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EELC

EUROPEAN EMPLOYMENT LAW CASES

OFFICIAL JOURNAL OF THE EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION **EELA**

2014 | **3**

UK: no service provision change if client changes

Netherlands: debate on "pre-packs"

Poland: Supreme Court on redundancy selection

France: shareholder to compensate former staff

Article: cross-border transfers

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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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.

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INTRODUCTION

Transfer of undertakings and discrimination continue to be widely litigated issues, but there are other "hot" employment law issues in Europe, as this issue of EELC demonstrates. For example, the French courts are refining their stance on the issue of whether and in which circumstances the parent company of a liquidated company can be held liable for the subsidiary's debts towards the former employees. Other examples:

- how restrictively to interpret a restrictive covenant?
- may employees be required to undergo drug or alcohol tests?
- must an employer allow a reduction in working hours?
- may management delegate the authority to dismiss employees?
- what is the effect of pregnancy during a period of parental leave?
- when may a difference in life expectancy between men and women be taken into account?
- under what circumstances must a fixed-term contract convert into a permanent contract (Italy)?
- how far may a Member State go in its effort to combat social dumping?

All readers of EELC are encouraged to report judgments rendered within their jurisdiction that can shed light on these and other issues with which employment lawyers all over Europe are dealing.

Peter Vas Nunes, general editor

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2014/35

No service provision change where underlying client not the same (UK)

CONTRIBUTOR RICHARD LISTER*

Summary

The Employment Appeal Tribunal (EAT) has confirmed that, in order for there to be a transfer of an undertaking meeting the service provision change definition (which is a UK-specific provision), the services carried out before and after the change must be on behalf of the same client. It has also commented on the exception for a "single specific event or task of short-term duration".

Background

The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) is the UK legislation implementing council directive 2001/23/EC (the Acquired Rights Directive (the Directive)). TUPE applies if there is a 'relevant transfer', which could be either a transfer of "an economic entity which retains its identity" (a transfer of an undertaking as defined by the Directive) and/or a "service provision change". The idea of a service provision change is specific to TUPE and is not found in the Directive and it involves activities which are being carried on by an organised grouping of employees switching from one person[1] to another. It occurs where:

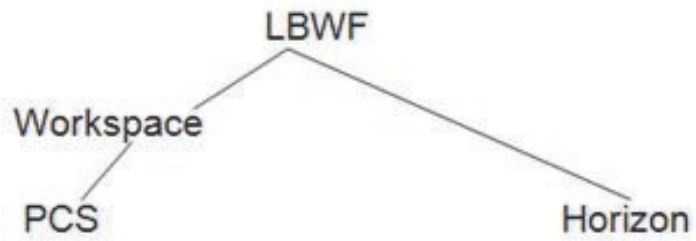
- a client ceases to carry out activities on its own behalf and assigns them to another (a contractor) to carry out on the client's behalf (outsourcing);
- the activities cease to be carried out by a contractor on a client's behalf and are reassigned to another (a subsequent contractor) to carry out on the client's behalf (second generation outsourcing); or
- the activities cease to be carried out by a contractor or a subsequent contractor on the client's behalf and are instead carried out by the client on its own behalf (bringing outsourced activities back in-house).

The client must intend that the relevant activities will, following the change, be carried out by the transferee other than in connection with a single specific event or task of short-term duration. This exception for short-term tasks is specific to the service provision change definition in TUPE and the legislation does not give any guidance about how to determine what 'short-term' might mean in practice.

Facts

The case concerned a contract to provide security at the Alpha business centre. The Alpha centre was located on a site owned by the London Borough of Waltham Forest (LBWF) but was managed by a separate entity called Workspace Plc. Workspace had engaged PCS to provide security at the centre. When plans were made in January 2013 to demolish the centre and build a supermarket there, LBWF terminated its contract with Workspace and Workplace terminated the security contract with PCS. LBWF then asked PCS and another firm called Horizon Security Services to quote to provide security services on the site for an interim period of approximately eight to nine months until the site was razed. LBWF awarded this contract to Horizon and informed PCS that it had been unsuccessful.

The following diagram illustrates what happened:



Mr Ndeze was a security guard employed by PCS and working at Alpha business centre. Initially PCS told Mr Ndeze that he would transfer under TUPE to Horizon. Rather confusingly however, he was also told by PCS that he should attend their office and he would be given details of another PCS site where he would be redeployed. When he attended the site, a different manager told him that he would be employed by LBWF in future and he should leave. He then returned to the Alpha business centre site but was told by Horizon that he had not transferred to them and that he should leave. Mr Ndeze brought an unfair dismissal claim against PCS, and PCS applied to join Horizon to the proceedings.

Judgment

The employment tribunal held a preliminary hearing on 16 September 2013 to determine if there had been a transfer of Mr Ndeze's employment from PCS to Horizon. The tribunal found that there had been a service provision change and therefore a TUPE transfer to Horizon. In particular, it held that the activities were carried out for the same client – LBWF – and that this was an example of second-generation outsourcing (the second type of service provision change listed above). It also held that the exception about specific events or tasks of short-term duration was not engaged. Horizon appealed.

The EAT overturned the employment tribunal's finding that there had been a service provision change under TUPE, relying on the Court of Appeal's ruling in *Hunter - v - McCarrick* [2013] IRLR 26 that the service provision change definition requires the services before and after the change to be on behalf of the same client. In this case, PCS was providing services for Workspace, whereas Horizon contracted with LBWF.

The EAT also overturned the finding that this was not intended to be a task of short-term duration on the basis that the tribunal Judge had failed to consider certain relevant issues. The EAT held that the tribunal should not have considered what the situation was at the time of the hearing (when security services were still being provided by Horizon and no date had yet been set for the centre's demolition) but rather what the client *intended* at the date of the purported transfer. At that time LBWF had intended that security services should be provided for only eight to nine months until the business centre was taken down. The tribunal should also have contrasted the past period of the task (some 16 years) with the proposed duration of the future task when considering whether or not it was intended to be short-term in duration. Finally, the tribunal had erred by focusing on the 'activity' rather than the 'task' to be carried out (i.e. what the activities were in connection with). Previously, the task had been the provision of security services for a business centre. Ultimately, the task (albeit still involving security services) became guarding a site pending the demolition of the buildings and the building of a supermarket.

1 The "person" may be a legal entity.

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The EAT did not determine what 'short-term' might mean in these circumstances. It would have remitted the question back to the tribunal for it to reconsider in light of the relevant factors it had identified but given its ruling on the first ground of appeal there was no need for this. It therefore quashed the decision of the tribunal and substituted its own judgment, that the claimant had not transferred to Horizon.

Commentary

This case illustrates how the service provision change definition is rather limited, applying only where there is one level of sub-contracting (client and contractor) rather than where there are multiple layers of subcontractors. Given the fact that in many industries (such as construction) there are often many layers of subcontractors this is a significant gap in the legislation.

Neither the employment tribunal nor the EAT considered whether or not the other definition of 'relevant transfer' (a transfer of an economic entity which retains its identity) was met. It is not clear from the case reports why this was, but the most likely explanation is that this possibility was not set out in the pleadings. It is impossible to know, therefore, whether or not this other definition might have been met on the facts of this case but it seems at least possible.

On the issue of 'tasks of short-term duration', the EAT's comments highlight that the important issue is what was in the mind of the client at the time of the possible transfer, not what may or may not have happened subsequently. This decision also illustrates how important it is to consider what happened in the past when trying to determine what 'short-term' might mean. The EAT's distinction between the two 'tasks' before and after the purported transfer is, however, difficult to understand or apply.

