she was stationed. Ms Cocca was dismissed by a letter of 30 January 2013. The reason given for her dismissal was that she had not passed the trial period, which was stipulated to be one year. From the time she started working for the company on 6 April and until she was dismissed, she was stationed at Moss Airport Rygge in Norway.

Legal proceedings

On 3 April 2013, Ms Cocca instituted proceedings against Ryanair Limited before Moss District Court claiming that she should have been permanently employed with the airline from 6 April 2012. In its defence, Ryanair argued that the Norwegian courts lacked jurisdiction and that the case should therefore be dismissed. Ms Cocca carried out most of her work on board a plane, and under the Chicago Convention, Irish planes are in Irish territory. Further, she had no tasks on the ground in Norway worth mentioning, and did not habitually carry out her work in Norway.

On 21 June 2013, the Moss District Court held that the case should be dismissed. The court concluded that the dispute had insufficient links to Norway, given sections 4-3 and 4-5(4) of the Norwegian Dispute Act and Article 19(2)(a) of the Lugano Convention.[2]

1 Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, executed in Lugano on 30 October 2007, OJEU 2009, L147, replacing the previous Lugano Convention of 16 September 1988.

2 Article 19(2) of the Lugano Convention is identical to Article 10(2) of Regulation 44/2001. It reads:
"An employer [...] may be sued [...] in the courts for the place where the employee habitually carries out his work or in the courts for the last place

Ms Cocca appealed the district court's decision to the Borgarting Court of Appeal. The Norwegian Confederation of Trade Unions (LO), the Norwegian Union of Commercial and Office Employees (HK) and the Confederation of Vocational Unions (YS) intervened in her support.

The Court of Appeal heard the case twice. In the first round it quashed the decision to dismiss the case, holding that the Norwegian District Court had jurisdiction under the Lugano Convention.. This ruling was, however, overturned by the Supreme Court Appeals Committee. The Appeal Committee found that the Court of Appeal had based its decision on a clear and undisputable error of fact. The Court of Appeal had given weight to the fact that the employee had worked with checking-in passengers, when it was later proven that she had not. This was regarded to be a procedural error which could have had an impact on the outcome, and the Appeals Selection Committee sent the case back to the Court of Appeal for a new ruling.

In its reconsideration of the case, the Court of Appeal found that an overall assessment should be made in which the special features of the aviation industry could be taken into account, and in which the decisive question would be what constituted the employee's centre of activities, rather than the more formal circumstances or the employer's links. The Court of Appeal stated that pursuant to section 4-5(4) of the Norwegian Dispute Act, an employee may take legal action against an employer *"...at the place where the employee habitually carries out his work"*. This provision has been modelled on the Lugano Convention of 2007. The Lugano Convention applies as Norwegian law, cf., Section 4-8 of the Norwegian Dispute Act and takes precedence over conflicting national provisions. The question is whether Ms Cocca *"...habitually carries out"* her work in Norway, cf., Article 19 (2) (a) of the Lugano Convention. If the answer is yes, Moss District Court is the correct legal forum for the proceedings.

The Court of Appeal further stated that parallel provisions relating to choice of law also should be taken into consideration. Within the EU the Rome Convention, later replaced by the Rome I Regulation, sets out provisions regarding *choice of law*. Norway is not a party to Rome I, but it is generally assumed that the Rome Convention/Rome I Regulation and the case law of the European Court of Justice relating to these are relevant sources of law in Norwegian international private law. Pursuant to Article 8(2) of Rome I: "[...] *in which [country], or failing that, from which [country] the employee habitually carries out his work"* must be taken into account. The phrase "from which" is intended to codify case law regarding *choice of law*. A corresponding codification in the Brussels Regulation regarding *jurisdiction* has been adopted, but will not enter into force until 2015.[3]

Ryanair's arguments that Ms Cocca carried out most of her work on board a plane which was registered in Ireland, and that under the Chicago Convention Irish planes are Irish territory, were disregarded by the Court of Appeal. Further, the court did not agree with Ryanair that considerable emphasis should be placed on the fact that the parties had agreed that Irish law applied to the employment relationship, that Ms Cocca was a member of the Irish National Insurance Scheme, had Irish insurance, had her wages paid into an account in an Irish bank, paid tax to Ireland, or that Ryanair does not have branches or the like in Norway or other countries, so that the organising of the work, including instructions and organisation, emanates from Ireland. The Court of Appeal did not find that these circumstances result in the proper forum being the court in Ireland pursuant to Article 19(2) (b) of the Lugano Convention. These circumstances are largely formal in nature and the employee's influence on them is normally very limited.

In the Court of Appeal's view, in the overall assessment to be made, one cannot simply conclude that Ms Cocca's assignments on the ground were so limited that the Norwegian airport Rygge was not the centre for her work activities (i.e. the place where she performed her work). In the opinion of the Court of Appeal, emphasis must be placed on the fact that Ms Cocca, pursuant to the contract, had an obligation to live near the airport. Because of this obligation, Rygge was not just a mustering place, as Ryanair described it. The residence duty meant that she lived close to the airport as long as the employment relationship lasted. According to the Court of Appeal, this represents an actual connection that must be given substantial weight. This meant that Rygge and the area where she lived, was her natural social connection point in relation to both work and leisure. In the Court of Appeal's opinion this connection carries significant weight, even though a number of other factors must be taken into account.

As a result, the Court of Appeal ruled that the appeal was successful and that the case should be heard in Norway by the Moss District Court. The decision by the Court of Appeal was appealed to the Supreme Court, but the Supreme Court Appeals Committee refused leave to appeal on 17 June 2014. The decision is therefore final.

Commentary

This case is interesting in terms of clarifying the limits on setting up operations within the aviation industry where this is carried out in order to avoid local jurisdictions, or less favourable local legislation (from the company's point of view).

Even though this case concerns jurisdiction and not choice of law, the link between the two questions and a similar approach in terms of deciding applicability is striking. In our understanding, the jurisdiction ruling will also be of great importance in relation to the question of applicable law, and we think it unlikely that a Norwegian district court would rule that Norwegian law does not apply following this ruling.

The case also highlights an important point of clarification made by the Appeals Selection Committee of the Supreme Court. Ryanair argued that it was incorrect of the Court of Appeal to disregard that Ms Cocca carried out most of her work on board a plane registered in Ireland, and that under the Chicago Convention, Irish planes are Irish territory. The Appeals Selection Committee stated that they did not find it legally incorrect to disregard this factor in determining where the employee habitually carries out her work. To the employee the place of registration must seem like a mere formality and giving weight to this factor would result in a significant weakening of the employee protection provided by Article 19 (2)(a). According to the Appeals Selection Committee such an interpretation would require a clear source of law reference in order for it to be used.

Subject: Jurisdiction
Parties: Alessandra Cocca - v - Ryanair Limited
Court: *Borgarting Lagmannsrett* (Borgarting Court of Appeal) and *Norges Høyesteretts Ankeutvalg* (Supreme Court Appeals Committee)
Date: 5 March 2014 and 17 June 2014.
Case number: 13-202882ASK-BORG/04 and HR-2014-1273-U
Publication: www.lovdata.no (login required)

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where he did so [...]."

3 Claims submitted from 10 January 2015 will be governed by Regulation 1215/2012 ('Rome I, recast') and no longer by Regulation 44/2001. What is now Article 19 will then be Article 21 and will read: "An employer [...] may be sued [...] in the courts for the place where **or from where** the employee habitually carries out his work or in the courts for the last place where he did so [...]." [emphasis added].

2014/31

How to calculate unemployment benefits in cross-border situations; 'typical' and 'atypical' frontier workers (CZ)

CONTRIBUTOR NATASA RANDLOVA*

Summary

Where a person was employed in a state, not being that of his residence, and he does not return to his state of residence at least once a week, he has, according to Regulation 1408/71, a choice of where to apply for unemployment support: in his state of residence or in his state of work. If such a 'frontier worker' applies for unemployment support in his state of residence, the amount of that support should be calculated based on the earnings a worker in a similar job earns in the state of residence and not on the applicant's own previous earnings.

Facts

The plaintiff in this case was a Czech citizen. He worked for an employer in Austria but he continued to be registered as a resident of the Czech Republic. When his employment contract terminated, he returned to his homeland, where he registered at the labour office. For a reason that the published documents in this case do not reveal, he was not entitled to any unemployment support in Austria.

The Czech labour office provided the plaintiff with unemployment support, the amount of which was derived from the average earnings of an employee in the same position in the Czech Republic. These unemployment benefits were 60% below what they would have been had they been based on the plaintiff's last earnings in Austria.

The plaintiff considered the amount of unemployment support incorrect. In his opinion, the labour office should have calculated it based on his last earnings in Austria. He therefore filed an appeal with the Ministry of Labour and Social Affairs. The Ministry confirmed the labour office's decision. The plaintiff disagreed and filed a suit with the administrative court against the Ministry's decision.

Court of first instance

The administrative court of first instance rejected the claim and confirmed the amount of unemployment benefits awarded by the Czech labour office. The court reasoned that in this particular case the Czech labour office had correctly applied the second sentence of Article 68(1) of Regulation 1408/71 and therefore had correctly determined the amount of unemployment support by deriving the amount from the average earnings of a similar worker in the state of the unemployed person's residence.

The plaintiff filed an appeal with the Supreme Administrative Court of the Czech Republic. He claimed that the court of first instance had incorrectly applied the second sentence of Article 68(1) of Regulation 1408/71, instead of applying the first sentence. Further, the plaintiff stated that he was not a frontier worker and that therefore his case should be judged according to Article 71(1)(b)(ii) and the first sentence of Article 68(1) of Regulation 1408/71.

The Ministry of Labour and Social Affairs as defendant in this case stated that:

- based on previous decisions of the European Court of Justice and wording of Articles 71 and 68 of Regulation 1408/71, the calculation of the amount of unemployment support for the plaintiff must derive from the amount of the average monthly earnings in an equivalent employment in his place of residence;
- the plaintiff could have brought the claim for unemployment support before the Austrian labour office. In that case, the amount would have been derived from his real earnings (the Ministry raised this argument despite the fact that the plaintiff had not gained entitlement for unemployment support in Austria).

Judgment

The Supreme Administrative Court agreed with the plaintiff that Article 71(1)(b)(ii) of Regulation 1408/71 applied to his case and that he should therefore be seen as an atypical frontier worker. Nevertheless, the court rejected the plaintiff's appeal and upheld the judgment of the court of first instance. It did this on the basis of the following reasoning.

The fact that the plaintiff was an atypical frontier worker was considered by the Supreme Administrative Court as crucial. The unemployment support should, according to the literal text of Article 68 of Regulation 1408/71, in the case of states where unemployment benefit derives from earnings gained in the previous employment, be provided according to the previous wage or salary in the state where the person applied for it. If there are no such earnings, the unemployment benefit derives from the normal wage or salary corresponding, in the place where the unemployed person is residing or staying, to an equivalent or similar employment to his last employment. However, as noted above, the ECJ overruled the literal text of Article 68(1) in favour of frontier workers.

The exception ruled by the ECJ however applies according to the Supreme Administrative Court only to "typical" frontier workers not to "atypical" frontier workers. The reason for this is, according to the Supreme Administrative Court, the fact that typical frontier workers do not have a choice and must apply for unemployment support in the state of their residence and their freedom of movement of workforce would therefore be limited. By contrast, atypical frontier workers have the choice as to whether to ask for unemployment support in their state of work or state of residence. It is therefore up to the worker whether their unemployment support will be derived from their last earnings or not (without regard to the fact that the plaintiff did not have such a choice in practice because he was not entitled to receive unemployment support in Austria).

Legal background: Regulation 1408/71

In order to explain the judgment in this case it is necessary to say something about the provisions in Regulation 1408/71 that deal with unemployment benefits. Although that regulation was replaced on 1 May 2010 (by Regulation 883/2004), it applied to this dispute because the plaintiff's unemployment occurred before that date.

Article 13(2)(a) gives the main rule: a person employed in a Member State is subject to that state's legislation even if he resides elsewhere. As regards unemployment benefits, the most common situation is where a person lives and works in one country and then, when he loses his job, moves to another country with a view to finding a new job there. This situation is dealt with in Section 2 of Chapter 6 (Articles 69 and 70). Basically, what these provisions say is that the unemployed person shall receive unemployment benefits under the legislation of the country in which he worked, with certain restrictions and provided he satisfies certain requirements.

Section 3 (Article 71) deals with the less common situation where a person lived and worked in different countries. It distinguishes between frontier workers and others. A frontier worker, as defined in

Article 1(b), is an employee who works in Member State A and resides in Member State B, to which he returns, as a rule, at least once a week.

Article 71(1)(a) deals with unemployed frontier workers. Subparagraph (ii) provides:
"A frontier worker who is wholly unemployed shall receive benefits in accordance with the provisions of the legislation of the Member State in whose territory he resides as though he had been subject to that legislation while last employed; these benefits shall be provided by the institution of the place of residence at its own expense."

Article 71(1)(b) deals with unemployed persons who lived and worked in different countries but who are **not** frontier workers. Subparagraph (ii) provides:
"An employed person, other than a frontier worker, who is wholly unemployed and who makes himself available for work to the employment services in the territory of the Member State in which he resides, or who returns to that territory, shall receive benefits in accordance with the legislation of that State as if he had last been employed there; the institution of the place of residence shall provide such benefits at its own expense. However, if such an employed person has become entitled to benefits at the expense of the competent institution of the Member State to whose legislation he was last subject, he shall receive benefits under the provisions of Article 69. [...]".

Technically, the plaintiff was not a typical frontier worker, given that he worked in Austria, lived in the Czech Republic but did not return to his place of residence at least once a week. Therefore, even though he had been subject to Austrian social insurance legislation and even though Austrian social insurance contributions had been deducted from his salary, he was eligible, not for Austrian unemployment benefits, but for Czech unemployment benefits, in accordance with Article 71(1)(b)(ii).
Section 1 of Chapter 6 of Regulation 1408/71 comprises two provisions that are common to all unemployment benefits: Articles 67 and 68. Article 68(1) consists of two sentences:
"The competent institution of a Member State whose legislation provides that the calculation of benefits should be based on the amount of the previous wage or salary shall take into account exclusively the wage or salary received by the person concerned in respect of his last employment in the territory of that State. However, if the person concerned had been in his last employment in that territory for less than four weeks, the benefits shall be calculated on the basis of the normal wage or salary corresponding, in the place where the unemployed person is residing or staying, to an equivalent or similar employment to his last employment in the territory of another Member State."

The 'Member State' referred to in this provision, in the plaintiff's case, was the Czech Republic. That was the Member State that was responsible for paying him unemployment benefits. Given that he had not been employed in the Czech Republic (and had therefore, by definition, been employed there "for less than four weeks"), the second sentence of Article 68(1) applied. Hence, his benefits were calculated using the lower Czech (comparator's salary) rather than the higher Austrian (last-earned salary) criteria.
However, the ECJ has had occasion to rule before on this type of situation. In 1980, in the *Fellinger* case (C-67/79), it held as follows with regard to the provisions of Article 68(1):
"These provisions occur amongst the 'common provisions' of Chapter 6 of Title III of the regulation, relating to 'unemployment', and are of general application and do not relate to particular situations peculiar to certain categories of worker. They clearly refer to the ordinary case of the worker who is normally employed in the territory of the competent State in which he is residing or staying and they provide, in the second sentence, the special rule there laid down only for the exceptional case in which that worker has been in his last employment in the territory of the said State 'for less than four weeks'. In the form in which they are drawn up these provisions do not therefore allow of a definition of the criteria of calculation applicable to unemployment benefit due to a frontier worker who, since he resides in a Member State different from that in which he is employed, can never, by very reason of his status as a frontier worker, be employed in the territory of the State which provides his unemployment benefit. The application of the said provisions to such a worker would produce the result that, since by definition he is in the position contemplated by the second sentence of Article 68(1), the rules which that provision lays down by way of an exception would normally be applied to him and he would never be able to receive unemployment benefit based on the wage or salary actually received in his last employment. Such treatment in regard to unemployment benefit would place him in an unfavourable situation compared with workers in general, for whom the State of employment where they reside or stay is normally the competent State and would, moreover, conflict with the requirements of the free movement of workers. Since daily movements often take place from countries with low wages to countries with higher wages the fact that unemployment benefit paid to frontier workers could never be calculated on the basis of the higher wages would in fact be such as to discourage those movements and thus the mobility of workers within the Community."

What the ECJ did in *Fellinger* was to hold that a typical frontier worker, despite the wording of Article 71(1)(a)(ii) and Article 68(1) of Regulation 1408/71 to the contrary, must receive unemployment benefit calculated from the last earnings received by the worker in the last employment held by him in the Member State in which he was engaged immediately prior to his becoming unemployed, not from earnings the worker would receive in a similar job in the state of his residence. In effect, the ECJ overruled the text of the Regulation.
Could the plaintiff in the case reported here benefit from *Fellinger* even though he was not a typical frontier worker (because he did not return to his homeland at least once a week)? That was the issue in this case.

Commentary
Generally the court decides in conformity with Regulation 1408/71. However, the court in this particular case did not take into consideration the fact that the plaintiff did not have a choice as to where to ask for unemployment support because he was not entitled to the unemployment support in Austria. The position of the plaintiff was therefore very similar to typical frontier workers and the same case law should be applied to his case. This decision however placed him without a good reason into a less favourable position than typical frontier workers.
The court decision also did not take into account the new Regulation 883/2004 which was, at the whole time of this case, enacted but yet not in force. This Regulation reflected the decisions of the ECJ and according to Article 62, only the last earnings by the individual should be taken into account when calculating unemployment support in countries where this is calculated based on the last earnings of the former employee. This should have been an indicator for the court as to which interpretation should be applied.
In my opinion the court also reached the incorrect conclusion that Article 68 of the Regulation 1408/71 applies to an atypical worker in accordance with the principle free movement of people because it enshrines inequality between countries and employees - given that it is obvious that most individuals will ask for unemployment support in a

state where it will be calculated from real earnings.
For the reasons given above, in my view, the plaintiff's unemployment support should have been derived from his real earnings in Austria and not from the average earnings of a similar employee in the Czech Republic.

Comments from other jurisdictions
Austria (Manuel Schallar): On 5 May 2012, the Austrian Administrative Court (Verwaltungsgerichtshof) decided a similar case regarding the amount of unemployment compensation to which a frontier worker was entitled (case number 2010/08/117). If an unemployed worker is registered as a resident of Austria, but formerly worked abroad, the amount of his unemployment compensation must be adapted to his former income in the foreign country. On the other hand, if the unemployed worker worked for at least four weeks in Austria before his application, the amount of the unemployment compensation must be adapted to the local customary income (at his residence) for the job that he did in the foreign country.

The Netherlands (Peter Vas Nunes): There seems to be confusion with the use of the expressions "typical frontier worker" and "atypical frontier worker". My understanding of this case report is that in Czech theory a typical FW is someone who lives in his home country A, works across the border in country B and returns to his home country at least once a week. There are probably tens of thousands of such workers across the EU. An atypical FW, within the meaning that seems to be used in Czech theory, is a FW who lives in his home country A, works in country B and does not return to his home country often. There must also be tens of thousands of such workers. Take, for example, Polish workers in the UK, who return to Poland twice a year.
My own understanding is that the expressions "typical" and "atypical" FW are used differently by the ECJ. An atypical FW within that meaning is a FW who does not live in his home country but does work there. An example would be a Dutchman who lives just across the border in Belgium (most likely for tax reasons; there are many thousands of such workers) but works in his home country, The Netherlands. The EU legislator in 1971 did not take the existence of this rather special species of FW into consideration. In *Miethe* (ECJ 12 June 1986, case C-1/85), the ECJ held - more or less contrary to the wording of Regulation 1408/71 - that such an "atypical" FW should not be considered to be a FW. An atypical worker, as the ECJ put it, is a worker who, although he is a frontier worker within the meaning of Article 1(b) of Regulation 1408/71, *"has in exceptional circumstances maintained in the Member State in which he was last employed personal and business links of such a nature as to give him a better chance of finding new employment there"*.
To take the example of the Dutchman working in his home country The Netherlands but living just across the border in Belgium, such a worker, upon losing his job, is not likely to seek new employment in Belgium (as Regulation 1408/71 supposes to be the most likely event) but in The Netherlands. For this reason, the ECJ, in Miethe, introduced a new, previously non-existent category of FW, namely an "atypical" FW who, although technically being a FW, is deemed not to be a FW for social insurance purposes. This distinction disappeared under Regulation 883/2004, which replaced Regulation 1408/71 in 2009: see ECJ 11 April 2013, case C-443/11 (Jeltes).

Subject: Unemployment support
Parties: J.K. – v – Ministry of Labour and Social Affairs
Court: The Supreme Administrative Court
Date: 24 May 2014
Case number: 6 Ads 86/2013

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2014/32

Severance pay is salary (LA)

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Summary
Severance compensation paid to an employee pursuant to section 112 of the Latvian Labour Law (e.g. where an employment contract is terminated on account of a headcount reduction) is covered by the concept of "work remuneration" (hereinafter "salary") as defined in section 59 of the Labour Law, being "any other remuneration in relation to work". This means that wrongly paid severance compensation can only be reclaimed on the basis of section 78 of the Labour Law and not on the basis of the general provisions of civil law. According to a recent Supreme Court decision, this in turn means that an employer cannot recover severance compensation paid to an employee based on a court judgment that has been enforced despite appeal and later overturned.

Facts
The plaintiff in this case was an employer, the limited liability company "Union Asphalttechnik". It terminated its employment contract with one of its employees - the defendant - in the course of a workforce reduction operation. As required by law, it paid the employee severance pay (the "severance compensation"). The severance compensation was paid on 25 May 2009.
The employee challenged the legality of his employment termination in court. The court of first instance ruled in his favour, ordering the employer to reinstate him in his previous position and pay him salary for the whole period of forced absence from work. The court also stated that the judgment must be executed with immediate effect[1]. Pursuant to the judgment the employer reinstated the employee and, on 4 November 2009, paid him the compensation (the "absence salary").
The employer appealed with success. The Court of Appeal held that the termination had been perfectly legal and valid, thus, the court of first instance had wrongly ordered reinstatement. This meant that there should have been no need to make the absence salary payment. The Court of Appeal's judgment was final.[2] Meanwhile, the employee had been validly dismissed again.

The above can be summarised by the following diagram:

E1		Absence		E2
	A		B	

1 According to Section 127(1) of the Labour Law and Section 205(1) of the Civil Procedure Law, following a motivated request of the employee, the court of first instance and the Court of Appeal, respectively, can rule that its judgment regarding reinstatement of an employee in his previous position and payment of the compensation for the whole period of forced absence from work must be executed with immediate effect.
2 The employee appealed to the Supreme Court unsuccessfully and, pursuant to the Law on Civil Procedure, it was the appellate court's judgment which came into effect.

The original period of employment E1 ended on date A, following which the employee was paid a lump sum by way of severance compensation. The employee was reinstated on date B, following which the employer paid him an amount basically equal to his salary for the "absence" between the end of the original period of employment and the beginning of the second period of employment.
The employer brought new proceedings. He claimed repayment of the absence salary as well as severance compensation. In these new proceedings, the Court of Appeal turned down the claim for repayment of the absence salary and awarded the claim for repayment of the severance compensation.
The Latvian Law on Civil Procedure prohibits courts from reversing a court judgment in which an employer is ordered to pay an employee "salary". It is not possible for an employer to claim repayment of salary from an employee that was paid pursuant to an enforced court order, unless the court order was based on false information or forged documents submitted by the employee. For this reason, the court had to turn down the claim for repayment of the absence salary.
As for the claim for repayment of the severance compensation, the Court of Appeal, following previous Supreme Court case law, found that this compensation did not qualify as "salary" within the meaning of the Law on Civil Procedure. Hence, the normal rules governing payments of sums not owed applied, rather than the special rules governing salary. On this basis, the Court of Appeal ordered the employee to repay the severance compensation.

Judgment
The issue before the Supreme Court was whether the severance compensation constituted "salary" within the meaning of the Labour Law. This was relevant for the following reason. Under the normal rules of Latvian civil law, a sum of money that is paid without there being legal grounds for it must be repaid. Thus, if those general rules applied, the employee would need to repay the severance compensation payment, given that - under the ruling of the court of first instance - there had been no valid termination and hence no reason to pay severance compensation. However, if that payment qualified as salary, the relevant rules were those provided under the Labour Law, rather than the civil law rules. Those special rules provide that an employee who has incorrectly been paid by his employer need not repay unless:

1. the payment was made as a result of an error by the employer; and
2. the employee was, or should reasonably have been, aware of the error, or the payment was made in circumstances in which the employee carries responsibility.

At the moment of paying the severance compensation to the employee, the employer was fully willing to make the payment and followed the provisions of the Labour Law obliging it to do so, as the termination was by reason of workforce reduction. Therefore, there is no reason to consider that the payment was made in error and it follows from that that the employee could not have been aware of something that did not exist. Thus, if the Labour Law applied, the employee was not under an obligation to repay.
Section 59 of the Labour Law defines salary. The definition includes as salary "any other remuneration in relation to work" performed by an employee. The Supreme Court analysed this definition in light of three ECJ judgments: Barber (ECJ 17 May 1990, case C-262/88), *Gewerkschaftsbund* (ECJ 8 June 2004, case C-220/02) and *Maruko* (ECJ 1 April 2008, case C-267/06). It concluded, overturning its own previous jurisprudence, that compensation for severance of an employment contract qualifies as "salary" within the meaning of the Labour Law.
The Supreme Court went on to explain that, as severance pay is part of salary, then the provisions of the Labour Law regulating how (and when) the employer can claim back wrongly paid amounts from the employee must also apply in this case. It clarified that there were no legal grounds to apply the general provisions of civil law to the case.

Commentary
One thing about this judgment is that the Supreme Court applied case law of the ECJ and changed its previous practice in order to comply with it. The most interesting issue, however, is not that employers must now follow a complicated procedure in order to claim back wrongly paid severance compensation, given that there are not many cases when the employer pays the employee the severance compensation by mistake (and if there has been an obvious error in calculating the correct amount of the severance compensation the employer still has a realistic prospect of proving that even in the light of this judgment). The most important change brought by this court judgment, which states that the compensation payment is covered by the concept of the "salary", is that from now on it will not be possible for the employer to recover such a payment in the event it was paid on the basis of an immediately enforceable court judgment (e.g. where there is a dispute over the amount of the severance pay or over whether or not the employee is entitled to severance pay) and the court of appeal decides the case differently.
In addition, this court judgment makes highly questionable the current practice of the Latvian courts which, when deciding on the amount the employee is entitled to for the period of forced absence from work in cases of illegal employment termination upon the employer's request, reduce that amount by the sum the employee received in the form of severance compensation. The rationale behind this approach is that, as the employment termination has been declared unlawful, the employee has no legal basis for keeping the severance compensation. However, this approach does not seem to be compatible with the present judgment.

Comments from other jurisdictions
The Netherlands (Peter Vas Nunes): A Dutch court would probably have ruled differently. The claim for repayment of the absence salary would have been awarded, given that – in hindsight – the employee was not employed during the absence period and that, therefore, there was no basis for that payment. On the other hand, the employee would not have had to repay the severance compensation, because – also in hindsight – the original employment period (E1) ended on date A.
Admittedly, there is case law protecting employees against unreasonable salary repayment claims, but that case law would not have come into play in a case such as this, where the employee must have been aware that the payment of salary for his period of absence was subject to appeal litigation.

United Kingdom (Sarmed Khalid): The facts of this case are unlikely to arise in the UK. Employees who are dismissed, including for economic reasons such as workforce reduction (redundancy) are able to challenge their dismissal by bringing a claim for 'unfair dismissal' in the Employment Tribunal, provided they have had at least two years' continuous service before dismissal. If the employee's claim is successful, by far the most common remedy awarded by the Tribunal is compensation, which is largely calculated by reference to the employee's likely future loss of earnings (capped at the lower of 52 weeks' pay or £76,574).
If the employee requests it, instead of awarding compensation, the Tribunal may make an Order for the employee to either be reinstated

into their role with the employer, or re-engaged by the employer into a similar role together with compensation for lost salary and benefits for the period between dismissal and returning to work for the employer. Such Orders (which are made under sections 114 and 115 of the Employment Rights Act 1996 (ERA) are extremely rare, and the Tribunal will not grant the Order if it is not practical for the employee to return to work for the employer. If the Tribunal does make the Order, when deciding the amount of compensation to be awarded for the period the employee was out of work, it can discount payments made by the employer to the employee. The employer will wish to argue that the compensation should be reduced by the amount of any redundancy pay paid to the employee.

A more common situation giving rise to issues similar to this case might be if an employer pays an employee too much redundancy pay by mistake. Statutory redundancy pay is based on a set formula which takes into account the employee's age, length of service and weekly pay. Employers might offer more generous contractual redundancy pay, which may also be based on a formula. If an employer gets the calculation wrong and pays too much, will it be able to deduct the amount of the overpayment from any further wages due to the employee?

There are limitations on what deductions an employer can make from an employee's wages under Part 2 of the ERA. The general position is that the employer will not be able to make the deduction, unless there is a clause in the contract of employment which allows it. Without such a clause, a deduction will still be possible under section 14 of the ERA if the deduction relates to an overpayment of "wages". However, section 27 of the ERA expressly excludes redundancy pay from the definition of "wages" and therefore section 14 cannot be relied on by the employer to recover overpaid redundancy pay. If the employer makes the deduction in breach of Part 2 of the ERA, the employee can bring a claim, recover the amount of the unlawful deduction and the employer will then be debarred from recovering the money any other way.

A practical problem is that redundancy pay will usually be paid alongside the final payment of wages due to the employee, and if that happens, there will be no opportunity to deduct overpaid redundancy pay in the future. The employer's only option will be to bring a claim in the civil courts (rather than in the Tribunal) to recover the overpayment. Due to the cost and time involved, it would rarely be worthwhile for the employer to bring the claim unless the amount of the overpayment was significant. Even then, an employee may not be required by the court to repay some or all of the overpayment if it would be unjust for them to do so (for example, if they had already spent the money in good faith).

Subject: Definition of salary
Parties: SIA "Union Asphalttechnik" - v - D.S.
Court: *Latvijas Republikas Augstakas tiesas Civillietu departaments* (Supreme Court of the Republic of Latvia, civil section)
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2014/33

Union attempt to have new tribunal fee regime struck out (UK)

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Summary

This case concerns the introduction of a new Employment Tribunal fee regime by the UK government. The trade union, Unison, opposed the regime on four grounds. They claimed it breached the principle of effectiveness, the principle of equivalence, the public sector equality duty, and that it was indirectly discriminatory. All of these grounds were dismissed – however, the Court claimed that the arguments would be better assessed if the challenge was brought later when more evidence could be considered. This leaves the way wide open for another challenge down the line.

Background

The Employment Tribunals and Employment Appeal Tribunal Fees Order 2013 was made on 28 July 2013 and came into force on 29 July 2013. This order made fees payable at two stages of a claim: when a claim form is presented to an employment tribunal (the 'issue fee') and on the listing of a final hearing of the claim (the 'hearing fee'). Claims, for the purpose of the new fees regime, are divided into two types: Type A, includes claims relating to statutory redundancy payments, unlawful deductions from wages and breach of contract; Type B includes claims for unfair dismissal, discrimination and whistleblowing. For a single claimant, the issue fee for a Type A claim is £160 and the hearing fee is £230 whereas the issue fee for a Type B claim is £250 and the hearing fee is £950.

However, low-income claimants can apply for full or partial fee remission. The remission system is complicated and is assessed on the claimant and his or her partner's disposable capital and income. Very broadly, if a household has disposable capital of £3,000 or more the claimant will probably not be entitled to any fee remission, irrespective of his or her income. If the claimant passes the capital test, the income test is applied. The income test varies according to family size. A single person without children must have a monthly income of £1,085 or under to be eligible for full remission. According to the government, the fees are not intended to deter claimants but to transfer some of the costs of the system onto users.

Facts

Unison pleaded four grounds in its case against the imposition of the new fee regime. Their first concern was that the requirement to pay fees violates the European Union 'principle of effectiveness'. They argued that the fees would make it "virtually impossible, or excessively difficult, to exercise rights conferred by EU law". The right to an effective remedy is set out in Article 19 and Article 47 of the Charter of Fundamental Rights of the EU (which has the same legal status as the Treaties). These Articles provide that "*legal aid shall be made available to those who lack sufficient resources insofar as is necessary to ensure effective access to justice*". Unison argued that if fees are imposed at the initial stage of proceedings before an assessment of the merits (as is the case now) a greater level of justification is required. In *Weissman - v - Romania* and *Podbielski – v - Poland* the European Court of Human Rights has ruled that "restrictions applied which are of a purely financial nature and which [...] are completely unrelated to

the merits of an appeal or its prospects of success, should be subject to particularly rigorous scrutiny from the point of view of the interests of justice."

Here, the Court found that, though the fees were not intended as a deterrent, they did have a deterrent effect: evidence presented by Unison showed dramatic falls in claims comparing September 2012 with September 2013. There was a fall in all claims of 56%; of claims in the North West region of 82%; in Wales of 88%; in all Equality Act discrimination claims, including equal pay, of 78%; of sex discrimination claims of 86%; and of unfair dismissal claims of 81%. However, the Lord Chancellor believed it was too early to rely on these statistics.

Unison's second challenge was that the new regime violates the 'principle of equivalence' between European and domestic law, arguing that the requirement to pay fees means that the conditions for the enforcement of rights derived from EU law are less favourable than for similar domestic claims brought in the County Court. The fees to bring a County Court claim depend upon the amount claimed. Unison sought to compare the median figure awarded in a discrimination claim (£5,256 for race discrimination, £6,746 for sex discrimination and £8,928 for disability discrimination) with the cost of bringing a county court breach of contract claim for a similar amount. However, instead, the court decided that an appropriate comparison was a claim for breach of contract worth £20,000. This type of claim could be brought in the County Court and in the Employment Tribunal and the total fees incurred would be similar. In addition, when considering potential liability for the other side's costs, the Court found that proceeding through the Tribunal is actually preferable. In the County Court, you may be liable to pay the other side's costs, whereas this applies more rarely in the Tribunal, where free early conciliation is also available.