Comments from other jurisdictions

The Netherlands (Peter Vas Nunes): Given that the Dutch legislature has simply transposed the Acquired Rights Directive without adding provisions on service provision change, a Dutch court would have had to apply the 'classic' transfer of undertakings rules. I expect it would have found that the activities transferred (if that was the case – see below), that the provision of security services is a labour-intensive activity and that the employees who previously performed that activity continued to do so after the change in the contractual relationships. A Dutch court would therefore probably have upheld the tribunal's decision that there was a transfer. The fact that PCS's client changed would not, I believe, have been considered relevant.

I agree with the author of this case report that the EAT's distinction between 'activity' and 'task' is difficult to apply. The EAT saw the task in this case as 'what the activities were in connection with'. Before the change in contractual relations, the activity of providing security services had been – so I assume – in relation to an *operational* business centre, afterwards they were in connection with the guarding of *empty* buildings pending their demolition. Is this perhaps another way of saying that the activities changed? I can imagine that the type of activities involved in providing security services in an operational business centre – directing visitors, taking telephone calls, distinguishing the occupants and their visitors from unauthorised intruders, etc. – may have been different than the type of activities involved in guarding an empty site.

Subject: TUPE, Service provision change
Parties: Horizon Security Services Ltd - v - Ndeze
Court: The Employment Appeal Tribunal
Date: 19 May 2014
Case number: [2014] UKEAT/0071/14
Internet publication: http://www.bailii.org/uk/cases/UKEAT/2014/0071_14_1905.html

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2014/36

Plaintiffs were de facto still employed on transfer date (DK)

CONTRIBUTOR MARIANN NORRBOM*

Summary

In cases where an acquisition is a transfer of an undertaking, the transferee takes over the transferor's rights and obligations regarding employees with effect from the takeover. This principle is set out in section 2 of the Danish Transfer of Undertakings Act, which is based on the Acquired Rights Directive (Directive 2001/23).

Whether or not an acquisition is a transfer of an undertaking within the meaning of the Danish Transfer of Undertakings Act has to be established on a case-by-case basis by the courts if the parties disagree.

If the Danish Labour Court finds that a transfer has taken place, the employees will be entitled to bring certain claims originating from their employment relationship with the transferor against the transferee (e.g. for holiday and overtime pay)

Facts

The employees in this case were employed by a small company that was owned by its director (the 'former employer'). On Friday 30 November 2012, because of the former employer's financial problems, a contract it had with one of its customers was transferred to another company (the 'competitor'). On Monday 3 December 2012, the former employer laid off all of its employees and on 11 December 2012 it went into receivership.

The former employer and the competitor agreed that the latter would offer employment to the employees and the former employer provided the competitor with information regarding those employees.

On 3 December 2012 – the same day that the former employer dismissed the employees – the competitor interviewed each of the employees individually and hired all of them, including the former employer's director. They began working for the competitor the next day, 4 December 2012. Their terms and conditions of employment were largely similar to what they were before and most of them continued to perform the same work with the same equipment as before. The bankrupt estate of the former employer offered equipment and supplies for sale to the highest bidder. The competitor was the highest bidder, so it acquired the equipment and supplies.

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A trade union approached the competitor on behalf of the employees, claiming that there had been a transfer of undertaking within the meaning of the Danish law transposing Directive 2001/23, the Transfer of Undertakings Act, and that the competitor was therefore liable to pay the employees their salary for the period up until 3 December 2012, as well as holiday pay arrears. The competitor denied that there had been a transfer of undertaking, arguing, mainly, that: (i) it had only acquired some, not all of the former employer's contracts; (ii) it had hired the employees, who had been laid off by the former employer, not collectively but following individual interviews, and (iii) it had purchased the former employer's equipment and supplies, but only because it was the highest bidder among other interested parties.

The union brought proceedings before the Labour Court.

Judgment

The court noted that, when determining whether there has been a transfer of an undertaking, it is necessary to make an overall assessment of all the facts. In this case, there were two issues:

1. Had the employment relationship between the employees and the former employer been terminated with permanent effect?
2. Had the competitor acquired the contract merely in order to complete it? If so, based on the ECJ's ruling in the *Rygaard* case (C-84/94), the acquisition of the contract did not trigger the transfer of undertakings rules.

The court rejected the first argument because (i) the former employer and the competitor had discussed the possibility of the competitor interviewing and hiring the employees; (ii) the former employer had provided the competitor with information regarding those employees; (iii) the competitor had hired all of the employees immediately after they had been laid off; and (iv) most of the employees performed the same type of work, for the same clients and with the same tools and materials as before. Based on these facts, the court concluded that the employment relationships between the former employer and the employees had, in actual fact, not been permanently terminated.

The Court also rejected the second argument, holding that the acquisition had not been limited to the completion of a single contract.

Accordingly, the Court held that a transfer had taken place and that, therefore, the competitor was liable for the salary and the holiday pay left unpaid by the former employer.

Commentary

As the above case report illustrates, the courts will make an overall assessment as to whether a transfer of contracts, goods, tools and employees is in fact a transfer of an undertaking subject to the rules on transfers.

If so, the new employer will take over the obligations of the former employer vis-à-vis the employees, which means that if they were dismissed by the former employer on grounds of the transfer, the new employer will be liable for any damages and compensation awarded to the employees if the dismissal is deemed unfair by the courts under the Danish Transfer of Undertakings Act – regardless of whether the new employer was at fault or even aware of the dismissals.

Further, it is explicitly prohibited under the Danish Transfer of Undertakings Act to dismiss employees solely because of the transfer of an undertaking.

Practices such as "pre-pack" do not exist in Denmark. This is mainly because, in the Danish "flexicurity" model (which provides employees with little dismissal protection but with generous unemployment benefits, and which provides employees with the benefit of an active labour market policy), employers are allowed a considerable margin of discretion in deciding which employees to retain and which of them to dismiss in a case of redundancy. [Note editor: pre-pack is where a company contemplating starting afresh makes an informal arrangement with the court to appoint a receiver for its existing company – which will later be declared insolvent. Once the insolvency has been declared, the receiver will move swiftly to dismiss the employees and rehire the desirable ones – all under the exemption from the transfer of undertakings rules for insolvent companies].

Comments from other jurisdictions

The Netherlands (Peter Vas Nunes): This Danish case report elicits two remarks. The first is that it surprises me that the defendant, who was represented by the Confederation of Danish Employers, seriously denied the existence of a transfer of undertaking. The competitor had taken over: (1) most of the former employer's work, not merely for the purpose of completing one unfinished contract; (2) all of its employees; and (3) all of its material assets. How could one seriously dispute that there was a transfer of undertaking? Denmark has been an EU Member State since 1973.

My second remark is that, if this had been a Dutch case, and if the agreements regarding the acquisition of equipment, supplies and employees had been made with the former employer's receiver following the declaration of receivership, i.e. on or after 11 December 2012, the rules regarding transfer of undertakings would not have applied and the competitor would not have been liable for the arrears of salary and holiday pay. This is because, contrary to the Netherlands, Denmark has not made use of Article 5(1) of the Directive. As a result, the transfer of undertaking rules apply in Denmark regardless whether the transferor is insolvent.

Subject: Transfer of undertaking
Parties: The Confederation of Danish Employers on behalf of Employers' Association A on behalf of Employer B - v - The Danish Confederation of Trade Unions on behalf of Trade Union C
Court: The Danish Labour Court
Date: 1 July 2014
Case number: AR2013.0518
Hard Copy publication: Not yet available
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2014/37

Transfer despite insolvency (NL)

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Summary

The owner of three companies purposely caused them to become insolvent[1]. Before doing so, he incorporated three new companies. Immediately following the insolvencies, those new companies took over the activities that the insolvent companies had previously performed and took over almost all of the employees. The owner relied on the provision of Dutch law according to which the transfer of activities from an insolvent employer is not subject to the rules on transfer of undertakings. He counted on the new companies not having to pay the employees their salaries and other benefits that the insolvent companies had left unpaid. However, the court described the combination of events as a transfer of undertaking and ordered the new companies to pay the salary arrears.

Facts

The defendants in this case were three limited liability companies: Jan de Roos Transport B.V., Jan de Roos Montage B.V. and Jan de Roos Verhuur Lemmer B.V. (the 'old companies'). The old companies, as well as several other companies, formed part of one group of legal entities ultimately controlled by Mr Jan de Roos. This group was organised in such a way that one of the companies (the 'owner company') - which was not one of the old companies - held legal title to all of the group's operational assets, including equipment, and entered into contracts with customers. It then subcontracted the work to other companies including the old companies and leased the necessary assets to them. The old companies owned no assets themselves.

The plaintiffs were 20 employees of the old companies.

On 23 May 2014, Mr Jan de Roos made an appointment with a civil law notary (*notaris)* to incorporate three new limited liability companies: Jan de Roos Transport Lemmer B.V., Jan de Roos Montage Lemmer B.V. and Jan de Roos Verhuur B.V. (the 'new companies'). The new companies were legally incorporated on 27 May. That same day, by order of the court and at their own request, the old companies went into liquidation (*faillissement*), i.e. became insolvent, and the court appointed a receiver (*curator*).

The new companies offered employment to 19 out of the 20 employees. They accepted the offer. One of the 19 was offered employment for 16 hours per week whereas she had previously worked 24 hours per week. The remaining 18 employees were offered the same terms of employment as they had when employed by the old employers. The one employee who was not offered employment by one of the new companies was dismissed by the receiver.

The owner company stopped subcontracting the work for its customers to the old companies and subcontracted that work to the new companies. Thus, from the perspective of both the customers and 18 employees, the work continued without interruption as if nothing had changed. The new companies used the same premises, equipment, website, telephone numbers and permits that the old companies had used.

The receiver refused to dismiss the 19 employees who had crossed over to the new companies, taking the position that there had been a transfer and that, therefore, the 19 employees had become employees of the new companies. The Employment Board (*UWV*), which for the Netherlands is the guarantee institution as provided in Directive 2008/94, refused to pay the plaintiffs the salary and other amounts that the old companies owed them for the period up to 27 May.

The plaintiffs brought summary proceedings against the new companies, seeking – by way of provisional order pending regular court proceedings – payment of salary and other arrears for the period up until 27 May (and, in the case of the part-time employee and the employee who was not rehired, additional relief).

Judgment

The defendants raised two defences. First, they argued that the legal basis of the claims was too complex to adjudicate in summary proceedings, which are only suitable for simple cases. The court rejected this argument. The second defence was based on the fact that Dutch law has made use of the exception provided in Article 5(1) of Directive 2001/23:

"Unless Member States provide otherwise, Articles 3 and 4 shall not apply to any transfer of an undertaking, business or part of an undertaking or business where the transferor is the subject of bankruptcy proceedings or any analogous insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor and are under the supervision of a competent public authority (which may be an insolvency practitioner authorised by a competent public authority)."

The Dutch *faillissement* proceedings fulfil these requirements. Accordingly, Article 7:666 of the Dutch Civil Code provides that the rules on transfer of undertakings do not apply in the event the transferor was insolvent at the time of the transfer.

Applying the case law of the ECJ, and specifically referencing *Spijkers* (C-24/85) and *Abler* (C-340/01), the court held that, if the old companies had not been insolvent, the circumstances (uninterrupted activities, use of same premises, equipment, permits, etc., offers of employment, close timing of insolvencies and incorporations) were such that there would, without doubt, have been a transfer of the undertakings. The issue was whether Article 7:666 Civil Code should lead to a different outcome.

Article 7:666 Civil Code was introduced following, and as a codification of, the ECJ's 1985 ruling in the (Dutch) case of Abels (case 135/83). With this introduction, Parliament aimed to increase the ability of receivers to execute a 'restart' (*doorstart*) in order to maintain employment as far as possible. A *doorstart* as envisaged by the legislature is where the receiver sells an insolvent company's assets to a third party and the third party, with or without the insolvent company's personnel, continues the business. After the ECJ had ruled in *Abels*, the case returned to the Dutch Supreme Court, which applied the ruling to the case. Based on the Supreme Court's post-ECJ ruling in Abels, the court in the present case held that the insolvency exception contained in Article 7:666 Civil Code does not apply where the owner of a company expressly steers towards insolvency with a view to continuing business with the same assets and (most of) the same staff *without* the cooperation of the court-appointed receiver. Accordingly, the defendants were ordered (i) to pay all 20 plaintiffs all salary and other benefits that they had

1 The Dutch expression is *failliet*. It means bankrupt, but as in the English language this expression is reserved for individuals, this case report uses the more common English expression "insolvent".

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earned but not received up to 27 May, with 10% penalty interest and compensation for legal expenses; (ii) to continue paying the part-time employee on the basis of a 24-hour working week; and (iii) to hire the employee who had not been offered new employment, with effect from 27 May.

Commentary

The original Acquired Rights Directive 77/187 dates from 1977. It was silent on whether the directive applies in insolvency situations. That issue came before the ECJ 17 years later in the case of *Abels*, in which the ECJ held, briefly stated, as follows:

- the directive's scope cannot be appraised solely on the basis of a textual interpretation. Its meaning must therefore be clarified in the light of the scheme of the directive, its place in the system of Community law in relation to the rules on insolvency, and its purpose (§ 11-13);
- given the facts (i) that the rules on liquidation proceedings and analogous proceedings are very different in the various Member States and (ii) that insolvency law is the subject of specific rules both in the legal systems of the Member States and in the Community legal order, it may be concluded that if the directive had been intended to apply also to transfer of undertakings in the context of such proceedings, an express provision would have been included for that purpose (§ 15-17);
- there is difference of opinion as to whether having the directive apply in insolvency situations would benefit workers or would do precisely the opposite; given this uncertainty, it cannot be ruled out that extending the directive's scope to insolvency situations would deteriorate the working and living conditions of workers, contrary to the objectives of the EC Treaty; "It cannot therefore be concluded that Directive No. 77/187 imposes on the Member States the obligation to extend the rules laid down therein to transfers of undertakings [...] taking place in the context of insolvency proceedings instituted with a view to the liquidation of the assets of the transferor under the supervision of the competent judicial authority" (§ 22-23);
- the reasons for not applying the directive to transfer of undertakings taking place in liquidation do not exist where a company is the subject of proceedings, such as the Dutch "surséance" proceedings, taking place at an earlier stage (§ 28-29).

In *Abels* (and in the subsequent judgments in *Botzen,* case C-186/83, *Wendelboe*, case C-19/83, and I*ndustriebond FNV*, case C-179/83), the ECJ made a distinction between insolvency proceedings that aim to liquidate an undertaking and those that aim to enable the undertaking to continue in business by suspending its debts and reaching a settlement with its creditors. The Acquired Rights Directive applies to the latter, not the former.

In 1998, the Acquired Rights Directive was amended, becoming Directive 98/50. This directive contained a new Article 4a, essentially codifying *Abels*. It consists of four paragraphs:

1. "Unless Member States provide otherwise, Articles 3 and 4 shall not apply to any transfer of an undertaking [...] where the transferor is the subject of bankruptcy proceedings or any analogous insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor and are under the supervision of a competent public authority (which may be an insolvency practitioner authorised by a competent public authority)."
2. This section allows Member States in certain situations and under certain conditions to (a) provide that the transferor's debts do not go across to the transferee and/or (b) provide that the employee's terms of employment may be amended.
3. This section allows Italy even further derogation on behalf of transferors "in a situation of serious economic crisis".
4. "Member States shall take appropriate measures with a view to preventing misuse of insolvency proceedings in such a way as to deprive employees of the rights provided for in this Directive."