Unison's third ground was that the new fees regime was in breach of the Public Sector Equality Duty. This is the duty on public bodies to have due regard in exercising their functions to the need to eliminate discrimination, advance equality of opportunity, and foster good relations between those who share protected characteristics and those who do not (s.149(1) Equality Act 2010). This duty is one *"which must be undertaken conscientiously and with rigour"* and it is a continuing obligation, to be constantly monitored. Following an impact assessment and consultation, the Ministry of Justice had concluded that: *"we do not consider that, for those negatively impacted, the proposals will amount to a substantial disadvantage in monetary terms. We consider that the fee remission system proposed will ensure that access to justice is maintained for those who are unable to afford to pay a fee"*. The Ministry therefore argued that the fee system was a proportionate means of achieving a legitimate aim.

The final ground was that the effect of the fee regime is indirectly discriminatory. Unison contended that the imposition of a higher rate of fees in Type B cases has a disparate impact on minority groups, which constitutes indirect discrimination in breach of ss.19 and 29 of the Equality Act and Article 14, read with Article 6 of the Convention. The two issues that the court needed to address were, first, whether the relevant provision, criterion or practice (PCP) puts persons sharing a particular characteristic at a particular disadvantage, and second, if a disparate impact on minority groups was established, whether the Lord Chancellor could objectively justify the PCP which placed those within the protected class at a particular disadvantage.

Judgment

The Court found, in relation to the first challenge, families on very modest means are capable of paying the fees. Payment would not be virtually impossible or excessively difficult. On whether the fees are 'excessive', the fact that they impose a burden was not found to be enough to qualify them as 'excessive'. Unison presented only hypothetical scenarios (because the fee system had not been in place long enough to obtain real examples), which did not persuade the Court. The first ground was therefore dismissed.

Regarding the second claim, the Court found that the liability for costs in the Courts, rather than the Tribunals, was a real disincentive to claimants of limited means. They therefore found that people would be more ready to pursue a case in the Tribunal rather than the Court and this ground was therefore readily dismissed.

The problem with the third claim was that it is a procedural claim but it *"leeches so readily into the ground of substance and not procedure, namely, that the regime amounts to indirect discrimination"*. In other words, it concerned the merits of the Lord Chancellor's decision, which was beyond the scope of the claim. The Court was satisfied that the Lord Chancellor had considered the impact on various groups with protected characteristics through the consultation procedure. However much Unison disagreed with the *conclusion* of the assessment, it could not establish that the assessment was inadequate, as many relevant factors were taken into consideration. If the fees do turn out to have a damaging effect on the fundamental obligation to eliminate discrimination, necessary steps will have to be taken. However, this will depend on future evidence, and so this claim was found to be premature. This ground was also dismissed.

In relation to the fourth and final claim, the Court had a strong suspicion that there would be a negative effect on those who bring Type B claims, and so the arguments relating to justification were considered. However, it was too early after the introduction of the scheme to assess the impact. The Court of Appeal in *R (Elias) v Defence Secretary* has said that the relevant questions are, first, whether the objective is sufficiently important to justify limiting a fundamental right; second, whether the measure is rationally connected to the objective; and third, whether the means chosen is no more than is necessary to accomplish that objective.

The broad objectives of the fee regime were given by the Government as being *"to transfer a one-third proportion of the annual cost of £84m incurred in running Employment Tribunals and the Employment Appeal Tribunal"*. It seeks to make tribunals "more efficient and effective", so that they can focus on more meritorious claims by making employees and employers think twice before bringing or defending a claim. As to proportionality, remission and free ACAS conciliation is available. Because the effect of the changes cannot yet be adequately analysed, the Court could not conclude whether the imposition of a higher rate of fees for Type B claims could be objectively justified if it has an indiscriminate effect.

After hearing the case, the court made some practical suggestions for case management. Firstly, that the tribunal should issue pre-hearing directions to ensure that witness statements and other relevant documents are exchanged before the hearing fee is due, to enable claimants to assess the merits of the case. This will help to ensure the aim of the fees is met – that is, meritorious claims are pursued while those without merit are dropped at the earliest stage. (The claimant will still have to pay the issue fee before receiving this information.)

The court also said that successful claimants should be able to recover their fees from the defendant, which might encourage those with meritorious claims to pursue them. These two suggestions are already being taken up by the tribunals.

Commentary

The Court found that the *"fundamental difficulty with the whole of this case"* was the fact that it was brought as a matter of urgency, meaning that the court was faced with judging the fees regime with insufficient

evidence, and based only on the predictions of the rival parties. (Unison had no choice in this, as judicial review proceedings must be brought without delay.) The Lord Chancellor undertook to keep the impact of the regime under review, and if any discriminatory effect is discovered, the Lord Chancellor will be under a duty to change it. Unison was also told to monitor the effects. For the moment, the Court underlined that *"there is no rule that forbids the introduction of a fee regime"*. However, this is not the end of the matter because Unison has recently sought and been given permission to appeal this decision.
The court suggested that the government would be obliged to revise the fee regime if future statistics uphold Unison's argument that it is having a deterrent effect on claimants. It is difficult to assess at this stage exactly how far people have been dissuaded by the fees from bringing claims but the latest figures from the tribunal service seem to indicate a very large drop in claims. The first full quarter after the introduction of fees was October to December 2013. This period saw 79% fewer claims being brought than in the same quarter in 2012. It is possible that some of this apparent fall in numbers is attributable to people who have applied for remission and are still being assessed. However, it seems likely that there has also been a significant deterrent effect. If these statistics are borne out in subsequent quarters, Unison's case will be all the stronger.

Subject: Tribunal Fees, EU law, Indirect Discrimination
Parties: The Queen on the Application of UNISON – v – The Lord Chancellor
Court: High Court of Justice, Queen's Bench Division (Administrative Court)
Date: 7 February 2014
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2014/34

Germany introduces minimum wage (ARTICLE)

AUTHOR PAUL SCHREINER*

The German parliament ("*Bundestag*") has just recently passed a bill on the country's first minimum wage. The outcome of the vote in the Bundestag on 3 July 2014 was not a surprise since the bill has been drafted and supported by the governing "Grand Coalition".
Coming into effect on 1 January 2015, the minimum wage will be set at € 8.50 per hour. However, during a transition period of two years (until 31t December 2016) the Minimum Wage Act will be pre-empted by both generally binding collective bargaining agreements and sector-specific minimum wages under the German Posted Workers Act ("*Arbeitnehmerentsendegesetz*").
After the aforementioned transition period, the Minimum Wage Act will in principle be binding on every employer. Further, the amount of the minimum wage will be reviewed by a minimum wage committee every year starting on 1 January 2018. The government has the sole power to adjust the minimum wage based on the minimum wage committee's advice.

The lawmaker has made a few exceptions to the obligation to pay the minimum wage. The Minimum Wage Act does not cover:
- internships (in principle up to six weeks);
- juveniles (up to the age 18) as long as they have not finished their education;
- long-term unemployed people for their first six months at work;
- trainees; and
- volunteers.

In addition to those exemptions, paperboys are eligible for 75% of the minimum wage (€ 8.50 per hour) starting on 1 January 2015, for 85% of the same minimum wage starting on 1 January 2016 and for the minimum wage of € 8.50 per hour starting on 1 January 2017.
However, the Minimum Wage Act does not address the various different kinds of wages that might need to be considered when assessing compliance with that Act. These might include rates for piecework and premiums (e.g. where an employer pays employees a basic wage of € 7.50 per hour and, at the end of the month, another € 1.50 per hour as a quality premium). Even though this question has been discussed many times in relation to the German Posted Workers Act, it has never been adequately answered.

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ECJ COURT WATCH

SUMMARIES BY PETER VAS NUNES

RULINGS

ECJ 16 May 2013, case C-589/10 (*Janina Wencel - v - Zakład Ubezpiecze Społecznych w Białymstoku*) (**"Wencel"**), Polish case (FREE MOVEMENT - SOCIAL INSURANCE)

Facts

Mrs Wencel is a Polish national. She has been registered as a Polish resident ever since 1954. Her husband, whom she married in 1975, lived and worked in Germany. Mrs Wencel frequently went to Germany to see him and he spent all his holidays in Poland. Mrs Wencel obtained a German residence certificate that described her as being permanently resident there.

In 1990, by virtue of her having completed insurance periods in Poland, Mrs Wencel acquired the right to a Polish retirement pension. Following the death of her husband in 2008, she was granted a German survivor's pension on the basis of her residence in Germany.

In 2009, the Polish social insurance authority ZUS withdrew Mrs Wencel's retirement pension and demanded repayment of the pension payments she had received in the previous three years. She challenged this decision.

National proceedings

The court of first instance ruled against Mrs Wencel. She appealed. The Court of Appeal accepted that, from 1975 to 2008, Mrs Wencel had spent half her time in Poland and half in Germany and that she genuinely considered that she had simultaneously had two places of residence of equal status for the purposes of Article 1(h) of Regulation 1408/71. Given this finding, the court held that the ZUS' decision appeared to be at odds with the principle of free movement within the EU. Moreover, according to the Court of Appeal, a 1975 convention between Poland and Germany, that would have stood in the way of simultaneous collection of Polish retirement benefits and German survivor's benefits, was superseded by Regulation 1408/71.

The Court of Appeal referred three questions to the ECJ. The ECJ reformulated the questions as asking, in essence, whether EU law must be interpreted as allowing a social security institution to withdraw, retroactively, the pension right of an insured person who, for many years, has had two habitual residences simultaneously in two different Member States, on the ground that the insured person receives a survivor's pension in another Member State in the territory in which he has also been resident.

ECJ's findings

1. First, it is necessary to determine whether a person may legitimately, for the purposes of the application of Regulation 1408/71, claim to have two habitual residences simultaneously. In previous cases, the ECJ has held that the provisions of Regulation 1408/71 are not only intended to prevent persons from being left without social security cover because there is no legislation which applies to them, but also to prevent more than one national social security system from applying. This aim finds expression in particular in Article 13(1), which provides that "persons to whom this Regulation applies shall be subject to the legislation of a single Member State only" and in Article 13(2)(f), which provides that "a person to whom the legislation of a Member State ceases to be applicable, without the legislation of another Member State becoming applicable to him [...] shall be subject to the legislation of the Member State in whose territory he resides [...]". Since the Regulation uses residence as the connecting factor for determining the applicable legislation, it cannot be accepted, without depriving said provisions of all practical effectiveness, that a person may simultaneously have habitual residences in more than one Member State (§ 43-51).
2. It is for the member state to determine, in the light of all the relevant evidence before it, the Member State of habitual residence. In that regard, it should be noted (i) that Mrs Wencel worked in Poland as a child minder for her daughter-in-law; (ii) that she was granted a retirement pension on the basis of the contributions made by her for that purpose in Poland and (iii) that following the death of her husband, her centre of interests were located solely in Poland (§ 52-55).
3. Was ZUS entitled to withdraw Mrs Wencel's Polish retirement pension retroactively? Article 12(1) of Regulation 1408/71 provides that the regulation can neither confer nor maintain, in principle, the right to several benefits of the same kind for one and the same period of insurance. In this case, the two benefits in question cannot be considered to be "benefits of the same kind", Mrs Wencel's Polish retirement pension having been calculated on the basis of her employment in Poland and her German survivor's pension being paid to her on account of her late husband's employment in Germany (§ 56-58).
4. Article 12(2) of Regulation 1408/71 provides that national rules on the reduction, suspension and withdrawal of benefits in the case of overlapping with other social security benefits may be invoked even where such benefits were acquired under the legislation of another Member State. It follows that, although Mrs Wencel's Polish old-age pension cannot be withdrawn on the ground that she receives a German survivor's benefit, that pension may be reduced, up to the limit of the German benefits, on the basis of any Polish rule precluding the cumulation of benefits. It is for the referring court to ascertain whether such a rule exists in the present case (§ 59-62).
5. However, even if such a rule exists, and even if it is not precluded by Regulation 1408/71, it may still be precluded by the TFEU. The finding that a national measure may be consistent with secondary EU law, such as Regulation 1408/71, does not necessarily have the effect of removing that measure from the scope of the TFEU's provisions (§ 63-65).
6. It is clear that Mrs Wencel's situation falls within the scope of Article 45 TFEU on freedom of movement. It precludes national measures which, even though applicable without discrimination on grounds of nationality, are capable of hindering or rendering less attractive the exercise by Member State nationals of their fundamental freedoms, unless they pursue a legitimate objective in the public interest; are appropriate for the purpose of ensuring the attainment of that objective, and do not go beyond what is necessary to obtain the objective pursued. Accordingly, it is for the national court to assess the compatibility of the Polish legislation at issue with the requirements of EU law by determining whether that legislation does not in fact lead, in respect of Mrs Wencel, to an unfavourable situation in comparison with that of a person whose situation has no cross-border element and, if such a disadvantage is established, whether the national rule in question is justified by objective considerations and is proportionate to the legitimate objective pursued by national law (§ 66-72).

Ruling (judgment)
Article 10 of Regulation (EEC) No 1408/71 [...] must be interpreted as meaning that, for the purposes of the application of the regulation, a person cannot have simultaneously two habitual residences in two different Member States.

Under the provisions of Regulation No 1408/71, in particular Articles 12(2) and 46a, the competent institution of a Member State cannot, in circumstances such as those in the main proceedings, legitimately withdraw, retroactively, the entitlement to a retirement pension of the person concerned and require that person to repay any pension to which it is alleged he was not entitled on the ground that he receives a survivor's pension in another Member State in whose territory he has also been resident. However, the amount of the retirement pension paid in the first Member State may be reduced, up to the limit of the amount of the benefits received in the other Member State, by virtue of the application of any national rule precluding the cumulation of benefits.

Article 45 TFEU must be interpreted as not precluding, in circumstances such as those in the main proceedings, a decision requiring the amount of the retirement pension paid in the first Member State to be reduced, up to the limit of the benefits received in the other Member State, by virtue of the application of any rule precluding the cumulation of benefits, provided that decision does not lead, in respect of the recipient of those benefits, to an unfavourable situation in comparison with that of a person whose situation has no cross-border element and, where such a disadvantage is established, provided that it is justified by objective considerations and is proportionate to the legitimate objective pursued by national law, which it falls to the national court to verify.

ECJ 7 November 2013, case C-522/12 (*Tevfik Isbir - v - DB Services GmbH)* (**"Isbir"**), German case (POSTING DIRECTIVE)

Facts
The plaintiff in this case was Mr Isbir. He was employed by the defendant, DB Services. Under that company's collective wage agreement (the "DB collective agreement") he received an hourly wage of € 7.56 until 31 March 2008 and € 7.90 afterwards.
DB Services fell within the scope of the collective wage agreement for the cleaning sector (the "cleaning sector collective agreement"), which had been declared universally binding. This collective agreement provided for slightly higher minimum wages: € 7.87 per hour until 1 March 2008 and € 8.15 per hour afterwards. Mr Isbir brought legal proceedings in which he claimed the balance between the wages he had received and the wages he should have been paid according to the cleaning sector collective agreement. DB Services acknowledged that Mr Isbir was entitled to payment of, respectively, € 7.87 and € 8.15 per hour and that, if one took into account only the hourly wages he had actually received, he had been underpaid. However, pursuant to the DB collective agreement, Mr Isbir had also been paid € 600 in August 2007 and € 150 in January 2008 (the "lump sum payments"). When one took into account these lump sum payments, Mr Isbir had received on average no less than, € 7.87 and € 8.15 per hour respectively. Moreover, DB Services had paid certain sums into a savings account on behalf of Mr Isbir, pursuant to a German law designed to allow workers to acquire capital (the Fifth Law on Capital Formation).

National proceedings
The parties litigated their dispute all the way to the highest court for labour matters, the Bundesarbeitsgericht. The issue before this court was whether or not to include the lump sum payments in the minimum wage. The court recognised that this issue was a purely national one. However, the German legislature intended that "internal situations" and "situations falling within the scope of EU law, especially as regards cross-border posting of workers" should be interpreted uniformly and, given that the German law on mandatory working conditions concerning cross-border services (the "AEntG") transposes Posting Directive 96/71, there was, indirectly, an element of EU law involved. Accordingly, the Bundesarbeitsgericht referred questions to the ECJ on the interpretation of "minimum rates of pay" within the meaning of Article 3(1)(c) of Directive 96/71.This Article 3(1)(c) provides:

"Member States shall ensure that [...] the undertakings referred to in Article 1(1) guarantee workers posted to their territory the terms and conditions of employment covering the following matters which, in the Member State where the work is carried out, are laid down [...] by collective agreements [...] which have been declared universally applicable [...] in so far as they concern [...] the minimum rates of pay [...].
For the purpose of this Directive, the concept of minimum rates of pay referred to in paragraph 1(c) is defined by the national law and/or practice of the Member State to whose territory the worker is posted."