Article 4a of Directive 98/50 became Article 5 of the present Directive 2001/23.

Dutch law makes it difficult, time consuming and/or expensive to dismiss staff for reasons of performance or for other than strict business reasons. Dismissing employees who are redundant for business reasons is, as a rule, less difficult, but such dismissals must follow a principle known as "mirroring", which is an age-adjusted variation of the well-known "seniority" or "last in first out" principle. The effect of the mirroring principle is often that the employer is obliged to retain employees whom it would have preferred to shed and to dismiss employees whom it wanted to retain. This is one reason - but by no means the only reason - why some employers resort to "restart" (*doorstart*) tactics.

The *doorstart* process works as follows (1) the employer files for receivership, (2) the employer is declared insolvent and the court appoints a receiver (*curator*); (3) the receiver - who is not bound by most of the rules on dismissal - dismisses all or most of the staff and then (4) proceeds to sell the business to another legal entity, frequently owned by the same person(s) or entity that owned the business before it went into receivership (in UK jargon: a "phoenix company").
Filing for receivership, which is the classical way to initiate the restart process, is wasteful. The receiver is not appointed until the court declares a company insolvent. The receiver does not know of his appointment until he receives notice from the court. He lacks knowledge of the company and needs to spend time investigating the company before being able to make decisions on whether to close down the business or to look for potential buyers, whom to dismiss, etc. Meanwhile, customers are lost, deliveries cease, creditors repossess goods, etc.

The solution to overcome these drawbacks is simple. It is known as "pre-pack". In a pre-pack scenario, a company contemplating a restart ('Oldco') arranges with the court (informally) for the selection of a person (the 'future receiver') who will become the receiver once the company has been declared insolvent. Contracts are prepared between the receiver (acting on behalf of Oldco, the future insolvent company) and the company that will be taking over the business (usually a company incorporated for that purpose) ('Newco') and it is decided which of Oldco's employees are to be (re-)hired by the transferee. Once all the documents are ready to sign, the company in question files for insolvency. The court declares the company insolvent and appoints the previously selected individual, who now becomes the receiver. One minute later the receiver and Newco sign the contracts and the receiver dismisses the entire staff. Newco hires those former employees whom it had previously picked as being desirable employees (more often than not, the young, healthy and cheapest staff). The net effect is that Newco (essentially the same company as before, merely a different legal entity) continues in business without interruption, now with only those staff that it wished to retain, and in many cases without a works council or with a new, more amenable works council.

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The first time a pre-pack construction was used in the Netherlands was, to my knowledge, in 2011. It is said that the construction was imported from the UK, where pre-packs have been in common use for many years.[2] Since 2011, pre-packs have become increasingly popular in the Netherlands. In 2013, the government announced that it was preparing legislation that will regulate the use of pre-packs.

Not surprisingly, the unions as well as some politicians and scholars are up in arms. One of the many arguments they advance against pre-packs is that the "mirroring" method of selecting redundant employees is not used, thus opening the door to arbitrary redundancy selection. In their resistance to the spread of pre-packs, the unions are now arguing that a transaction between a pre-pack receiver and a Newco qualifies as a transfer of an undertaking within the meaning of Directive 2001/23 and the Dutch implementing legislation. I see two lines of argument that could support such a stance:

a. although the documents selling the business are not executed (signed) until after the court has declared the transferor to be insolvent, the actual agreement is entered into - verbally, at least - before that time, so the exception under Article 5 of the Directive does not apply;

b. the insolvency is not really an insolvency, in that its purpose is not to liquidate the business but to enable the business to continue. It is in fact, if not in theory, more like a *"surséance"* procedure (i.e. a debt moratorium designed to enable continuation of the business).

Technically, argument a. is not strong because, even supposing it can be argued that the actual agreement to sell the business was entered into before the court order had been delivered, that agreement was conditional and does not come into effect until the condition precedent - the court order - has been satisfied. However, in practice the condition is usually no more than theoretical. This is particularly the case where the new owner is none other than the old owner in the form of a new legal entity. As the UK Insolvency Service noted[3], "Pre-packs have attracted criticism because it can appear that an insolvent company has reformed without any redress to its creditors - a concept known commonly as 'phoenixism'".

Argument b. is based on the distinction in Dutch law between - on the one hand - insolvency (*faillissement*), which is designed with liquidation of the assets on behalf of the creditors in mind and - on the other hand - debt moratorium (*surséance*), which is designed with continuation of the business and an arrangement with the creditors in mind. In practice, however, this distinction is not a bright line one. Receivers frequently sell a business rather than liquidating its assets, and debt moratoria more often than not evolve into insolvency.

As Professor Catherine Barnard (EU Employment Law, 4th edition (2012), page 621) notes, the distinction drawn by the ECJ between insolvency and pre-insolvency proceedings may be based on a false premise. Professor Barnard analyses four ECJ judgments with a view to determining "on which side of the line the national rules fall": *d'Urso* (C-362/89), *Spano* (C-472/93), *Dethier* (C-319/94) and *Europièces* (C-399/96), but she does not provide an answer.

The UK Court of Appeal has tried to find the answer. Reference is made to its eminently readable judgment in *Key2Law (Surrey) LLP - v - Gaynor De' Antiquis* [2011] EWCA Civ 1367 delivered on 20 December 2011, in which it analysed the distinction between, on the one hand, "bankruptcy proceedings or any analogous insolvency proceedings ...." within the meaning of Article 5(1) of Directive 2001/23 and, on the other hand, other types of insolvency proceedings. The case involved a law firm "DK" that became the subject of an "administration order" under the British Insolvency Act (as amended in 2003). The court appointed two administrators, who proceeded to liquidate the law firm and to sell its assets, by entering into a "management agreement" with another law firm (Key2), under which Key 2 was to collect DK's unbilled work in progress on behalf of the administrators in consideration of commission equal to 25% or 50% of the sums collected. A few days before going into administration, DK dismissed one of its solicitors, Ms De' Antiquis. She claimed that the agreement between (the administrators acting on behalf of) DK and Key2 qualified as a transfer of the undertaking within the meaning of the UK legislation transposing Directive 2001/23 ('TUPE') and that, therefore, Key2 was liable to her under various heads, including unfair dismissal and sex discrimination.

Key2 based its defence on Regulation 8(7) of TUPE which (almost literally repeating the wording of Article 5 of Directive 2001/23) provides:

"Regulations 4 and 7 do not apply to any relevant transfer where the transferor is the subject of bankruptcy proceedings or any analogous insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor and are under the supervision of an insolvency practitioner."

The central issue in the case was whether the proceedings that led to DK going into administration qualified as "analogous insolvency proceedings" within the meaning of Regulation 8(7) of TUPE and, hence, Article 5 of Directive 2001/23. In view of the ECJ's rulings in Abels, D'Urso, Spano, Dethier and *Europièces*, this issue boiled down to determining the *purpose* of the administration order.

Paragraph 3(1) of Schedule B1 to the UK Insolvency Act provides:
"The administrator of a company must perform his functions with the objective of:
(a) rescuing the company as a going concern, or
(b) achieving a better result for the company's creditors as a whole than would be likely if the company were wound up (without first being in administration), or
(c) realising property in order to make a distribution to one or more secured or preferential creditors."

Paragraphs 3(3) and 3(4) add that the administrator may only perform his functions with objective (b) if objective (a) cannot be achieved or if objective (b) would achieve a better result for the company's creditors, and he may only perform his functions with objective (c) if objectives (a) and (b) cannot be achieved. In other words, there is a hierarchy: first (a), then - if (a) is not the best option - (b) and finally - if neither (a) nor (b) are achievable - (c).

In the case at hand, DK argued that it was clear from the outset that objective (a) was not realistic. It was hoped that the administrator would be able to sell the law firm (= objective b), but as it turned out, this proved impossible and, instead, the law firm was liquidated (=

2 In 2011, it was estimated that 25% of the 2,808 companies that entered administration in the UK in that year used the pre-pack procedure and that nearly 80% of pre-pack sales were to connected parties: see the Insolvency Service's 2011 Annual Report.
3 House of Commons, The Insolvency Services, Sixth Report of Session 2012-2013.

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objective c). Therefore, in DK's view, the proceedings that led to the administrative order were "instituted with a view to the liquidation" of its assets and, hence, the exemption under Regulation 8(7) of TUPE applied.

It is worth reading the Court of Appeals' entire judgment, which can be accessed on www.bailii.org/ew/cases/EWCA/Civ/2011/1567. In brief, the court rejected DK's argument, finding it :
"unsatisfactory in principle that the determination of whether or not administration proceedings are, in any particular case, to be characterised as 'analogous insolvency proceedings' should depend on the evidence leading up to the making of the appointment of administrators. That is because an inquiry of that nature may well produce an uncertain picture as to the objective, or the predominant objective, intended to be achieved by any appointment ..."

Secondly, the court regarded
"it as in principle anyway wrong to identify the purpose of an appointment of administrators by reference to pre-appointment considerations as to the particular objective or objectives that it is foreseen that an appointment is reasonably likely to achieve."

Back to the Netherlands. There have been several pre-pack cases recently that have caught the attention of the media and Parliament. The most publicised of these is the *Estro* case, where hundreds of child care centres were transferred to a phoenix company and thousands of employees were involved. The case is controversial and is sure to influence the coming debate on a Bill that the government plans to introduce into Parliament modernising the Insolvency Act. The government aims to codify the currently informal *pre-pack* practice.

Comments from other jurisdictions

Germany (Paul Schreiner): German law is different from the legal situation in the Netherlands and the UK. A transfer of undertaking can also happen in insolvency situations. There is no exclusion in section 613a of the German Civil Code regarding a transferor that is in insolvency procedures.

German case law merely modifies certain of the consequences of a transfer of undertaking where the transferor is insolvent, in that the transferee does not have to take over the transferor's obligations in respect of the employment relationships, in particular, the obligations relating to employee pensions. Generally, only the obligations that accumulated after the transfer must be borne by the transferee.

However, in one respect, there is scope for activity that is similar to pre-pack. Buyers of companies in insolvency procedures often think they have found ways to run the business more efficiently and profitably, but this usually requires restructuring the business. The insolvency administrator is permitted to restructure the business in accordance with the buyer's plans. The measures taken will follow the rules of the insolvency procedure, meaning that termination periods can be shorter than usual and collective agreements can be terminated or concluded in a timely way. In this way, the buyer is able to shape the entity it buys and this is analogous to a pre-pack situation.

Slovakia (Beáta Kartiková): The Slovak legislator transposed Article 5 of Directive 2001/23 into the Slovak Labour Code as follows: "The provisions on the transfer of rights and obligations from employment relationships shall not apply to an employer which has been declared insolvent by a court." This means that the provisions on transfer apply only to restructuring and not to insolvency.

Further, the Slovak Act on Insolvency provides that: "When an insolvency trustee sells an insolvent enterprise, he shall transfer to the buyer all material assets, rights and other assets belonging to the enterprise. Liabilities related to enterprise shall transfer to the buyer only to the extent of liabilities incurred in connection with the operation of the enterprise following the court declaration of the insolvency, and non-monetary employment liabilities shall transfer only to the extent specified in the contract on the sale of enterprise." This wording makes clear that the buyer and the insolvency trustee may agree on which employees the buyer will take over and that only those employment contracts that are specified in the contract transfer.

We are not aware of any cases where insolvency has been used to allow for the transfer of a business without the transferee having to take over all of the staff. The insolvency process in Slovakia can take a long time and in our opinion it is unattractive for undertakings to go through it simply to acquire the business without all of its employees.

An alternative to insolvency proceedings is to transfer part of an enterprise. In other words, if a buyer wishes to buy a business, the parties may decide on sale of part of it on condition that this part creates a separate organisational and economic unit. In such cases, only the employees belonging to the transferred part will transfer. In addition, according to the Slovak Labour Code (transposition of Article 4(1) and (2) of Directive 2001/23), if the working conditions of an employee will undergo significant detrimental change as a result of a transfer and if the employee does not agree to the change, his or her employment will be deemed terminated by agreement for organisational reasons as of the date of transfer.

Subject: Transfer of undertakings - insolvency
Parties: 20 employees – v – Jan de Roos Transport Lemmer B.V. and others
Court: *Rechtbank Noord-Nederland, kantonrechter* (Lower Court) in Leeuwarden
Date: 22 August 2014
Case number: 3275687\CV EXPL 14-8565
ECLI number: ECLI: NL: RBNNE:2014:4598
Internet publication: www.rechtspraak.nl→uitspraken→zoeken in uitspraken→enter Jan de Roos
Hardcopy publication: JAR 2014/234

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2014/38

Czech Supreme Court applies 'good practice' rather than transfer of undertakings rules (CZ)

CONTRIBUTOR PETRA SOCHOROVÁ AND PREMYSL JIRECEK*

Summary

An employee transferred from one legal entity to another. Even though the transfer qualified as a transfer of undertaking, the employee was paid severance compensation. When he was dismissed a few months later, the transferee demanded repayment of 3/5th of the compensation, pursuant to Czech law. The Supreme Court rejected the demand. It did so without applying the transfer of undertakings rules. Instead, it held the demand to be "contrary to good practice".

Facts

The defendant in this case was Z.C. He was employed by a private organisation established by the State, known as the Consolidation Agency, as the managing director. His average salary, including bonuses, was € 38,000 per month. The Consolidation Agency was dissolved by operation of law with effect from 31 December 2007, without going into liquidation. Its rights and obligations were transferred to the State, acting through the Ministry of Finance. The Consolidation Agency paid the defendant severance compensation equalling five times his average monthly earnings, i.e. € 190,000.

On 28 December 2007, the defendant entered into an employment contract with the Ministry of Finance, which employed him at a salary of € 1,400 per month, i.e. less than 4% of what he previously earned. Upon termination of this contract in March 2008, after only three months, the Ministry of Finance clamed repayment of 3/5th of the severance compensation of € 190,000, i.e. € 114,000. The claim was based on Article 68 of the Labour Code. It provides that if an employee is rehired by the same employer that paid him severance compensation, and if this happens within as many months from the termination date as the number of months' severance compensation, the employee must pay back a pro rata portion of that compensation, in this case 3/5th (three because the defendant was employed anew for three months and five because he received five months' salary by way of severance compensation). The rationale for this is that severance compensation is intended to help the employee overcome the difficult situation in which he finds himself as a result of losing his job through no fault of his own. The compensation is designed to mitigate the unfavourable impact of organisational changes in the form of a lump sum payment. If the employee, after the termination of his employment, resumes employment with his original employer within the period that the compensation is designed to compensate him for (in this case, within five months), the compensation no longer serves its intended purpose.

The defendant submitted three reasons why he need not repay any part of the severance compensation he had received:

1. the fact that rights and obligations transferred from the Consolidation Agency to the Ministry of Finance did not mean that those two bodies were identical, i.e. the defendant was not rehired by the same employer;
2. his salary with the Ministry of Finance was totally inadequate to enable him to repay € 114,000;
3. prior to taking up employment with the Ministry of Finance it had assured him that his new engagement would not impact on his severance compensation. Therefore, demanding repayment of 3/5th of that compensation was contrary to "good practice".