ECJ's findings
1. The ECJ reformulated the questions referred to it as asking whether Article 3(1)(c) of Directive 96/71 is to be interpreted as precluding the inclusion in the concept of "minimum wage" of elements of remuneration such as the lump sum payments and the capital formation contribution (§ 32).
2. The purpose of Directive 96/71 is not to harmonise systems for establishing terms and conditions of employment in the Member States. The latter are free to choose a system at the national level, provided that it does not hinder the provision of services between the Member States. Furthermore, Article 3(1) of the directive leaves it to the Member State to which a worker is posted to determine the minimum rates of pay. Thus, the task of defining what the constituent elements of the minimum wage are, comes within the law of the Member State concerned, as defined by the national courts (§ 33-37).
3. In 2005, in its *Commission - v - Germany judgment* (C-34/102), the ECJ held that certain allowances and supplements cannot be treated as constituent elements of the national minimum wage, namely payments which "alter the relationship between the service provided by the worker, on the one hand, and the consideration which he receives for that service, on the other". For example, if an employer requires a worker to carry out additional work (overtime) or to work under particular conditions (e.g. night shift), the compensation for that additional service is not taken into account for the purpose of calculating the minimum wage (§ 38-40).
4. The lump sum payments in this case appear to be in consideration for Mr Isbir's usual work. Admittedly, those payments were made outside the period in which the work was performed. However, that fact does not, in itself, affect the classification of the remuneration, provided that the lump sum payments were intended to introduce an increase in wages (§ 41-43).
5. The capital formation contribution seems to alter the relationship between work and remuneration. If this is indeed the case, it cannot be regarded as forming part of the usual relationship between the work done and the financial consideration for that work (§ 43-44).

Ruling (judgment)
Article 3(1)(c) of Directive 96/71 [...] is to be interpreted as meaning that it does not preclude the inclusion in the minimum wage of elements of remuneration which do not alter the relationship between the service provided by the worker, on the one hand, and the consideration which he receives by way of remuneration for that service, on the other. It is for the national court to verify whether that is the case as regards the elements of remuneration at issue in the main proceedings.

ECJ 13 March 2014, case C-38/13 (*Malgorzata Nierodzik - v - Samodzielny Publiczny Psychiatryczny Zaklad Opieki Zdrowotnej*) (**"Nierodzik"**), Polish case (FIXED-TERM WORK)

Facts
The plaintiff in the main proceedings was Ms Nierodzik. She was employed by the defendant, a psychiatric hospital, on a full-time basis. Her employment contract was for an indefinite duration (permanent contract). At her request, the contract was terminated by mutual agreement with effect from 15 February 2010, because she wished to take early retirement. Subsequently, the parties entered into a fixed-term contract for part-time employment for the five year period 16 February 2010 - 3 February 2015. This fixed-term contract was governed by Article 33 of the Polish Labour Code, which provides that "Where a fixed-term employment contract is concluded for a period exceeding six months, the parties may provide for the contract to be terminated on two weeks' notice." Accordingly, Ms Nierodzik's new contract provided that the hospital could terminate it at two weeks' notice. The hospital made use of this provision in 2012, when it terminated Ms Nierodzik's contract with effect from 21 April 2012.

Ms Nierodzik brought proceedings before the local court (*Sad Rejonowy*) in Bialystok, seeking reclassification of her fixed-term contract as a permanent contract and a declaration that she was entitled to the notice period of three months that would have applied had she continued to be employed on the basic of a permanent contract. She argued that the conclusion of a fixed-term contract for a period of five years was unlawful, as it was intended to circumvent national law and deprive her of the rights she could have relied upon if she had had a permanent contract.

National proceedings
The court was unsure whether said Article 33 is compatible with the Framework Agreement annexed to Directive 1999/70, the purpose of which is to "improve the quality of fixed-term work by ensuring the application of the principle of non-discrimination". Does Article 33 discriminate against fixed-term employees?

ECJ's findings
1. Clause 4(1) of the Framework Agreement prohibits treating fixed-term workers less favourably than comparable permanent workers "in respect of employment conditions". Does the length of a notice period fall within the definition of "employment conditions"? Based on the objective of Clause 4(1), the ECJ replies affirmatively (§ 20-29).
2. It is for the referring court to determine whether Ms Nierodzik was in a situation comparable to that of other workers employed on a permanent basis by the hospital for the same period. If the referring court finds that Ms Nierodzik did work similar or identical to that of a permanent worker (which may be deduced from the fact that until 15 February 2010 she occupied the same post as such a permanent worker and then continued to do similar work), then it should be found that her situation was comparable. In that case, the application of a two week notice periods constitutes different treatment in respect of employment conditions (§ 30-35).
3. As the ECJ has previously held, reliance on the mere temporary nature of employment is not capable of constituting an objective justification (§ 36-39).

Ruling (judgment)
Clause 4(1) of the Framework Agreement on fixed-term work [...] annexed to Council Directive 1999/70 [...] must be interpreted as precluding a national rule, such as that at issue in the main proceedings, which provides that, for the termination of fixed-term contracts of more than six months, a fixed notice period of two weeks may be applied regardless of the length of service of the worker concerned, whereas the length of the notice period for contracts of indefinite duration is fixed in accordance with the length of service of the worker concerned and may vary from two weeks to three months, where those two categories of workers are in comparable situations.

E**CJ 13 March 2014, case C-190/13** (*Antonio Márquez Samohano – v – Universitat Pompeu Fabra*) (**"Samohano"**), Spanish case (FIXED-TERM WORK)

Facts
Mr Samohano was employed by a Spanish university as a part-time associate lecturer. Initially, he was employed for the fixed term of one year. This contract was renewed three times, on each occasion for (almost) one year. When his fourth contract was not renewed, he brought legal proceedings, seeking the annulment of his "dismissal" or, alternatively, a finding that his "dismissal" was unfounded.

Unlike the general Spanish rules on fixed-term contracts, the rules applying to universities do not require objective reasons for the renewal of such contracts, nor do they impose a maximum total duration or a limit on the number of renewals, nor do they lay down, in respect of associate lecturers, any equivalent measure to prevent the abusive use of successive fixed-term contracts.

National proceedings
The court referred three questions to the ECJ. The first related to the Spanish law allowing universities to renew fixed-term employment contracts without limitation. The second and third questions related to differences, as regards fixed-term employment, between public and private sector workers and between categories of public sector workers.

ECJ's findings
1. According to case-law (see *Angelidaki*, C-378/07), the concept of "objective reason" in Clause 5(1)(a) of the Framework Agreement annexed to Directive 1999/70 must be understood as referring to precise and concrete circumstances characterising a given activity, which are therefore capable, in that particular context, of justifying the use of successive fixed-term employment contracts. Those circumstances may result, in particular, from the specific nature of the tasks or the pursuit of a legitimate social-policy objective. On the other hand, a national provision which merely authorises recourse to successive fixed-term contracts, in a general and abstract manner by a rule of statute or secondary legislation, does not accord with these requirements. Such a provision, which is of a purely formal nature, does not permit objective and transparent criteria to be identified in order to verify whether the renewal

of such contracts actually responds to a genuine need and is appropriate for achieving the objective pursued and necessary for that purpose. A provision such as the one at issue therefore carries a real risk that it will result in misuse (§ 45-47).

2. The Spanish rules at issue justify the conclusion and renewal by universities of fixed-term employment contracts with associate lecturers by the need to entrust "specialists with recognised competence", who exercise a professional activity otherwise than in a university, with the performance, on a part-time basis, of specific teaching tasks, so that those specialists can bring their knowledge and professional experience to the university, thus establishing a partnership between university teaching circles and professional circles. According to those rules, such an associate lecturer must have exercised a paid professional activity for a minimum period of several years before being employed by the university. Furthermore, the employment contracts in question are entered into and renewed on condition that the conditions relating to the exercise of the professional activity remain in place and those employment contracts must be terminated when the associate lecturer concerned reaches the age of retirement. Thus, the Spanish rules in question appear to lay down the precise and concrete circumstances in which fixed-term employment contracts may be concluded or renewed and to respond to a genuine need (§ 48-50).
3. Given that, in order to be recruited as an associate lecturer, the person in question must necessarily exercise a professional activity outside the university and that he may perform his teaching tasks only on a part-time basis, it does not appear that such a fixed-term employment contract is capable of undermining the purpose of the Framework Agreement, which is to protect workers against job instability (§ 52).
4. However, the Spanish authorities must ensure that the **actual** application of the rules in question satisfies the requirements of the Framework Agreement, having regard to the particular features of the activity concerned and to the conditions under which it is carried out. Those authorities must be in a position to identify objective and transparent criteria in order to verify whether the renewal of such contracts actually responds to a genuine need and is appropriate and necessary to achieve the objective pursued. It should be borne in mind that the renewal of fixed-term employment contracts in order to cover needs which are, in fact, not temporary in nature is not justified (see *Kücük*, C-486/10) (§ 54-56).
5. The mere fact that associate lecturers' contracts are renewed in order to cover a recurring or permanent need and that such a need can be met with a permanent contract is not, however, sufficient to preclude the existence of an objective reason within the meaning of Clause 5(1) of the Framework Agreement. Whilst such fixed-term contracts cover a permanent need, in that the associate lecturers perform tasks that are part of universities' usual activities, the fact remains that the need in terms of employment of associate lecturers remains temporary in so far as lecturers are supposed to resume their professional activity on a full-time basis at the end of their contract. Fixed-term contracts such as those at issue cannot be renewed for the performance of teaching tasks which normally come under the activity of the university's ordinary teaching staff (§ 57-58).
6. Questions 2 and 3 are irrelevant for the purpose of resolving the dispute in the main proceedings because they are hypothetical.

Ruling (judgment)

Clause 5 of the framework agreement on fixed-term work [...] must be interpreted as not precluding national rules, such as those at issue in the main proceedings, which allow universities to renew successive fixed-term employment contracts concluded with associate lecturers, with no limitation as to the maximum duration and the number of renewals of those contracts, where such contracts are justified by an objective reason within the meaning of clause 5(1)(a), which is a matter for the referring court to verify. However, it is also for that court to ascertain whether, in the main proceedings, the renewal of the successive fixed-term employment contracts at issue was actually intended to cover temporary needs and whether the rules such as those at issue in the main proceedings were not, in fact, used to meet fixed and permanent needs in terms of employment of teaching staff.

ECJ (Grand Chamber) 18 March 2014, case C-167/12 (*C.D. - v - S.T.*) (**C.D.**), UK case (MATERNITY LEAVE)

Facts

Ms D, an employee in the UK, entered into a surrogacy agreement to have a baby. The sperm was that of her partner but the egg was not hers. Her employer had a maternity leave and pay policy as well as an adoption leave and pay policy. Neither of those policies provided for leave and pay for "intended mothers" who have a baby through a surrogate arrangement with a "surrogacy mother". Ms D requested her employer for surrogacy leave, which, according to her, equated to adoption leave. Her request was denied. On 7 June 2011, she brought an action before the local Employment Tribunal, claiming, *inter alia*, on the grounds of sex and/or pregnancy and maternity.

The baby was born on 26 August 2011. Ms D immediately began to mother and breastfeed the child. She continued doing this for three months. On 19 December 2011 Ms D and her partner were granted full and permanent parental responsibility for the child.

National proceedings

The Employment Tribunal referred seven questions to the ECJ. With its first and second questions it asked whether the Maternity Directive 92/85 is to be interpreted as meaning that a "commissioning mother" (= an intended mother who has had a baby through a surrogacy agreement) is entitled to maternity leave under Article 8 of the directive, in particular in circumstances where the commissioning mother breastfeeds. In its questions 3-5 the referring court asked whether an employer's refusal to provide maternity leave to a commissioning mother constitutes sex discrimination under Directive 2006/54.

ECJ's findings

1. Maternity leave is intended (i) to protect a woman's health during and after pregnancy and (ii) to protect the special relationship between a woman and her child by preventing that relationship from being disturbed by the multiple burdens which would result from the simultaneous pursuit of employment. Objective (ii) concerns only the period after pregnancy and childbirth. Therefore, the grant of maternity leave pursuant to Article 8 of Directive 92/85 presupposes that the worker has been pregnant and has given birth to a child. Thus, a worker such as Ms D does not fall within the scope of Article 8, even where she breastfeeds (§ 34-40).
2. Member States may apply more favourable laws (§ 42).
3. The refusal to provide maternity leave in the situation of Ms D constitutes direct sex discrimination if the fundamental reason for the refusal applies exclusively to workers of one sex. This is

not the case in the UK, given that a commissioning father who has had a baby through a surrogacy arrangement is not entitled to maternity leave either (§ 46-47).
4. There is nothing in the ECJ's file to establish that the refusal of leave at issue puts female workers at a particular disadvantage compared with male workers. Consequently, the refusal to grant Ms D maternity leave does not constitute (direct or) indirect sex discrimination (§ 48-50).

Ruling (judgment)
1. Council Directive 92/85 [...] must be interpreted as meaning that Member States are not required to provide maternity leave pursuant to Article 8 of that directive to a female worker who as a commissioning mother has had a baby through a surrogacy arrangement, even in circumstances where she may breastfeed the baby following the birth or where she does breastfeed the baby.
2. Article 14 of Directive 2006/54 [...] read in conjunction with Article 2(1)(a) and (b) and (2)(c) of that directive, must be interpreted as meaning that an employer's refusal to provide maternity leave to a commissioning mother who has had a baby through a surrogacy arrangement does not constitute discrimination on grounds of sex.

ECJ 22 May 2014, case C-539/12 (*Z.J.R. Lock - v – British Gas Trading Limited*) (**"Lock"**), UK case (PAID LEAVE)

Facts
Mr Lock was and is employed by British Gas as a Sales Consultant. His job is to sell British Gas's energy products. His remuneration consists of basic pay in the amount of £ 1,222 per month and commission, the amount of which depends on the number and type of sales he achieves. In 2011 the commission averaged £ 1,912 per month. In other words, the commission constituted over 60% of his remuneration. Commission is paid several weeks or months after it has been earned.

Lock was on paid annual leave from 19 December 2011 to 3 January 2012. In December 2011 he was paid his basic pay for that month and an amount of £ 2,350 in respect of commission earned in a previous period. Because he generated no sales during his leave, he was paid less commission in January/February 2012 than he would have been paid had he worked during his leave. He brought a claim for outstanding holiday pay in the period 19 December 2011 – 3 January 2012.

National proceedings
The Employment Tribunal in Leicester decided to stay the proceedings and to refer questions to the ECJ regarding the correct interpretation of Article 7 of Directive 2003/88. The doubts of the Employment Tribunal as to the correct interpretation of Article 7 stemmed from the judgment by the Court of Appeal of 27 November 2002 in the *Evans – v – Malley* case, in which the court in a similar situation held that the employee was entitled to be paid only his basic pay in respect of annual leave.

ECJ's findings
1. By questions 1 and 2, the referring tribunal asks whether Article 7(1) of Directive 2003/88 precludes national legislation and practice under which a worker whose remuneration consists of a basic salary and sales commission is entitled, during paid leave, only to basic salary (§ 13).
2. Paid leave is a particularly important principle of EU law, whose implementation must be confined within the limits expressly laid down in Directive 2003/88. Article 7 of that Directive must be interpreted in the light of its wording and objective. The ECJ has previously held that the term "paid leave" in Article 7 means that workers must receive their normal remuneration during leave periods. The purpose of providing payment during leave periods is to put the worker in a position which is comparable to periods of work, as regards his salary (§ 14-17).
3. British Gas and the UK government submit that this purpose is achieved in respect of Mr Lock, given that during leave he received not only his basic salary but also commission resulting from sales which he had achieved during the weeks preceding the leave. This argument cannot be accepted, because Mr Lock might be deterred from taking leave, given that he will earn less commission in the period following his leave (§ 18-23).
4. By question 3, the referring court asks how to calculate the commission to which a worker such as Mr Lock is entitled during his leave (§ 25).
5. As held in *Williams* (EU:C:2011:588), all components of remuneration linked intrinsically to the performance of the worker's contractual duties as well as components relating to a worker's professional and personal status, such as allowances relating to seniority, length of service and professional qualifications, must be maintained during leave periods. By contrast, components intended to cover occasional or ancillary costs arising during work need not be taken into account. Mr Lock's commission is directly linked to his work for British Gas. Consequently, it must be taken into account when calculating his remuneration during leave periods (§ 26-33).
6. It is for the UK courts to assess, in the light of the principles identified in the ECJ's case-law whether, on the basis of an average over a reference period which is considered to be representative, the methods of calculating the commission payable to a worker such as Mr Lock achieve the objective pursued by Article 7 of Directive 2003/88 (§ 34).

Ruling (judgment)
1. Article 7(1) of Directive 2003/88 [...] must be interpreted as precluding national legislation and practice under which a worker whose remuneration consists of basic salary and commission, the amount of which is fixed by reference to the contracts entered into by the employer as a result of sales achieved by that worker, is entitled, in respect of his paid annual leave, to remuneration composed exclusively of basic salary.
2. The methods of calculating the commission to which a worker, such as the applicant in the main proceedings, is entitled in respect of his annual leave must be assessed by the national court or tribunal on the basis of the rules and criteria set out by the case law of the Court of Justice of the European Union and in the light of the objective pursued by Article 7 of Directive 2003/88.

ECJ 12 June 2014, case C-118/13 (*Gülay Bollacke - v - K + K Klaas & Kock B.V. & Co KG*) (**"Bollacke"**), German case (PAID LEAVE)

Facts
Mr Bollacke died in 2010. On the date of his death he had 140.5 days of annual leave outstanding. His widow, who was his sole beneficiary, asked her late husband's employer to pay her the value of the 140.5 days. The employer refused, arguing that there was no inheritable entitlement.

National proceedings
Mr Bollacke applied to the court, which referred three questions to the ECJ for a preliminary ruling.

ECJ's findings
1. When an employment relationship has terminated and, therefore, it is no longer possible to take paid annual leave, Article 7(2) of Directive 2003/88 provides that the worker is entitled to an allowance in lieu in order to prevent all enjoyment by the worker of that right, even in pecuniary form, being lost. In *Schulz-Hof* (C-350/06), the ECJ interpreted Article 7(2) as precluding national legislation or practices which provide that, on termination of employment, no allowance in lieu of paid annual leave is to be paid to a worker who has been unable to exercise his right to paid annual leave on account of long-term sick leave (§ 17-18).
2. Article 7(2) of Directive 2003/88, as interpreted by the ECJ, lays down no condition for entitlement to an allowance in lieu other than that relating to the fact that, first, the employment relationship has ended and, secondly, the worker has not taken all leave to which he was entitled (§ 23).
3. Receipt of financial compensation if the employment relationship has ended by reason of a worker's death is essential to ensure the effectiveness of the entitlement to paid annual leave. Indeed, if the obligation to pay annual leave were to cease with the end of the employment relationship because of the worker's death, the consequence of that circumstance would be an unintended occurrence, beyond the control of both the worker and the employer, retroactively leading to a total loss of the entitlement (§ 24-25).
4. Since Article 7(2) of Directive 2003/88 does not impose any condition for entitlement to an allowance in lieu other than that the employment relationship has ended, it must be held that receipt of such an allowance should not be made subject to the existence of a prior application for that purpose (§ 27).

Ruling (judgment)
Article 7(2) of Directive 2003/88 [...] must be interpreted as precluding national legislation or practice, such as those at issue in the main proceedings, which provide that the entitlement to paid annual leave is lost without conferring entitlement to an allowance in lieu of leave outstanding, where the employment relationship is terminated by the death of the worker. Receipt of such an allowance must not be dependent on a prior application by the interested party.

ECJ 19 June 2014, joined cases C-501 to 506/12 and C-540 and 541/12 (*Thomas Specht and others - v - Land Berlin and Rena Schmeel and another - v - Bundesrepublik Deutschland*) ("**Specht**"), German case (AGE DISCRIMINATION)

Facts
Mr Specht was a civil servant employed by the provincial Berlin government. Although the cases of the other civil servants dealt with in this judgment were slightly different, the issues are identical. This summary is therefore limited to the case of Mr Specht.
Until 1 August 2011, Mr Specht's remuneration was determined on the basis of the version of the Federal Law on remuneration of civil servants as it stood before that date (the "old law"). Under that law, civil servants were paid according to a pay scale which had a number of steps within each scale. Upon hiring, a civil servant was placed on a certain step, depending primarily on his age, and subsequently, he progressed up the pay scale depending primarily on seniority. This system was replaced on 1 August 2011 by an amended version of said Federal Law (the "new law"), under which age no longer plays a role in determining pay. Under the transitional rules governing the transfer of civil servants from the old to the new system, civil servants who had already been employed before 1 August 2011 were placed on the step of their pay scale corresponding to the step that reflected their existing salary (rounded up to the next step).

National proceedings
Mr Specht challenged the method for calculating his pay on the basis that it was age discriminatory. Following an unsuccessful complaint, he brought the case before the *Verwaltungsgericht Berlin*. It referred eight questions to the ECJ for a preliminary ruling on the interpretation of Directive 2000/78 (the "Directive").

Question 1 was whether the treatment of civil servants falls within the scope of the Directive.
Questions 2 and 3 were whether the Directive precludes a pay system such as that under the old law.
Questions 6 and 7 were whether the effect of the transitional rules is to perpetuate age discrimination and, if so, whether those rules are objectively justified.
Question 4 relates to the legal implications of a discriminatory practice such as that of the old law.
Question 5 relates to German law that requires a civil servant to assert a claim for back pay within a certain short period of time.

ECJ's findings

Question 1
1. The Directive applies to all persons, including civil servants, as regards employment and working conditions. How does this relate to Article 153(5) TFEU, which prohibits the EU from intervening in matters of pay? The answer is that that provision merely deals with the level of pay but not the system for determining that level. Therefore, the answer to this question is affirmative (§ 30-37).

Questions 2 and 3
2. Under the old law, the basic pay awarded to two civil servants appointed on the same day of the same grade, whose professional experience is equivalent but whose ages are different, differed according to their age at the time of appointment. It follows that these two civil servants are in a comparable situation and that there is direct age discrimination (§ 38-43).
3. Member States enjoy broad discretion in their choice, not only to pursue a particular aim in the field of social and employment policy, but also in the choice of measures capable of achieving that aim. The old law's aim of rewarding previous professional experience in a standard manner is legitimate. However, at the time of appointment, the sole criterion on the basis of which a particular step is initially allocated to a person without professional experience is age. That goes beyond what is necessary for achieving said aim. Hence, the age discrimination under the old law is not justified (§ 44-52).

Questions 6 and 7
4. The scheme put in place by the transitional provisions perpetuated a discriminatory system, given that some civil servants hired before 1 August 2011 ("established civil servants") received lower pay than others after that date, even though they were in comparable situations, solely on account of their age at the time

of appointment. The issue is whether this difference in treatment on grounds of age was justified (§ 53-61).

5. The transitional system aims to protect the acquired rights and the legitimate expectations of civil servants as to the future progression of their remuneration. The unions argued for the preservation of acquired rights. A draft law that had ensured the preservation of those rights would have met with opposition, which would have seriously compromised its prospects of adoption (§ 62-63).
6. Protection of the acquired rights of a category of persons constitutes an overriding reason in the public interest; see *Commission - v - Germany* (C-456/05) and *Hennigs and Mai* (C:2011:560) (§ 64).
7. For most established civil servants, the old law was more favourable than the new law. Accordingly, placing established civil servants directly within the scheme under the new law would have caused many of them to lose salary. On average, this loss would have amounted to € 80 - € 150 per month. The transitional scheme therefore appears suited to achieving the said aim. The question is whether it goes beyond what is necessary to achieve that aim (§ 65-69).
8. The referring court notes that it would have been preferable either (i) to apply the new law retroactively to all established civil servants or (ii) to apply a transitional scheme guaranteeing an established civil servant, whose salaries would be lower under the new law, their old salaries until such time as their experience qualifies them for higher pay under the new scheme. However, the German legislature had to take into account the following obstacles to such a solution:

- in view of budgetary constraints, the reform of the pay system in the civil service had to be made at neutral cost;
- the transition to the new system had to take place without excessive use of administrative resources, that is to say, as far as possible, without requiring case-by-case consideration;
- it would have been necessary to examine over 65,000 individual case in order to determine the appropriate "experience step" under the new law, a process that would have taken approximately 360,000 hours to complete;
- for many civil servants it was no longer possible to determine the periods of activity before they became civil servants that they could validly claim; it would therefore have been necessary, depending on the circumstances, either wholly to discount such periods or to recognise them without proof (§ 70-76).

9. As a rule, justifications based on increased cost and administrative difficulties cannot justify age discrimination. However, an individual examination of each particular case cannot be insisted on in order to establish, *a posteriori* and individually, previous periods of activity, since the management of the scheme must remain technically and economically viable. In those circumstances, it must be held that the German legislature did not exceed the limits of its discretion by taking the view that it was neither realistic nor desirable to apply the new classification system retroactively to all civil servants or to apply a "last pay guarantee" system (§ 77-80).
10. The damage that the transitional rules could cause to certain persons is difficult to determine and is possibly, as the German government contends, relatively small and relatively short- term (§ 81-84).
11. In view of the foregoing, it does not appear that, by adopting the transitional rules, the German legislature went beyond what was necessary to achieve the aim pursued (§ 85).

Question 4

12. The referring court states that it is impossible to interpret the old law in conformity with EU law and that German law does not permit levelling up in a case such as this. However, the referring court wonders whether levelling up is truly the only way of ensuring observance of the principle of equal treatment (§ 87-93).
13. In the first place, it is for the national court to determine the legal implications of the finding that its domestic legislation does not comply with the Directive (§ 94).
14. Secondly, in *Terhoeve* (C:1999:22) and *Landtová* (C:2011:415), the ECJ essentially held that, where national law, in infringement of EU law, provides for different treatment as between groups of people, observance of the principle of equality can be ensured only by granting to the persons within the disadvantaged category the same advantages as those enjoyed by the persons within the favoured category. In those judgments, the ECJ also stated that the arrangements applicable to members of the favoured group remained, for want of the correct application of EU law, the only valid point of reference. That approach is intended to apply only if there is such a valid point of reference. In the case of Mr Specht, it is not possible to identify a category of favoured civil servants, given that the discriminatory aspects arising from the transitional rules potentially affect all civil servants. It follows that *Terhoeve* and *Landtová* are not applicable to the case before the referring court (§ 95-97).
15. Thirdly, Member States are liable for legislation that violates EU law: see *Francovich* (C:1991:428), *Brasserie du pêcheur* (C-46/93) and *Transportes Urbanos* (C-118/08), provided three conditions have been satisfied: (i) the rule of EU law infringed must be intended to confer rights on the claimant, (ii) the breach of that rule must be sufficiently serious and (iii) there must be a direct causal link between the breach and the loss. In this case, condition (i) is satisfied. In order to determine whether condition (ii) has been satisfied, the national court must take into account that Article 6(1)(first subparagraph) of the Directive allows Member States broad discretion in their choice of aim and measures. That court may need to distinguish the periods before and after 8 September 2011, the date on which the ECJ delivered its judgment in *Hennigs*. In that judgment, the ECJ clarified the nature and extent of the obligation on Member States under the Directive in respect of national legislation such as the old law at issue in this case. As for condition (iii), it is for the referring court to establish whether this has been satisfied (§ 98-107).

Question 5

16. The question of time-limits for initiating a procedure for the enforcement of an obligation under the Directive is not governed by EU law. However, national rules on such time-limits may not be less favourable than those governing similar domestic situations (principle of equivalence) and may not make it in practice impossible or excessively difficult to exercise rights conferred by the EU legal order (principle of effectiveness).

Ruling (judgment)

1. Article 3(1)(c) of Council Directive 2000/78 [...] must be interpreted as meaning that pay conditions for civil servants fall within the scope of that directive.
2. Articles 2 and 6(1) of Directive 2000/78 must be interpreted as precluding a national measure, such as that at issue in the main proceedings, under which, within each service grade, the step determining basic pay is allocated, at the time of recruitment, on

the basis of the civil servant's age.

3. Articles 2 and 6(1) of Directive 2000/78 must be interpreted as not precluding domestic legislation, such as that at issue in the main proceedings, laying down detailed rules governing reclassification within a new remuneration system of civil servants who were in post before that legislation entered into force, under which the pay step that they are now allocated is to be determined solely on the basis of the amount received by way of basic pay under the old system, notwithstanding the fact that that amount depended on discrimination based on the civil servant's age, and advancement to the next step now to depends exclusively on experience acquired after that legislation entered into force.
4. In circumstances such as those of the cases before the referring court, EU law — and, in particular, Article 17 of Directive 2000/78 — does not require civil servants who have been discriminated against to be retrospectively granted an amount equal to the difference between the pay actually received and that corresponding to the highest step in their grade; it is for the referring court to ascertain whether all the conditions, laid down by the case-law of the Court of Justice of the European Union, are met for the Federal Republic of Germany to have incurred liability under EU law.
5. EU law does not preclude a national rule, such as the rule at issue in the main proceedings, which requires the civil servant to take steps, within relatively narrow time-limits — that is to say, before the end of the financial year then in course — to assert a claim to financial payments that do not arise directly from the law, where that rule does not conflict with the principle of equivalence or the principle of effectiveness. It is for the referring court to determine whether those conditions are satisfied in the main proceedings.

ECJ 3 July 2014, joined cases C-362/13, C-363/13 and C-407/13 (*Maurizio Fiamingo and others - v - Rete Ferroviaria Italiana SpA*) (**"Fiamingo"**), Italian case (FIXED-TERM WORK)

Facts

Mr Fiamingo and his two co-plaintiffs were employed as seafarers on board ferries that plied between two Italian ports. They were hired under fixed-term contacts for one or more voyages for a maximum of 78 days. Considering that their employment relationship had been unlawfully terminated, they brought proceedings, seeking a declaration that their fixed-term contracts were void, the conversion of those contracts into ones of indefinite duration, immediate reengagement or reinstatement and compensation for loss suffered. They based their case on the Framework Agreement on Fixed-Term Work annexed to Directive 1999/70 (the "Framework Agreement"), arguing that the use of fixed-term contracts was abusive because their use was explained not by the particular character of maritime work or the existence of objective reasons, but in order to remedy structural staff shortages.

National proceedings

On appeal, their claims were dismissed. The Court of Appeal held that the Framework Agreement does not apply to seafarers. It also held that the fixed-term contracts were lawful even though they did not indicate the termination date of the contracts but only their duration by the phrase "a maximum of 78 days". The plaintiffs brought their case to the Supreme Court. It referred four questions to the ECJ for a preliminary ruling.

ECJ's findings

1. The first question is whether the Framework Agreement applies to seafarers. The ECJ answers affirmatively (§ 27-40).
2. The second question is whether the Framework Agreement precludes national legislation which provides that fixed-term employment contracts must indicate their duration, but need not specify their termination date. The Framework Agreement does not contain any provision that lays down the formal particulars that must be included in fixed-term contracts. It defines the concept of a "fixed-term worker" and sets out the central characteristic of a fixed-term contract, namely the fact that the end of such a contract is determined "by objective conditions such as reaching a specific date, completing a specific task, or the occurrence of a specific event" (§ 41-46).
3. Inasmuch as this question seeks to determine whether the Framework Agreement is applicable to workers whose employment contracts, such as those at issue in the main proceedings, indicate only their duration (by referring to a "maximum of 78 days"), it suffices to state that such workers must be regarded as 'fixed-term workers' within the meaning of Clause 3(1) of the Framework Agreement, given that such a reference permits the end of those contracts to be determined objectively and that the Framework Agreement therefore applies to them (§ 47).
4. The third and fourth questions are whether the Framework Agreement precludes national legislation which, on the one hand, considers that the mere indication of one or several voyages to be made constitutes objective justification for the fixed-term contract and, on the other hand, provides that fixed-term contracts are converted into permanent contracts only where the worker has been employed continuously under such contracts by the same employer for a period longer than one year, the employment relationship being considered to be continuous when the time that elapses between contracts is less than or equal to 60 days (§ 49).
5. For the purposes of implementing Clause 5(1) of the Framework Agreement, a Member State can legitimately choose not to adopt the measure referred to in Clause 5(1)(a), which requires the renewal of such successive fixed-term employment contracts or relationships to be justified by objective reasons. It may, on the contrary, prefer to adopt one or both of the measures referred to in Clause 5(1)(b) and (c) which deal, respectively, with the maximum total duration of those successive fixed-term employment contracts or relationships and the number of renewals of such contracts or relationships, or it may even choose to maintain an existing equivalent legal measure, and it may do so provided that, whatever the measure thus chosen, the effective prevention of the misuse of fixed-term employment contracts or relationships is assured (§ 61).
6. Furthermore, where, as in the present case, EU law does not lay down any specific penalties in the event that instances of abuse are nevertheless established, it is incumbent on the national authorities to adopt measures that are not only proportionate, but also sufficiently effective and a sufficient deterrent to ensure that the measures taken pursuant to the Framework Agreement are fully effective (§ 62).
7. While, in the absence of relevant EU rules, the detailed rules for implementing such measures are a matter for the domestic legal order of the Member States, under the principle of their procedural autonomy, they must not, however, be less favourable than those governing similar domestic situations (principle of equivalence) or render impossible in practice or excessively difficult the exercise of rights conferred by EU law (principle of effectiveness) (§ 63).
8. Therefore, where the abuse of successive fixed-term contracts or relationships has taken place, a measure offering effective and equivalent guarantees for the protection of workers must be

capable of being applied in order duly to punish that abuse and nullify the consequences of the breach of EU law (§ 64).

9. The Framework Agreement does not lay down a general obligation on the Member States to provide for the conversion of fixed-term employment contracts into contracts of indefinite duration (§ 65).
10. It is for the referring court to determine to what extent the conditions for the application and effective implementation of the relevant provisions of national law constitute a measure adequate to deter and, if necessary, punish the misuse of successive fixed-term employment contracts or relationships (§ 67).
11. The Italian legislation at issue in this case, which lays down a mandatory rule that, when a worker has been employed continuously by the same employer under several fixed-term employment contracts for a period longer than one year, those contracts are converted into an employment contract of indefinite duration, is likely to satisfy the requirements of the Framework Agreement (§ 69).
12. This conclusion does not appear to be thrown into doubt by the provision of that legislation whereby only those fixed-term employment contracts separated by a time lapse of less than or equal to 60 days are considered to be 'continuous' and, hence, 'successive'. Such a lapse of time may generally be considered to be sufficient to interrupt any existing employment relationship and to have the effect that any contract signed after that time is not considered to be successive, especially where, as in the cases in the main proceedings, the duration of those fixed-term employment contracts cannot exceed 78 days. It would seem difficult for an employer, who has permanent and lasting requirements, to circumvent the protection against abuse afforded by the Framework Agreement by allowing a period of about two months to elapse following the end of every fixed-term employment contract (§ 71).
13. That said, it is for the national authorities and courts responsible for implementing the measures transposing Directive 1999/70 and the Framework Agreement, and which are called upon to rule on the classification of successive fixed-term employment contracts, to consider in each case all the circumstances at issue, taking account, in particular, of the number of successive contracts concluded with the same person or for the purposes of performing the same work, in order to ensure that fixed-term relationships are not abused by employers (§ 72).
14. In particular, in cases such as those in the main proceedings, the referring court must satisfy itself that the maximum duration of one year, provided for by the national legislation at issue in the main proceedings, is calculated in a manner that does not substantially reduce the effectiveness of the prevention and punishment of the misuse of successive fixed-term employment contracts. That might arise, if, rather than being calculated on the basis of the number of calendar days covered by those employment contracts, the maximum duration of one year was calculated on the basis on the number of days' service actually completed by the worker concerned, where, for example, as a result of the low volume of crossings, the latter number is considerably lower than the former (§ 73).