Judgment

The Czech Supreme Court emphasised in its judgment that the phrase 'previous employer' means not only the employer with whom the employee's employment was terminated, who paid the severance pay and with whom the employee 'resumes' employment, but also any person or entity to whom the rights and obligations arising from the employment relationship were transferred from such employer. This means that the term also covers the transferee employer with whom the employee would have worked (by virtue of the transfer of rights and obligations arising from employment) had the employment not been terminated prior to such a transfer of rights and obligations.

The Czech Supreme Court further noted that, with regard to the obligation under the Czech Labour Code to return the received severance pay, it is of no relevance how much salary is paid to the employee under the new employment contract, nor how it compares to the salary under the previous contract (on which the severance pay was based). The Czech Labour Code assumes in this respect that it is solely and exclusively at the employee's discretion whether he resumes work with the previous employer, even if it is on slightly less, or significantly less, advantageous terms. Likewise, it is at the employee's sole discretion whether or not to accept a new engagement with his previous employer, even though this entails repaying the severance pay or part of it, as long as the new salary is not below the statutory minimum wage.

However, the Czech Supreme Court attached importance to the fact that the Ministry of Finance, when it entered into the new contract of employment, assured the defendant that no refund of the severance pay would be required. If the employee resumed work for the previous employer in reliance on this assurance and reasonably believed that he would not have to refund the severance pay, it would be contrary to good practice for the employer to demand a refund of the severance pay despite this assurance. The Czech Supreme Court reproached the lower courts for not considering the case in light of this aspect, overturned the judgments of both courts and returned the case to the court of first instance for further proceedings.

Commentary

Article 1(1) (b) of Directive 2001/23 excludes "the transfer of administrative functions between public administrative bodies" from the scope of the directive. However, the Czech legislator has provided that the rules regarding transfer of undertakings also apply to situations such as the one at issue in this case, where the law provides that all rights and obligations transfer from one part of the State to another. There is no need to consider the question of whether in those situations Czech law must be interpreted in accordance with the Directive, because that question did not arise in this case, as the fact that there was a transfer of an undertaking was clear. The Supreme Court recognized and confirmed that transfer. However, it did not apply the transfer of undertakings rules. Instead, it applied the doctrine of "good practice". In that way, it had no need to address the issue of whether there had been a need to pay the defendant severance compensation in the first place. It should not have been paid, but despite that, the Supreme Court protected the defendant against the claim for repayment.

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The Supreme Court's judgment does not reveal why the court saw no need to apply the rules on transfer of undertakings, although it is probably not for lack of knowledge of those rules. The same cannot be said of many Czech employment lawyers. The Czech Republic implemented Directive 2001/23 more than ten years ago and its implementation is a standard part of the Czech Labour Code, which is the main statute regulating employment law in the Czech Republic. Nevertheless, although both employment lawyers and others regularly engage in human resources work under the Labour Code, knowledge of transfer of undertakings is limited to employment lawyers working in large firms or boutique employment firms, and to those lawyers and HR specialists working in international companies, which deal with such issues on a regular basis. Nevertheless, it is true that knowledge of this topic has increased in the Czech Republic in the last a few years.

Comments from other jurisdictions

Germany (Paul Schreiner): There is no comparable situation in Germany since German law does not require an employer to make severance payments. Therefore there are also no regulations as to how such severance payments have to be paid back in case the employee is rehired. Social plans which are agreed between the employer and the works council regularly do contain an obligation to make redundancy payments, and where a larger company is involved they also regularly contain rehiring clauses. Typically, such rehiring clauses provide that in certain situations the employee shall pay back a proportion of the redundancy payment and that he is entitled to new redundancy payments if the employment is terminated again due to operational reasons within a certain period.

The Netherlands (Peter Vas Nunes): The outcome of this case seems logical and fair. Technically, the Czech courts could perhaps have reasoned as follows:

1. the transfer of the Consolidation Agency's rights and obligations to the Ministry of Finance constituted a transfer of undertaking;
2. therefore, the defendant continued to be employed and there was no reason for paying him severance compensation on 31 December 1997;
3. therefore, the defendant was unjustly enriched and was obligated to repay (not 3/5th but all of) the € 190,000;
4. however, that would have been in breach of the assurance that he would be paid this amount and, hence, contrary to good practice;
5. therefore, the claim for repayment should be rejected.

Most likely, applying the transfer of undertakings doctrine would not have altered the outcome. The Czech Supreme Court seems to have skipped steps 1-5 and to have gone directly to step 4.

Subject: Transfer of undertaking vs. good practice
Parties: Ministry of Finance – v – Z.C.
Court: *Nejvyšší soud Ceské republiky* (Supreme Court of the Czech Republic)
Date: 22 May 2014
Case number: 21 Cdo 2071/2013
Publication: http://www.nsoud.cz→ECLI → ECLI:CZ:NS:2014:.....

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2014/39

Supreme Court fails to identify transfer, Constitutional Court corrects error (SK)

CONTRIBUTOR BEATA KARTIKOVA*

Summary

A state-owned company was privatised. The transaction was clearly the transfer of an undertaking. However, the Social Insurance Agency, applying social insurance legislation, did not see it that way, with the result that a former employee of the company received lower pension benefits than he would have done, had the privatisation been treated as a transfer of undertaking. The issue in three instances was whether the private company had 'arisen' out of the state company within the meaning of the social insurance legislation and, if not, whether there was discrimination of private company employees as compared with employees of state-owned companies. It was not until subsequent proceedings in the Constitutional Court that the issue of the transfer came up.

Facts

The plaintiff was a blue collar worker in a state-owned mining company. In 1993, a number of senior employees set up a private limited liability company (the 'private company') which took over part of the mining operations, leased the premises from the State, purchased equipment and other assets from the state-owned company and hired some of the employees. Following this transaction (the 'privatisation'), those employees continued to perform the same work under the same conditions as before.

Upon the plaintiff's retirement, the Social Insurance Agency awarded him retirement benefits. However, these benefits were less than the plaintiff believed he was entitled to. This had to do with a distinction that Slovak social insurance made (until the year 2000) between three categories of employee: employees who perform physically or mentally strenuous or dangerous work (Categories I and II) and others (Category III). Employees in categories I and II ('favoured employees') accrued higher retirement benefits than those in Category III. Prior to the privatisation, the plaintiff had been categorised as a favoured employee. Following the privatisation, the Social Insurance Agency categorised him as a Category III employee, as a result of which his retirement benefits accrued in the period following the privatisation were lower than what they would have been had he continued to be classified as a favoured employee.

The Social Insurance Agency, applying social insurance legislation, took the position that the private company had not 'arisen' out of the state-owned company. Had the private company arisen out of the state owned company, the plaintiff would have retained his status as a favoured employee. In the Social Insurance Agency's view, there were only three situations where one company is deemed to 'arise' out of another company: legal merger, acquisition and split-up as provided in the Commercial Code. Given that none of these situations had occurred, the Agency turned down the plaintiff's request for reclassification.

In 2004, the plaintiff brought legal proceedings against the Social Insurance Agency, seeking reclassification as a favoured employee. In

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2005, the court of first instance ruled in his favour, but the next year this ruling was overturned on appeal. The plaintiff appealed to the Supreme Court. It upheld the appellate court's ruling, holding that the private company had not arisen out of the state-owned company. The Supreme Court affirmed the Social Insurance Agency's position that, according to the wording of the Social Security Act, merger, acquisition and split-up within the meaning of the Commercial Code are the only three ways in which one company can arise out of another.