Ruling (judgment)

1. The Framework Agreement on fixed-term work [...], must be interpreted as meaning that it applies to workers, such as the appellants in the main proceedings, who are employed as seafarers under fixed-term employment contracts on board ferries making sea crossings between two ports situated in the same Member State.
2. The provisions of the Framework Agreement on fixed-term work must be interpreted as meaning that they do not preclude national legislation, such as that at issue in the main proceedings, which provides that fixed-term employment contracts have to indicate their duration, but not their termination date.
3. Clause 5 of the Framework Agreement on fixed-term work must be interpreted as meaning that it does not preclude, in principle, national legislation, such as that at issue in the main proceedings, which provides for the conversion of fixed-term employment contracts into employment contracts of indefinite duration only in circumstances where the worker concerned has been employed continuously under such contracts by the same employer for a period longer than one year, the employment relationship being considered to be continuous where the fixed-term employment contracts are separated by time lapses of less than or equal to 60 days. It is, however, for the referring court to satisfy itself that the conditions of application and the effective implementation of that legislation result in a measure that is adequate to prevent and punish the misuse of successive fixed-term employment contracts or relationships.

ECJ 10 July 2014, case C-198/13 (*Víctor Hernandez and others - v - Reino de España and others*) (**"Hernandez"**), Spanish case (INSOLVENCY)

Facts

Mr Hernandez and the other plaintiffs in this case were employed by, *inter alia*, Obras Alteamar SL. They were dismissed. On 2 October 2009 a Spanish court declared the dismissals to be invalid and ordered the defendant employers to pay them (i) severance compensation and (ii) their remuneration owed since the date of their dismissal. The plaintiffs attempted to enforce the judgment, but were unsuccessful because the companies in question were unable to pay, and on 11 June 2010 they were declared to be in a state of provisional insolvency. The plaintiffs applied to the Wage Guarantee Fund, known as "Fogasa". Fogasa paid part of what the defendants owed, thereby discharging its obligations under the Spanish law transposing Directive 2008/94 on the protection of employees in the event of insolvency of their employer. They then brought an action against the Spanish State for additional payments. Their claim was based on the following legislation.

Depending on the reason for, and the facts underlying, a dismissal, a court can declare a dismissal to be either unfair or invalid. In the event a dismissal has been declared to be unfair, the employer is ordered (i) to either reinstate the employee or to pay him compensation and (ii) to pay the employee his salary and other benefits for the period between the dismissal and the judgment. However, in order to protect employers against long delays in delivering judgment, Spanish law provides that if unfair dismissal proceedings last longer than 60 days, the State shall referred to the employer the salary he had to pay beyond 60 days (the "60 days rule"). The 60 days rule is there to protect the employer, not the employee. However, in the event an employer is insolvent, the employee may - by way of subrogation in the employer's right - claim such a refund from the State. In the event a dismissal is declared to be invalid, the employer must reinstate the employee and pay him his salary for the period between the dismissal and the judgment, except where the employer has ceased trading, in which case the employer may pay compensation rather than reinstating the employee. The difference with the situation where an insolvent employer dismissed an employee unfairly is that the 60 days rule does not apply. The issue in this case was essentially whether this difference complies with EU law.

National proceedings

The court before which the plaintiffs brought their claim against the State referred four questions to the ECJ.

ECJ's findings

1. The provisions of Spanish law in question must be assessed in the light of Article 20 of the Charter of Fundamental Rights and Freedoms of the EU (the "Charter"), which provides: "Everyone is equal before the law", on condition that they come within the scope of Directive 2008/94. According to Article 51(1) of the Charter, its provisions are addressed to the Member States only when they are implementing EU law. The concept of "implementing EU law" presupposes a degree of connection between the measure of EU law and the national measure at issue which goes beyond the matters concerned being closely related or one of those matters having an indirect impact on the other. In particular, fundamental EU rights cannot be applied in relation to national legislation if the relevant provisions of EU law do not impose any specific obligation on Member States with regard to the situation at issue in the main proceedings. The mere fact that a national measure comes within an area in which the EU has powers cannot bring it within the scope of EU law, and, therefore, cannot render the Charter applicable (§ 32-36).
2. In order to determine whether a national measure involves the implementation of EU law for the purposes of Article 51(1) of the Charter, it is necessary to determine, inter alia, (i) whether that national legislation is intended to implement a provision of EU law; (ii) the nature of the legislation at issue and whether it pursues objectives other than those covered by EU law, even if it is capable of indirectly affecting EU law; and also (iii) whether there are specific rules of EU law on the matter or rules which are capable of affecting it (§ 37).
3. As regards, first, the objectives pursued by the legislation at issue in the main proceedings, it appears that that legislation sets in place a regime under which the Spanish State is liable in respect of 'irregularities' in the administration of justice. To that end, the law grants the employer, in cases in which the duration of unfair dismissal proceedings exceeds 60 days, the right to request from the Spanish State the payment of remuneration paid after the 60th working day following the date on which those proceedings were commenced. Even though the employee may directly request from the Spanish State payment of that remuneration if the employer is in a state of provisional insolvency and has not yet paid that remuneration, this is by operation of a legal subrogation to the right granted in favour of the employer against the Spanish State, not by operation of the employee's own right. It follows that the purpose of the law is not to recognise an employee's claim against his employer resulting from his employment relationship, to which Directive 2008/94 is capable of applying, but to recognise a right of a separate nature (§ 38-39).
4. In addition, it should be pointed out that the right resulting from the 60 days rule does not cover remuneration which has become due during the first 60 working days of unfair dismissal proceedings. Thus, in so far as those provisions do not confer entitlement to any payment where the duration of the proceedings challenging a dismissal does not exceed 60 working days, those provisions do not guarantee the payment of remuneration, as required by Directive 2008/94 (§ 40).
5. It follows from the characteristics of the legislation at issue that that legislation pursues an objective which differs from that of guaranteeing a minimum protection for employees in the event of the employer's insolvency, as referred to in Directive 2008/94, namely, that of providing for compensation by the Spanish State for the adverse consequences resulting from the fact that judicial proceedings last for more than 60 working days (§ 41).
6. The mere fact that the legislation at issue in the main proceedings come within an area in which the European Union has powers under Article 152(2) TFU cannot render the Charter applicable (§ 46).
7. It follows from the foregoing that the 60 days rule cannot be regarded as implementing EU law within the meaning of Article 51(1) of the Charter and, therefore, cannot be examined in the light of the guarantees of the Charter and, in particular, of Article 20 thereof (§ 48).

Ruling (judgment)

National legislation, such as that at issue in the main proceedings, according to which an employer can request from the Member State concerned payment of remuneration which has become due during proceedings challenging a dismissal after the 60th working day following the date on which the action was brought and according to which, where the employer has not paid that remuneration and finds itself in a state of provisional insolvency, the employee concerned may, by operation of legal subrogation, claim directly from that State the payment of that remuneration, does not come within the scope of Directive 2008/94 [...] on the protection of employees in the event of the insolvency of their employer and cannot, therefore, be examined in the light of the fundamental rights guaranteed by the Charter of Fundamental Rights of the European Union and, in particular, of Article 20 thereof.

OPINIONS

Opinion of Advocate-General Kokott of 15 May 2014 in case C-318/13 (*X - v - Finland*), Finnish case (SEX DISCRIMINATION)

Facts

In 1991 a male employee (X) suffered an accident at work. As a result, he was (slightly) disabled for life. As per Finnish social security law, his employer had taken out a disability insurance policy with a private insurance company. Because the disability in question was not of a serious nature, the insurance company did not pay out periodic sums, but a lump sum based, *inter alia*, on the employee's statistical life expectancy. The insurance company calculated statistical life expectancy differently for men and women. This resulted in X receiving € 278.89 less than he would have received had he been a woman. X took the insurance company to court, claiming an additional € 278.89. He lost the case in all instances, the highest court turning down his claim in 2008.

National proceedings

In 2009, X brought a claim against the Finnish State. The court referred two questions to the ECJ. The questions related primarily to Directive 79/7 on the progressive implementation of the principle of equal treatment for men and women in matters of social security. Article 4(1) of this directive provides:

"The principle of equal treatment means that there shall be no discrimination whatsoever on ground of sex, either directly or indirectly, by reference in particular to [...] the calculation of benefits [...]."

The first question was whether this provision precludes a distinction such as that at issue. If so, the second question was whether the State of Finland was liable.

Opinion

1. The accident occurred before Finland joined the EU. Does this mean that Directive 79/7 does not apply? The Advocate-General replies in the negative (§ 18-21).
2. Directive 79/7 applies to social security. Does this mean that an insurance scheme with a private insurance company falls outside the scope of the directive? The Advocate-General replies in the negative (§ 22-25).

First question

3. The Finnish government argues that there is no discrimination, given that men and women are both eligible for a sum that is actuarially equal. The Advocate-General does not subscribe to this view. The issue is not whether the insurance scheme at issue is discriminatory, the issue is whether it is objectively justified (§ 26-29).
4. Unlike Directive 2004/113 (equal treatment between men and women in the access to and supply of goods and services) and unlike Directive 2006/54 (equal treatment of men and women in employment), Directive 79/7 does not allow statistical life expectancy to be taken into account. This indicates that, in Directive 79/7, the absence of an exception to the prohibition of sex discrimination on the basis of life expectancy was intentional (§ 32-34).
5. Primary EU law allows direct sex discrimination only if the distinction is necessary on account of relevant differences between men and women that can be determined with certainty (§ 38).
6. A distinction is only relevant if it aligns with the fundamental principles of the EU, as formulated in Article 2 TEU and Article 21 of the Charter. This requirement is not satisfied in the present case, both for actuarial reasons (not all women live longer than men) and for normative reasons. The prohibition of sex discrimination is on a par with the prohibition of racial discrimination. It would surely be unacceptable to distinguish as to life expectancy on the basis of race. Both reasons (actuarial and normative) preclude making a distinction on the basis of gender based on generalised assumptions (§ 39-54).
7. The conclusion so far is that neither Directive 79/7 nor primary EU law allow for unequal treatment based on gender-specific statistics. Therefore, the Finnish courts should have disapplied the discriminatory provision in the insurance scheme (§ 55-57).

Second question

8. The referring court argues that Finland is not liable, observing (i) that there is no case law on Directive 79/7, (ii) that in its *Test-Achats* judgment (ECJ 1 March 2011, case C-236/09), the ECJ accepted a transitional period for compliance and (iii) that the Finnish legislator could reasonably rely on Directives 2004/113 and 2006/54, which allow gender-specific actuarial distinction (§ 61).
9. The breach of EU law did not occur in 1991 (date of the accident), nor in 2005 (when the insurance company paid out to X), but in 2008, when the highest Finnish court turned down X's claim. At that time, there was no case law on Directive 79/7, and the European Commission held the view that gender-specific actuarial factors were legitimate. The issue of whether Finland can be held liable for X's loss must be seen in the light of this background (§ 63-66).
10. According to settled ECJ case-law (see *Francovich*, case C-6/90, and *Brasserie du pêcheur*, case C-46/93), an individual who has sustained a loss on account of his national legislation being in breach of EU law is entitled to compensation by the State if three conditions have been satisfied: a. the rule that was breached aims to bestow rights on individuals; b. the breach is "sufficiently serious"; and c. there is a direct causal link between the breach and the loss. The referring court's question relates exclusively to requirement b (§ 68-69).
11. When determining whether a State's breach of EU law is "sufficiently serious", account must be taken of (i) the extent to which the breached rule is clear and precise; (ii) the extent to which the breached rule allows the national authorities a margin of appreciation; (iii) whether the rule was breached or the loss was inflicted intentionally; (iv) whether a mistaken notion of EU law was excusable and (v) whether an EU institution (may have) contributed to the breach (§ 70).
12. Criteria (i) and (ii) could lead one to conclude that Finland's breach of EU law was sufficiently serious, criteria (iii) to (v) seem to lead to the opposite conclusion. Even if the wording and the context of Directive 79/7 could be said to be sufficiently clear and precise, and even if Article 4 of the Directive can be said to leave the national legislature no margin of appreciation, the Finnish legislation and the Finnish courts cannot be said to have intentionally and inexcusably breached Article 4. Prior to the *Test-Achats* judgment, it was not clear that gender-specific actuarial distinctions were in breach of EU law. In fact, the EU legislator itself breached EU law in a similar context, by adopting Directive 2004/113 [*which the ECJ declared invalid with effect from 21 December 2012, Editor*]. The EU's legislative activity in the year 2004-2008 may well have caused the Finnish legislature to err (§ 72-76).
13. The Advocate-General sees no reason to limit the ECJ's judgment in terms of the date from which it is effective (§ 79-82).

Opinion

1. Article 4(1) of Directive 79/7 must be interpreted as precluding national law that provides for an actuarial calculation based on life expectancy for the purpose of determining the amount of a social security benefit, where the use of this criterion caused a man to be paid a one-off payment of less than a woman of the same age would have received in similar circumstances.
2. It is up to the national court to determine whether the requirements for State liability have been satisfied. However, when assessing whether the State's breach of EU law was sufficiently serious, account must be taken of the following:

- that the ECJ has not expressly addressed the issue of whether gender-specific actuarial criteria to calculate social security benefits fall within the scope of Directive 79/7;
- that the ECJ did not declare Article 5(2) of Directive 2004/113 (which allows such actuarial differentiation) invalid until 2011, in its *Test-Achats* judgment, and even then admitted a transitional period;
- that the EU legislator, in Directives 2004/113 and 2006/54, allowed States to take account, under certain conditions, of such actuarial factors when calculating social security benefits, thereby leading national legislatures to believe that they could do likewise.

Opinion of Advocate-General Jääskinen delivered on 17 July 2014 in case C-354/13 (*FOA acting on behalf of Karsten Kaltoft - v - KL acting on behalf of the Municipality of Billund*((**"Kaltoft"**), Danish case (DISABILITY DISCRIMINATION)

Facts

Karsten Kaltoft had been working for the Municipality of Billund in Denmark as a child-minder hired to care for other people's children in his own home for fifteen years when his employment was terminated on 22 November 2010. A decline in the number of children was stated as the grounds for dismissal, yet there was no express reason given for selecting Mr Kaltoft. Throughout his employment Mr Kaltoft never weighed less than 160 kg and, with, therefore, a BMI of 54, he was classified as obese. Whilst Mr Kaltoft's obesity was discussed at his official dismissal hearing, the parties disagree as to how it came to be discussed and the Municipality denies that it formed part of the basis of its dismissal decision.

National proceedings

Mr Kaltoft submits that he was unlawfully discriminated against because of his obesity, and that the Municipality of Billund must pay him damages by way of compensation for the discrimination in which it engaged. He instituted proceedings before the Retten i Kolding, in pursuit of this claim. This court referred four questions to the ECJ for a preliminary ruling. The first question was whether it is contrary to EU law to discriminate on grounds of obesity in the labour market. In other words, is obesity a self-standing ground of discrimination that is unlawful on the basis of a general principle of EU law? The fourth question was whether obesity can be deemed to be a disability covered by the protection provided for in Directive 2000/78 and, if so, which criteria will be decisive for the assessment as to whether a person's obesity means specifically that that person is protected by the prohibition of discrimination on grounds of disability as laid down in that directive. This question asks whether obesity is included in the notion of disability.

Opinion

1. If there is a general prohibition on discrimination in the labour market that is provided by EU law, it would have to be grounded either on (i) the EU Charter provision on non-discrimination (Article 21) or on (ii) general EU law principles resulting from constitutional traditions common to the Member States or guaranteed in the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) (§ 18).
2. The EU Charter only binds the Member States when they are "implementing" EU law. The fact that discrimination occurs in a substantive field such as the labour market is an insufficient foundation for concluding that a Member State is 'implementing' EU law. Equally, where the objective of the main proceedings does not concern the interpretation or application of a rule of EU law other than those set out in the Charter, the link will be insufficient. Rather, before a legal situation is covered by EU fundamental rights law, as reflected in the EU Charter, there must be a certain degree of connection with EU law above and beyond the fact that matters covered are closely related, or one of those matters has an indirect impact on the other. The requisite link will be established when there is a specific and identified provision of Member State law, and in this case the law of Denmark, falling within the (substantive) scope of an equally specific and identified provision of EU law, whether it be found in an EU legislative act, or in the Treaties themselves. A dual identification exercise of this kind does not appear in the case file. Rather, reliance is placed on the existence of a general principle of EU law precluding all discrimination in the labour market (§ 19-22).
3. While EU "fundamental rights" encompasses the general principle of non-discrimination, and binds the Member States where the national situation at issue falls within the scope of EU law, it does not follow from this that the scope of Directive 2000/78 should be extended by analogy beyond the discrimination based on the grounds listed exhaustively in Article 1 thereof (§ 25).
4. The concept of "disability" is not defined by Directive 2000/78, and nor does the directive refer to the laws of the Member States for its definition. Thus, an autonomous and uniform interpretation of "disability" has been developed in the Court's case-law, and more recently against the background of the United Nations Convention on the Rights of Persons with Disabilities, which the European Union approved by a decision of 26 November 2009. The Convention forms an integral part of the EU legal order from its time of entry into force. It is also worth emphasising that Directive 2000/78 must, as far as possible, be interpreted in a manner that is consistent with the UN Convention. The Court has held that the purpose of Directive 2000/78, as regards employment and occupation, is "to combat *all forms of discrimination on grounds of disability*" (§ 29).
5. The notion of "disability" for the purposes of Directive 2000/78 must be understood as referring to limitations which result, in particular, from (i) long-term (ii) physical, mental or psychological impairments (iii) which in interaction with various barriers (iv) may hinder (v) the full and effective participation of the person in professional life (vi) on an equal basis with other workers. The Court has further held that the expression 'persons with disabilities' in Article 5 of Directive 2000/78 must be interpreted as encompassing all persons having a disability corresponding with this definition. The scope of Directive 2000/78 cannot, through reference to the general EU law principle of non-discrimination, be extended by analogy beyond the grounds of discrimination listed in Article 1 thereof. Therefore sickness as such is not a ground of discrimination that is prohibited by Directive 2000/78 (§ 30-31).
6. Taking into account the objective of Directive 2000/78, which is, in particular, to enable a person with a disability to have access to or participate in employment, the concept of disability must be understood as referring to a hindrance to the exercise of professional activity, not only to the impossibility of exercising such activity (§ 33).
7. It is sufficient that a long term condition causes limitations in full and effective participation in professional life *in general* on equal terms with persons not having that condition. No link has to be made between the work concerned and the disability in issue before Directive 2000/78 can apply. So, for example, a wheelchair bound travel agent who is dismissed because a new owner sees her disability as inconsistent with a new image for the agency that he wishes to develop will not be precluded from relying on Articles 1 and 2 of Directive 2000/78 just because all her co-workers also perform the task required seated, so that the job in question is not affected by her condition (§ 38-39).
8. The Court's case-law has referred to impossibility of carrying out work *or* hindrance in the exercise of professional activity. This reflects a distinction between absolute or relative incapacity in relation to specific work, and full and effective participation in professional life in general. This distinction is important because the Municipality of Billund, Denmark and the Commission argue that it cannot be contended that Mr Kaltoft's obesity entails a

limitation that may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers because he worked for 15 years as a childminder with the municipality, and he has participated in professional life on an equal footing with other childminders in their employ. In other words, Mr Kaltoft's obesity may not necessarily have impeded his work as a childminder (§ 42-43).

9. It is true that in relation to the impossibility of, or the existence of obstacles to, the carrying out of specific work, the applicability of the concept of disability depends on the concrete circumstances of the work in question, not abstract medical or social insurance classifications concerning the degree of the impairment as such. As Advocate General Bot has recently observed, what is decisive is the "obstacles" a person encounters when they come into contact with that environment. However, there can be long-term physical, mental or psychological impairments that do not make impossible certain work, but which render the carrying out of that job or participation in professional life objectively more difficult and demanding. To return to the example mentioned above of a wheelchair bound travel agent: working from a wheelchair is an obstacle to full and effective participation in professional life on equal terms with persons not having that condition, because of the physical difficulties that inevitably arise in performing tasks, even if it does not affect the capacity of the person concerned to carry out the specific work in question (§ 44-45).
10. It is established that Directive 2000/78 aims in particular at ensuring that persons with disabilities have access to, and can participate in, employment. Therefore, the concept of disability must be understood as referring to a hindrance to the exercise of professional activity, not only to the impossibility of exercising such activity. Moreover, the argument above put forward by the Municipality of Billund, Denmark, and the Commission would have the absurd result of excluding from the scope of Directive 2000/78 persons who either already had a disability when they managed to secure a specific job, or who acquired a disability in the course of an employment contract, but who managed to keep working. Hence, it is sufficient that a long term condition causes limitations in full and effective participation in professional life in general on equal terms with persons not having that condition (§ 44-47).
11. It is not necessary to go into the issue of whether falsely presumed disability, and discrimination resulting therefrom, is captured by Directive 2000/78 (§ 48).
12. Classification of obesity as an illness by the WHO is not as such sufficient to render it a disability for the purposes of Directive 2000/78. This is so because, as explained above, illnesses as such are not encapsulated by Directive 2000/78. In cases where the condition of obesity has reached a degree that it, in interaction with attitudinal and environmental barriers, as mentioned in the UN Convention, plainly hinders full participation in professional life on an equal footing with other employees due to the physical and/or psychological limitations that it entails, then it can be considered to be a disability. "Mere" obesity in the sense of WHO class I obesity is insufficient to fulfil the criteria in the Court's case-law on 'disability' under Directive 2000/78. In fact, for a person of Mr Kaltoft's height (1.72 m) a weight of 89 kg is sufficient to lead to BMI over 30. In my opinion, most probably only WHO class III obesity, that is severe, extreme or morbid obesity, will create limitations, such as problems in mobility, endurance and mood, that amount to a 'disability' for the purposes of Directive 2000/78 (§ 54-56).
13. At the hearing, the representative of the employer was concerned that admitting obesity in any form as being a disability would lead to intolerable results because alcoholism and drug addiction could then, as serious illnesses, be covered by that notion. In my opinion this concern is misplaced. It is true that, in medical terms, alcoholism and addiction to psychotropic substances are diseases. This does not, however, mean that an employer would be required to tolerate an employee's breach of his contractual obligations by reference to these diseases. For example, a dismissal because the employee comes to work intoxicated is not based on the disease of alcoholism or drug addiction as such, but is a breach of the employment contract which the employee could have avoided by abstaining from consuming alcohol or the substance in question. Any employer is entitled to expect such an employee to seek the medical treatment that is necessary for him to be able to properly perform his obligations under the contract of employment. It is worth recalling that Article 5 of Directive 2000/78 merely requires employers to provide "reasonable accommodation" to persons with disabilities (§ 59).

Proposed reply

1. EU law does not include a general principle prohibiting employers from discriminating on grounds of obesity in the labour market.
2. Severe obesity can be a disability covered by the protection provided in Council Directive 2000/78 [...] if it, in interaction with various barriers, hinders full and effective participation of the person concerned in professional life on an equal basis with other workers. It is for the national court to determine if this is the case with respect to the plaintiff in the main proceedings.

PENDING CASES

Case C-665/13 (*Sindicato Nacional dos Profissionais de Seguros e Afins – v – Via Directa – Companhia de Seguros SA*), reference lodged by the Portuguese *Tribunal do Trabalho de Lisboa* on 16 December 2013 (DISCRIMINATION OF PUBLIC SECTOR EMPLOYEES)

1. Must the principle of equal treatment, from which the prohibition of discrimination is derived, be interpreted as applying to public sector employees?
2. Does the fact that the State imposed a unilateral suspension of the payment of those items of remuneration and applied this only to a specific category of workers – those in the public sector – constitute discrimination having regard to the nature of the employment relationship?

Case C-19/14 (*Ana-Maria and Angelina Talasca – v – Stadt Kevelaer*), reference lodged by the German *Sozialgericht Duisburg* on 16 January 2014 (FREE MOVEMENT – SOCIAL INSURANCE)

Is the second sentence of Paragraph 7(1) of Book II of the *Sozialgesetzbuch* (SGB) compatible with EU law? If not, must the legal situation be altered by the Federal Republic of Germany, or does a different legal situation arise immediately, and if so, which? Does the second sentence of Paragraph 7(1) of Book II of the SGB remain in force until a (possibly) necessary change to the law by the institutions of the Federal Republic of Germany?

Note: by order dated 3 July 2014, the request for a preliminary ruling was declared inadmissible.

Cases C-25/14 and C-26/14 (respectively, *UNIS – v – State and others* and *Beaudout Père et Fils SARL – v – State and others*), reference lodged by the French *Conseil d'État* on 20 January 2014 (FREEDOM OF SERVICE PROVISION)

Is compliance with the obligation of transparency flowing from Article 56 [*freedom of service provision*] TFEU a mandatory prior condition for the extension, by a Member State, to all undertakings within a sector, of a collective agreement under which a single operator, chosen by the social partners, is entrusted with the management of a compulsory supplementary social security scheme for employees?

Case C-47/14 (*Holterman Ferho Exploitatie BV and others – v – F.L.F. Spies von Büllesheim*), reference lodged by the Dutch *Hoge Raad der Nederlanden* on 30 January 2014 (EMPLOYEE AND DIRECTOR LIABILITY)

1. Must Articles 18-21 of Regulation 44/2001 [*on the recognition and enforcement of judgments*] be interpreted as precluding the application by the courts of Article 5(1)(a) or of Article 5(3) of that Regulation [*that a person may be sued, respectively, in the place of performance of the obligation and the place where the harmful event occurred*] in a case such as that at issue here, where the defendant is held liable by the company not only in his capacity as director of that company on the basis of the improper performance of his duties or on the basis of unlawful conduct, but quite apart from that capacity, is also held liable by that company on the basis of intent or deliberate recklessness in the execution of the contract of employment entered into between him and the company?
2. (a) If the answer to question 1 is in the negative, must the term 'matters relating to a contract' in Article 5(1)(a) of Regulation 44/2001 then be interpreted as also applying to a case such as that at issue here, where a company holds a person liable in his capacity as director of that company on the basis of the breach of his obligation to properly perform his duties under company law? b) If the answer to question 2(a) is in the affirmative, must the term 'place of performance of the obligation in question' in Article 5(1)(a) of Regulation 44/2001 then be interpreted as referring to the place where the director performed or should have performed his duties under company law, which, as a rule, will be the place where the company concerned has its central administration or its principal place of business, as referred to in Article 60(1)(b) and (c) of that Regulation?
3. (a) If the answer to question 1 is in the negative, must the term 'matters relating to tort, delict or quasi delict' in Article 5(3) of Regulation 44/2001 then be interpreted as also applying to a case such as that at issue here, where a company holds a person liable in his capacity as director of that company on the basis of the improper performance of his duties under company law or on the basis of unlawful conduct? (b) If the answer to question 3(a) is in the affirmative, must the term 'place where the harmful event occurred or may occur' in Article 5(3) of Regulation 44/2001 be interpreted as referring to the place where the director performed or should have performed his duties under company law, which, as a rule, will be the place where the company concerned has its central administration or its principal place of business, as referred to in Article 60(1)(b) and (c) of that Regulation?

Case C-56/14 (*Openbaar Ministerie – v – Marc de Beuckeleer and others*), reference lodged by the Belgian *Rechtbank van eerste aanleg te Turnhout* on 5 February 2014 (SOCIAL DUMPING)

Is the prior declaration requirement for employees imposed under the LIMOSA system, as provided for in Articles 137 to 152 of the Belgian Programme Law of 27 December 2006, incompatible with the freedom to provide services guaranteed by Article 49 EC and Article 56 TFEU?

Case C-72/14 (*Rijksbelastingdienst – v – X*), reference lodged by the Dutch *Gerechtshof te 's-Hertogenbosch* on 10 February 2014 (FREE MOVEMENT – SOCIAL INSURANCE)

In the *Fitzwilliam* judgment (case C-202/97) the Court of Justice ruled that an E 101 certificate, issued by the competent institution of a Member State, is binding on the social security institutions of other Member States, even if the content of that certificate is incorrect. Does that decision also apply to cases such as that at issue here, where the designation rules of the Regulation do not apply?

Is it significant for the answer to that question that it was not the intention of the competent institution to issue an E 101 certificate, yet for administrative reasons it consciously and deliberately used documents which, judging by their format and content, appear to be E 101 certificates, while the interested party believed, and was also reasonably entitled to believe, that he had received such a certificate?

Case C-80/14 (*Union of Shop, Distributive and Allied Workers (USDAW) and Mrs B. Wilson – v – WW Realisation 1 Ltd (in liquidation), Ethel Austin Ltd and Secretary of State for Business, Innovation and Skills*), reference lodged by the UK *Court of Appeal (England & Wales) (Civil Division)* on 14 February 2014 (COLLECTIVE REDUNDANCIES AND INSOLVENCY)

1. (a) In Article 1(1)(a)(ii) of Collective Redundancies Directive 98/59, does the phrase "at least 20" refer to the number of dismissals across all of the employer's establishments in which dismissals are effected within a 90 day period, or does it refer to the number of dismissals in each individual establishment? (b) If Article 1(1)(a)(ii) refers to the number of dismissals in each individual establishment, what is the meaning of "establishment"? In particular, should "establishment" be construed to mean the whole of the relevant retail business, being a single economic business unit, or such part of that business as is contemplating making redundancies, rather than a unit to which a worker is assigned their duties, such as each individual store.
2. In circumstances where an employee claims a protective award against a private employer, can the Member State rely on or plead the fact that the Directive does not give rise to directly effective rights against the employer in circumstances where: (i) The private employer would, but for the failure by the Member State properly to implement the Directive, have been liable to pay a protective award to the employee, because of the failure of that employer to consult in accordance with the Directive; and\ (ii) That employer being insolvent, in the event that a protective award is made against the private employer and is not satisfied by that employer, and an application is made to the Member State, that Member State would itself be liable to pay any such protective award to the employee under domestic legislation that implements the Insolvency Directive 2008/94, subject to any limitation of liability imposed on the Member State's guarantee institution pursuant to Article 4 of that Directive?

Case C-86/14 (*Marta León Medialdea – v – Ayuntamiento de Huétor Vega*), reference lodged by the Spanish *Juzgado de lo Social No 1 de Granada* on 18 February 2014 (FIXED-TERM EMPLOYMENT)

Is a worker employed under a non-permanent contract of indefinite duration, as envisaged by the legislation and the case-law, a fixed-term worker within the meaning of the definition set out in Directive 1999/70/EC?

Is it compatible with EU law for the national court to interpret and apply national law in such a way that, as regards fixed-term employment contracts in the public sector entered into in circumvention of the law which are transformed into non-permanent contracts of indefinite duration, the public authorities may fill or eliminate the posts held by persons employed under such contracts unilaterally, without paying any compensation to the worker, where the legislation does not lay down other measures to limit the misuse of temporary contracts?

Would the same conduct by the public authority be compatible with EU law if, in filling or eliminating the post, the worker concerned was paid the compensation provided for in the event of termination of temporary contracts entered into lawfully?

Would the same conduct by the public authority be compatible with EU law if, in order to fill or eliminate the post, it was required to have recourse to the procedures and grounds provided for in the event of dismissal for objective reasons and to pay the same compensation?

Case C-115/14 (*RegioPost GmbH & Co. KG – v – Stadt Landau*), reference lodged by the German *Oberlandesgericht Koblenz* on 11 March 2014 (SOCIAL DUMPING)

1. Is Article 56(1) TFEU in conjunction with Article 3(1) of Posting Directive 96/71 to be interpreted as precluding a national provision which makes it mandatory for a contracting authority to award contracts only to undertakings which undertake and whose subcontractors undertake in writing, at the time of submitting the tender, to pay their employees who perform the contract a minimum wage fixed by the State for public contracts only but not for private ones, where there is neither a general statutory minimum wage nor a universally binding collective agreement that binds potential contractors and possible subcontractors?
2. If the first question is answered in the negative: is EU law in the area of public procurement, in particular Article 26 of Directive 2004/18 to be interpreted as precluding a national provision which provides for the mandatory exclusion of a tender if an economic operator does not, already when submitting the tender, undertake in a separate declaration to do something which he would be contractually obliged to do if awarded the contract even without making that declaration?

Case C-117/14 (*Grima Janet Nisttahuz Poclava – v – José María Ariza Toledano (Taberna del Marqués)*), reference lodged by the Spanish *Juzgado de lo Social No 23 de Madrid* on 11 March 2014 (FIXED-TERM EMPLOYMENT)

Is national legislation under which employment contracts of indefinite duration to support entrepreneurs are made subject to a probationary period of one year, during which the employee may freely be dismissed, contrary to EU law, and is it compatible with the fundamental right guaranteed by Article 30 of the Charter of Fundamental Rights of the European Union?

Is the probationary period of one year to which employment contracts of indefinite duration to support entrepreneurs are made subject prejudicial to the objectives of, and to the rules laid down in, Directive 1999/70/EC concerning the framework agreement on fixed-term work, clauses 1 and 3?