Judgment

The plaintiff filed a complaint with the Constitutional Court, alleging violation of his constitutional right to protection by the State against discrimination. In his opinion, there was a discriminatory distinction between, on the one hand, employees of companies that were formerly state-owned but had later been privatised and, on the other hand, employees of companies that have remained the property of the state. The plaintiff argued that, when determining the relevant criteria, the type of work performed should also have been considered. If an employee was accurately classified as a favoured employee before the privatisation, and if he continued to perform the same work afterwards, then surely there could be no reason to change his classification. The legal basis of the plaintiff's complaint was that, by interpreting the Social Security Act in a restrictive, grammatical manner, thereby ignoring the purpose, the origin and the historical context of the Act and its successive amendments, the Supreme Court had created a situation where employees such as the plaintiff were unconstitutionally discriminated.

For technical legal reasons, besides dealing with the discrimination issue, the Constitutional Court focused on the concept of one company 'arising out of' another. The Constitutional Court emphasized that public authorities and courts should not interpret statutory provisions in an excessively formalistic manner if that leads to injustice. Courts are not always bound by the literal wording of a law. They may, and sometimes must, depart from that wording if that is required by the purpose of the law, the history of its origin or any constitutional principle. When interpreting and applying laws, their purpose and meaning - which are not only derived from their wording but also from fundamental principles of law - should be taken into account.

Given the need to interpret the Social Security Act purposively, the Social Insurance Agency should have looked to the Labour Code, which contains provisions on transfer of undertakings. It defines a transfer of undertaking as the transfer of an economic activity which retains its identity as an organised grouping of resources. This definition must be interpreted in accordance with the case law of the Court of Justice of the EU (the ECJ), including its judgments in the cases *Wendelboe* (C-19/83), *Ny Mølle Kro* (C-287/86), *Hidalgo* (C-173/96), *Ziemann* (C-247/96), *Sodexho* (C-340/01) and *Mayeur* (C-175/99). If the privatisation of the plaintiff's former employer qualifies as a transfer of undertaking and his work remained unchanged afterwards, then there was no reason to change the plaintiff's classification as a favoured employee.

On these grounds, the Constitutional Court repealed the Supreme Court's judgment and referred the case back to the Supreme Court for further proceedings.

Commentary

In the decision reported above, the courts judged whether the plaintiff fulfilled the prescribed requirements for being granted higher retirement pension on the basis of whether there was a transfer of undertaking from the state-owned enterprise to the commercial company.

The Supreme Court dealt only with what the Social Security Act actually said. In its view the employer of the plaintiff did not arise from the state-owned enterprise because it was not its legal successor and not even part of the employer's property was state owned. The Supreme Court summed up that the work performed by the plaintiff in the company had not been performed in a company created from the state-owned enterprise and therefore he could not have been assessed to be in a favoured category for higher retirement pension.

We fully agree with the findings and the opinion of the Slovak Constitutional Court, as they respect the purpose and objective of statutory provisions. The Constitutional Court had regard to all the rights of employees under the Labour Code and the Constitution of the Slovak Republic, in light of the ECJ's case law. In our opinion the Constitutional Court assessed the facts and found that there was a de facto transfer of the undertaking and therefore the employment rights and obligations transferred, even though there was no legal succession within the meaning of the Commercial Code.

Comments from other jurisdictions

Germany (Dagmar Hellenkemper): It is very likely that the highest German Federal Labour Court (the Bundesarbeitsgericht) would have come to the same conclusion as the Slovak Constitutional Court. Under German Law, Section 613a BGB (the German transposition of Directives 1977/187 and 2001/23) does not differentiate whether the transfer of undertaking concerns a private or a public company or a public-private partnership. If the same employees work with the same machinery, tools and equipment, it is considered under German Law that the essential business resources have been transferred by way of a transfer of undertaking. Depending on the type of company, a transfer of undertaking can even take place if the entire group of employees transfers without any hardware or machinery (in cases where the employees are considered the essential business resources, such as in a company providing security services or a callcenter) or the entire hardware transfers without the employees (in cases where employees are not considered the essential business resources, e.g. power plants and highly industrialised companies). A distinction such as the one presented by the Slovak Higher Court would probably have been considered arbitrary.

Subject: Transfer of undertaking
Parties: Z – v – S
Court: *Ústavný súd Slovenskej republiky* (Constitutional Court of the Slovak Republic)
Date: 8 December 2010
Case number: I. ÚS 306/2010
Internet publication: www.concourt.sk → *Vyhľadávanie rozhodnutí* → *Spisová znacka* → case number

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2014/40

Nature of activity, including asset/labour intensiveness, determines existence of transfer (HU)

CONTRIBUTOR GABRIELLA ORMAI*

Summary

Earlier this year, the Supreme Court of Hungary decided that there is no transfer of an undertaking where the activity concerned is labour-intensive and no staff or immaterial assets transfer.

Facts

The defendant employer in this case had entered into an open-ended contract of employment with the claimant in 2008. The claimant was employed as the Head of Secretariat. The Secretariat had three employees altogether and was charged with providing secretarial support. On or about 31 August 2009, the defendant offered to terminate the employment relationships of all three employees at the Secretariat with a mutually agreed compromise agreement. The claimant refused the offer. On the same day, the defendant terminated the claimant's employment relationship with regular notice, the termination date being 30 September 2009. The notice letter stated as the reason for the termination that the defendant had decided to close the Secretariat, to cancel the positions of all employees in the Secretariat for economic reasons and to engage a subcontractor to perform the tasks carried out by the Secretariat. The defendant engaged a third party subcontractor (MPH) based on a service agreement to carry out the tasks of the Secretariat by providing professional staff, while the infrastructure was provided by the defendant.[4]

The claimant submitted a claim at court arguing that the notice of termination was unlawful because there had been a transfer between the defendant employer and MPH as subcontractor.

Judgments

The court of first instance found that the defendant employer had transferred an organised group of resources to MPH which – on its own – was sufficient to continue the activities of the Secretariat and maintain its identity. Although the service contract between the defendant and MPH determined that the services of the Secretariat were to be engaged on the basis of a subcontracting arrangement, rather than employment, this did not necessarily mean that there was no transfer. The main element of a transfer in this case would be the transfer of an activity from the transferor to the transferee based on an agreement between the defendant and MPH - which itself constituted a transfer of the undertaking. For this reason, the notice of termination was unlawful, since the real reason for the notice was the transfer. Therefore, the employment termination breached the Labour Code. The defendant appealed to the court of second instance.

The court of second instance reversed the decision of the court of first instance and rejected the claim. Its view was that whether a transaction should be treated as a transfer should be primarily based on the nature of the transaction and the terms and conditions of the contract between the parties to the transaction (in this case, the defendant and MPH). According to the court of second instance, the essence of the service agreement between the defendant and MPH was that the defendant was engaging a subcontractor to provide an all-inclusive secretarial service. The court was not in a position to second-guess the legal basis or change this. In the present case, the defendant had decided to engage a subcontractor to perform the Secretariat's tasks. As a result, it ceased to have a secretariat of its own, it got rid of the relevant jobs and terminated the affected employees. From October 2009 onwards, the defendant received services from a subcontractor and its activity of maintaining a secretariat with three employees ceased. The court's view was that the decision of the court of first instance had been incorrect, since the defendant did not transfer the Secretariat to MPH as an intangible asset. It had shut down the Secretariat and outsourced its functions. This business decision could not be amended by a court.