Case C-152/14 (*Autorità per l'energia elettrica e il gas (AEEG) – v – Antonella Bertazzi and others*), reference lodged by the Italian *Consiglio di Stato* on 1 April 2014 (FIXED-TERM EMPLOYMENT)

Is it possible, in principle, to regard as compatible with Clause 4(4) of the Framework Agreement annexed to Directive 1999/70/EC a provision of national law, under which — in relation to duties which have remained unchanged and which are completely the same for fixed-term staff as for permanent staff — no account whatsoever is to be taken of length of service accrued with independent public authorities under fixed-term employment contracts where the employment position of the persons concerned has been 'stabilised' on the basis of selection tests which, albeit not wholly comparable with the more rigorous public competitive examination procedure undergone by other staff members, are provided for by statute and accordingly, under the terms of the Italian Constitution, a legitimate means of verifying the candidate's suitability to perform the duties to be assigned?

a) In the event that the above legislation is held to be inconsistent with the principles of Community law as regards the fixed-term employees concerned, is it possible to identify objective reasons for derogating from the principle that those employees should be treated no differently from permanent employees, for considerations relating to social policy purposes, construed in these circumstances as the need to prevent the insertion of 'stabilised' employees in parallel with those already placed on the permanent staff in accordance with the general rule requiring a competitive examination for access to posts with the public administrative authorities and is it possible - in the light of the Court's observations in § 47 of its order in Case C-393/11 (*AEEG v Bertazzi and Others*) - for the needs underlying those objective reasons to be regarded as satisfied, in terms of proportionality, merely by giving workers in precarious employment whose position has been 'stabilised' personal salary compensation which can be absorbed by future pay rises and is not open to reassessment, with an interruption of the normal advancement in salary level and of access to higher grades?

b) On the other hand, if, once suitability for particular duties has been determined, periodic appraisals were undertaken to verify that the duties are being performed correctly, with a view to permitting the employees concerned to progress to higher grades and salary levels with the possibility of moving to a different category on the strength of a competitive examination held later, would that be sufficient to redress the balance between the position of 'stabilised' employees and the position of staff members recruited on the basis of a public competitive examination, without it being necessary for length of service to be set at nought and salaries to be set at the starting level in the case of the former group (in the absence, moreover, of any appreciable advantage in favour of the second group under the AEEG rules governing career advancement, as described above), with the result that, in the case under consideration, there would be no objective reasons, of the requisite objectivity and transparency, for derogating from Directive 1999/70/EC that could be applied to the employment conditions in

question in the particular context of relevance here?
Is it, in any event, necessary to recognise that the practice of setting the length of service accrued at nought is disproportionate and discriminatory (with the consequence that it would be necessary to refrain from applying the relevant national legislation) — while continuing to recognise the need to protect the positions of successful candidates in the competitive examinations, without prejudice to the fact that it is for the administrative authority to decide, on the basis of prudent assessment, upon the measures to adopt in this regard (in the form of a 'bonus'; or the right of those who have been recruited on the basis of success in a competitive examination to preferential treatment in the selection procedure for access to higher grades; or by other means within the discretion enjoyed by the national authorities for the organisation of the national public administrative authorities)?

Case C-160/14 (*João Filipe Ferreira da Silva e Brito and others – v – Portuguese State*), reference lodged by the Portuguese *Varas Cíveis de Lisboa (5a Vara Cível)* on 4 April 2014 (TRANSFER OF UNDERTAKINGS)

Must Directive 2001/23, in particular Article 1(1) thereof, be interpreted as meaning that the concept of a 'transfer of a business' encompasses a situation in which an undertaking active on the charter flights market is wound up by decision of its majority shareholder, itself an undertaking active in the aviation sector and, in the context of the winding up, the parent company:

(i) replaces the company being wound up under aircraft leasing contracts and ongoing charter flight contracts with tour operators;
(ii) carries out activities previously pursued by the company being wound up;
(iii) re-employs some workers until that point employed by the company being wound up and engages them to perform identical tasks;
(iv) receives small equipment from the company being wound up?

Must Article 267 TFEU be interpreted as meaning that, in the light of the facts set out in the preceding question and the fact that the lower national courts adjudicating on the case adopted contradictory decisions, the Supremo Tribunal de Justiça was under an obligation to refer to the Court of Justice of the European Union for a preliminary ruling the question of the correct interpretation of the concept of a 'transfer of a business' within the meaning of Article 1(1) of Directive 2001/23?

Do Community law, in particular, the principles laid down by the Court of Justice in Köbler (C-224/01) on State liability for loss or damage caused to individuals as a result of an infringement of Community law by a national court adjudicating at last instance preclude the application of a national provision which makes a claim for damages against the State conditional upon the adverse decision having first been set aside?

Case C-177/14 (*María José Rogojo Dans – v – Consejo de Estado*), reference lodged by the Spanish *Sala Tercera de lo Contencioso-Administrativo del Tribunal Supremo* on 10 April 2014 (FIXED-TERM EMPLOYMENT)

Does the definition of 'fixed-term worker' in clause 3(1) of the framework agreement on fixed-term work, annexed to Directive 1999/70, include 'non-permanent staff' (*'personal eventual'*)?

Is the principle of non-discrimination in clause 4(4) of the framework agreement applicable to such 'non-permanent staff', so that they may be granted the right to receive and be paid the remuneration in respect of length of service which is paid to career civil servants, staff engaged under employment contracts for an indefinite duration, interim (non-established) civil servants and staff engaged under temporary employment contracts?

Do the rules, laid down in Spanish law, whereby the appointment of such 'non-permanent staff' and the termination of their appointment are not — on account of the positions of trust involved — subject to any restrictions, come within the objective grounds which under clause 4 may justify different treatment?

Case C-189/14 (*Bogdan Chain – v – Atlanco Ltd*), reference lodged by *the Cypriot Eparkhiako Dikastirio Lefkosias* on 16 April 2014 (SOCIAL INSURANCE)

1. Should the fact that the scope of Article 13(1)(b) of Regulation (EC) No 883/2004 and of Article 14(5)(b) of the implementing Regulation (EC) No 987/2009 covers 'a person who normally pursues an activity as an employed person in two or more Member States' be interpreted as meaning that it also covers the situation where a person is employed, under an employment contract with only one employer who is established in a Member State, with a view to working in two other Member States even if:
   i. the second Member State in which the person is to be employed has not yet been determined and is not foreseeable when an application is made for the issue of the A1 form due to the specific nature of the work, i.e. the temporary employment of workers for short periods of time in various Member States? or
   ii. the duration of employment in the first and/or second Member State cannot yet be determined or is unforeseeable due to the specific nature of the work, i.e. the temporary employment of workers for short periods of time in various Member States?
2. If the answer is in the affirmative, is it possible to interpret Article 14(5)(b) of Regulation 987/2009 in such a way that, for the purpose of applying Article 13(1)(b) of Regulation 883/2004, the reference to 'a person who normally pursues an activity as an employed person in two or more Member States' also applies to a situation in which there are periods of inactivity between two jobs undertaken in different Member States, during which periods the employee is still covered by the same employment agreement?
3. If the answer to the questions stated under point 1 above is in the affirmative, should the fact that the competent Member State does not issue the A1 form preclude application of Article 13(1)(b) of Regulation 883/2004?
4. Do Articles 16(5) and/or 20(1) or any other article of Regulation 987/2009 require the Member State, based on a preliminary decision relating to the applicable law from the Member State of stay, to issue the A1 form on its own initiative without the need for the employer concerned to file an additional application to the competent Member State?

Case C-199/14 (*János Kárász – v – Nyugdíjfolyósító Igazgatóság*), reference lodged by the Hungarian *Fővárosi Közigazgatási és Munkaügyi Bíróság* on 22 April 2014 (PROPERTY RIGHTS)

May Article 17 of the Charter of Fundamental Rights of the European Union be interpreted as meaning that cases of cessation, interruption or suspension of the payment of a retirement pension to which an entitlement has arisen because a certain age has been reached constitute an infringement of the right to property laid down in that provision?

Case C-219/14 (*Kathleen Greenfield – v – The Care Bureau Ltd*), reference lodged by the UK *Employment Tribunal, Birmingham* on 6 May 2014 (PART-TIME WORK)

Is the *"pro rata temporis principle"*, as set out in clause 4.2 of the Framework Agreement on Part-Time Work, to be interpreted as requiring a provision of national law, to have the effect that, in circumstances where there is an increase in the working hours of an employee, the amount of leave already accumulated must be adjusted proportionally to the new working hours, with the result that the worker who increases his/her working hours has his/her entitlement to accrued leave recalculated in accordance with the increased hours?

Is either clause 4.2 of the Framework Agreement or Article 7 of Working Time Directive 2003/88 to be interpreted as precluding a provision of national law from having the effect that in circumstances where there is an increase in the working hours of an employee, the amount of leave already accumulated is to be adjusted proportionally to the new working hours, with the result that the worker who increases his/her working hours has his/her entitlement to accrued leave recalculated in accordance with the revised hours?

If the answer to question (i) and/or (ii) is yes, does the recalculation apply only to that portion of the holiday year during which the employee worked the increased hours or to some other period?

When calculating the period of leave taken by a worker, is either clause 4.2 of the Framework Agreement or Article 7 of the Working Time Directive to be interpreted as requiring a provision of national law to have the effect of adopting a different approach as between calculating an employee's allowance in lieu of paid annual leave entitlement upon termination and when calculating an employee's remaining annual leave entitlement when they remain employed?

If the answer to question (iv) is yes, what is the difference in approach required to be adopted?

Case C-222/14 (*Konstantinos Maistrellis – v – Minister for Justice, Transparency and Human Rights*), reference lodged by the Greek *Simvoulio tis Epikratias* on 7 May 2014 (PARENTAL LEAVE)

Must the provisions of Parental Leave Directive 96/34/EC and Directive 2006/54 on equal treatment of men and women, in so far as they are applicable, be interpreted as precluding national regulations, providing that if the civil servant's wife does not work or exercise any profession, the male spouse is not entitled to parental leave, unless it is considered that due to a serious illness or injury the wife is unable to meet the needs related to the upbringing of the child?

RUNNING INDEX OF CASE REPORTS

TRANSFER OF UNDERTAKINGS

Status of Directive 2001/23

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

Is there a transfer?

2009/5 (MT) contracting out cleaning is a transfer despite no assets or staff going across
2009/22 (BE) collective agreement cannot create transfer where there is none by law
2009/41 (GE) BAG follows *Klarenberg*
2009/42 (UK) EAT clarifies "service provision change" concept
2010/1 (FR) Supreme Court drops "autonomy" requirement
2010/4 (SP) Supreme Court follows *Abler*, applying assets/staff mix
2010/5 (LU) court applies *Abler* despite changes in catering system
2010/6 (IT) Supreme Court disapplies national law
2010/27 (NL) assigned staff not an economic entity
2010/40 (NO) Supreme Court applies comprehensive mix of all *Spijkers* criteria
2010/73 (CZ) Supreme Court accepts broad transfer definition
2011/34 (BU) Bulgarian law lists transfer-triggering events exhaustively
2011/37 (CY) Cypriot court applies directive
2012/14 (NO) Airline catering company capital-intensive
2012/15 (GE) No TOU unless activity pre-transfer independent entity
2012/17 (LI) Lithuanian courts follow Directive
2012/31 (AT) TOU despite *ex tunc* cancellation of contract
2013/16 (GE) only actual takeover of staff, not offer of employment, relevant
2013/50 (LU) did beauty parlour retain its identity?
2013/51 (Article) transfer of employees on re-outsourcing?
2014/1 (CZ) Czech law goes beyond the directive
2014/14 (NL) all Spijkers criteria relevant

Cross-border transfer

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

Which employees cross over?

2009/2 (NL) do assigned staff cross over? *Albron* case before ECJ
2010/24 (NL) temporarily assigned staff do not cross over
2011/1 (FR) partial transfer?
2011/2 (FR) partial transfer?
2011/20 (NL) activity transferred to A (80%) and B (20%): employee transfers to A
2011/21 (HU) pregnancy protection in transfer-situation
2011/35 (UK) resignation does not prevent employee's transfer
2011/52 (NL) do assigned staff go across? *Albron* case after ECJ
2012/30 (NL) Supreme Court on public transport concessions

Employee who refuses to transfer

2009/20 (IR) no redundancy pay for employee refusing to transfer
2009/21 (FI) transferee liable to employee refusing to transfer on inferior terms
2009/23 (NL) agreement to remain with transferor effective
2011/18 (AT) no *Widerspruch* right except in special cases
2012/2 (CZ) employers cannot transfer staff without their consent unless there is a TOU
2012/45 (GR) employee who refuses to go across loses job
2013/1 (AT) no general *Widerspruch* right for disabled employees

Termination

2010/2 (SE) status of termination prior to transfer
2010/41 (CZ) termination by transferor, then "new" contract with transferee ineffective
2013/5 (CZ) which employer to sue where invalid dismissal is followed by a transfer?

Which terms go across?

2009/4 (NL) terms closely linked to transferor's business are lost
2010/3 (P) transferee liable for fine levied against transferor
2010/25 (FI) voluntary pension scheme goes across
2010/56 (CZ) claim for invalid dismissal goes across
2010/75 (AT) not all collective terms go across
2013/35 (NL) transferee liable for pension premium arrears

Duty to inform

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

ETO

2012/16 (NL) ETO defence fails
2013/17 (AT) dismissal soon after transfer creates non-ETO presumption
2014/2 (UK) dismissals to enhance transferor's value for future sale = ETO
2014/15 (NL) court interprets ETO exception narrowly

Miscellaneous

2009/1 (IT) transfer with sole aim of easing staff reduction is abuse
2010/23 (AT) transferee may recover from transferor cost of annual leave accrued before transfer
2010/26 (GE) purchaser of insolvent company may offer transferred staff inferior terms
2011/19 (AT) employee claims following transferor's insolvency presumption
2013/34 (MT) when does unfair dismissal claim time-bar start to run?

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

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?
2014/26 (FR) Supreme Court rejects E101 posting certificates
2014/28 (AT) employer may not delegate duty to have wage payment evidence on hand
2014/31 (CZ) typical and atypical frontier workers

Conflict of laws

2010/53 (IT) "secondary insolvency" can protect assets against foreign receiver
2011/63 (IT) American "employer" cannot be sued in Italy
2012/8 (BE) posted workers benefit from Belgian law
2012/9 (NL) to which country was contract more closely connected?
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
2014/30 (NO) where to sue foreign airline?

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
2010/52 (NL) employer liable for bicycle accident
2010/54 (AT) seniority-based pay scheme must reward prior foreign service
2010/88 (HU) employer not fully liable for traffic fine caused by irresponsible employee
2011/9 (NL) collective fixing of self-employed fees violates anti-trust law
2011/11 (FI) no bonus denial for joining strike
2011/47 (PL) reduction of former secret service members' pensions
2011/49 (LA) forced absence from work in light of EU principles
2011/64 (IR) Irish minimum wage rules unconstitutional
2012/6 (FR) parent company liable as "co-employer"
2012/41 (DK) summary dismissal, burden of proof
2012/43 (UK) decision to dismiss not covered by fair trial principle
2012/52 (FR) shareholder to compensate employees for mismanagement
2012/54 (GR) economic woes justify 20% salary cut
2012/58 (CZ) employer cannot assign claim against employee
2012/59 (IR) illegal foreign employee denied protection
2013/30 (RO) before which court may union bring collective claim?
2013/32 (FR) employee not liable for insulting Facebook post
2013/45 (RO) court may replace disciplinary sanction with milder sanction
2013/49 (HU) employee may not undergo lie detection test
2014/27 (UK) covert recording admitted as evidence
2014/33 (UK) new tribunal fee regime

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).

19 June 2014, C-501/12 (*Specht*): deals with transitional rules for move to new salary structure (EELC 2014-2).

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).

13 March 2014, C-38/13 (*Nierodzik*); unequal treatment of fixed-termers compared to permanent employees (EELC 2014-2).

13 March 2014, C-190/13 (*Samohano*): Spanish law allowing unlimited fixed terms for part-time university lecturers justified (EELC 2014-2).

3 July 2014, C-362/13 (*Fiamingo*): fixed-term contracts need not specify termination date; duration is sufficient (EELC 2014-2).

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).

22 May 2014, C-539/12 (*Lock*): remuneration during paid leave to include average sales commission (EELC 2014-2).

12 June 2014, C-118/13 (*Bollacke*): right to payment in lieu net lost at death (EELC 2014-2).

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, tax

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).

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

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

12. Free movement, social insurance

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).

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).

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).

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 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).

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).

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 May 2013, C-589/10 (*Wencel*): one cannot simultaneously habitually reside in two Member States (EELC 2014-2).

13. Free movement, work and residence permit

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

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).

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).

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

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

14. Free movement, pension

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).

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).

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).

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).

15. "Social dumping"

7 November 2013, C-522/12 (*Isbir*): concept of minimum wage in Posting Directive (EELC 2014-2).

16. Free movement (other)

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).

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

8 November 2012, C-461/11 (*Radziejewski*): Article 45 TFEU precludes Swedish legislation conditioning debt relief on residence (EELC 2012-4).

17. Maternity and 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).

18 March 2014, C-167/12 (*C.D.*): no right to maternity leave for commissioning mother with surrogate arrangement (EELC 2014-2).

18. 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.

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

19. 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).

20. Fundamental Rights

7 March 2013,C-128/12 (*Banco Portugus*): 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.

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