There is a difference between the transfer of an undertaking and a subcontractor becoming the employer. Based on court practice, if the employees continue their work at the same place under the same conditions it is assumed that a transfer has taken place. This was not, however, what happened in the present case. When determining whether a transaction should be treated as a transfer, the terms and conditions of the service contract and the intention of the parties must also be considered. Based on Directive 2001/23/EC, the requirement to maintain the employment relationships following a transfer is a consequence, not a condition of the transfer. Therefore, it is not necessary for staff to have been moved across for the arrangement to be considered a transfer.

In spite of the above, the court of first instance failed to consider how the defendant and MPH had agreed on the employment of the three employees and incorrectly concluded that the service contract acted as a transfer of the undertaking.

According to the opinion of the court of second instance, the court of first instance revised the contractual basis between the defendant and MPH without either being asked to do so, or indeed having the authority to do so. It found that treating MPH as the transferee would go against the parties' contractual intentions. A court does not have the power to intervene in managerial decisions that are not the subject of the court case.

Based on the above, the notice of termination was in compliance with the applicable laws.

The claimant submitted a claim for extraordinary review by the Supreme Court. The Supreme Court confirmed the decision of the court of second instance that there was no transfer of undertaking in the given case. It highlighted that the court of second instance was correct in stating that how the defendant arranges for tasks to be completed is a matter for its own discretion, but also said that the claimant was correct to say that whether the conditions of transfer are met must be considered based on the arrangement chosen. As was highlighted by the court of second instance, the agreement between the defendant and the subcontractor did not require the further employment of the affected employees. In other words, it did not stipulate that the subcontractor would step into the shoes of the employer.

The case law of the ECJ developed based on Directive 2001/23/EC indicates that the rules on transfer of undertakings apply where there

4 The judgment does not specify what the "infrastructure" was. It may refer to material assets such as computers and files, but it may also mean that MPH agreed to carry out the work at the defendant's premises.

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is a transfer of an economic entity which retains its identity. The further employment of staff is not a condition of this, but it may indicate that the identity of the entity remains the same. The criteria set by the ECJ must be considered in order to decide whether the economic entity has retained its identity. These are as follows: (i) the transfer of movable and immovable assets; (ii) the transfer of intangible assets; (iii) the similarity of the activities carried out by the economic entity before and after the transfer; (iv) the (possible) continuation of the activity carried out before the transfer; (v) the transfer of clients. However, the presence of these criteria alone does not necessarily lead to a transfer. The nature of the activity transferred has an impact on whether the conditions for the transfer rules to apply are fulfilled. Based on the practice of the ECJ, whether the business is asset- or labour-intensive is important. In order to establish whether a business has retained its identity, it is necessary to work out what the 'core' assets of the business are and establish whether these assets have been transferred. If the core assets are transferred, then the transaction triggers the rules of transfer of undertakings, with the result that the affected employees automatically transfer as well.

In this case, however, the 'core' assets (i.e. staff and intangible assets) were not transferred. The fact that the activity carried out after the transaction was the same or similar to the one before the transaction does, on its own, mean that the economic entity retained its identity. Therefore, the transaction did not constitute a transfer of undertaking.

Commentary

Cases on transfer of undertakings are rare in Hungarian employment tribunals and this can be seen by the fact that the three courts reasoned the case very differently. It is interesting that only the Supreme Court made express reference to ECJ case law and applied the correct test, using arguments based on the nature of the business affected. This decision will be of significant guidance in interpreting Hungarian law on transfer of undertakings. We expect more court cases in this field because of an increasing awareness among employees of the rules and their consequences for them.

Comments from other jurisdictions

Austria (Manuel Schallar): In Austria transfer of undertakings and their legal effects are regulated in the Act Adapting Employment Contract Law (*Arbeitsvertragsrechts-Anpassungsgesetz*, the 'AVRAG'). According to §3 AVRAG, the transferee must take over all rights and duties arising from contracts of the transferor. In deciding whether the transfer of an economic entity has actually taken place, the Austrian courts consider whether a business is asset- or labour-intensive. In the case of a transfer of a labour-intensive function, whether a substantial number of employment relationships in the part of the business transferred cross over and/or whether the managerial staff of the unit cross over are significant factors.

Germany (Paul Schreiner): A German court would probably also have come to the conclusion that there was no transfer of undertaking in the case at hand. Besides this question, a German court would also have scrutinized the nature of the outsourcing contract. In the situation of the secretariat, one could very well guess that in reality the "outsourcing" turns out to be the employment of leased employees. Under German law this would be the case if MPH´s personnel was directly reporting to employees of the defendant and received day to day orders from them. If that was the case, the termination would have been invalid under German law, because a termination for operational reasons necessarily requires the lack of work. The mere decision to change own employees to leased employees is not related to the lack of work and therefore no sufficient reason for a termination.

The Netherlands (Peter Vas Nunes): My understanding of this case is, in essence, the following:

- Court of first instance: the activities of the Secretariat remained the same, therefore there was a transfer of undertaking (TOU);
- Court of Appeal: there was no TOU because the defendant and MPH had agreed that the work would be performed on the basis of a (sub)contract, and if one were to accept a TOU, that would effectively amount to a change to the nature of the contractual relationship between the parties involved from one of employment to one of subcontract;
- Supreme Court: a secretariat is a labour-intensive activity and as MPH did not take on any of the three employees, there was no TOU. In other words, the Supreme Court upheld the Court of Appeal's decision, but on totally different grounds.

If this understanding is correct, then, in my view, the court of first instance's decision was wrong, because whether or not there is a TOU is not determined solely by activity going across. The court of appeal's decision was wrong, because the parties cannot avoid a transfer of activity being a TOU merely by changing the legal nature on the basis of which the activity is carried out. The Supreme Court's judgment strikes me as correct.

Subject: Transfer of undertakings
Parties: not published
Court: *Curia* (Supreme Court of Hungary)
Date: 7 January 2014
Case number: Mfv.I.1.090/2013 (EBH2014.M.6)
Internet publication: www.lb.hu→Elvi birósági határozatok → "Évszám"= 2014 and "Szakág" = munkaügyi → 6/2014

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2014/41

Employee forfeits right to object to transfer (GE)

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Summary

An employee's right to object to a transfer of undertaking and to remain employed by the transferor can be forfeited if the employee first sues the transferee, then settles and then sues the transferor.

Facts

The plaintiff had been employed by the defendant, a catering company, which had operated a staff
cafeteria since 2006. The plaintiff had worked in the cafeteria since 1985. In 2010, the defendant lost the contract to operate the cafeteria, which, from January 2011 on, was operated by a third party (the 'new caterer'). The defendant informed the plaintiff of the transfer to the new caterer.
However, the information letter did not fulfil the statutory requirements, in that it named the wrong recipient for any objections to the transfer.

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The plaintiff offered his services to the new caterer in January 2011. However, the new caterer denied that a transfer had taken place and declined the plaintiff's offer. The plaintiff brought action against the new caterer, claiming an employment relationship with it. In the course of the lawsuit, it became apparent that a transfer of the undertaking had indeed taken place. Nevertheless, the parties concluded the lawsuit with a settlement agreement in April 2011, in which they established that a transfer had not taken place and that there had never been an employment relationship between them. They ex-plicitly included a clause stating that the plaintiff retained his right to object to the transfer of undertaking vis-a-vis the defendant. They also agreed on a severance payment amounting to € 45,000.

In May 2011, the plaintiff objected to the transfer of the undertaking on the basis of the German doctrine of *Widerspruchsrecht* as laid down in section 613a of the Civil Code (BGB). This doctrine allows an employee to object to transferring into the employment of the transferee. In such cases, the employee remains in the transferor's employment. The defendant, however, had no job to offer the plaintiff. Accordingly, the plaintiff brought an action against the defendant. He asked the court to establish the continued employment relationship between him and the defendant. He also claimed outstanding salary.

The *Arbeitsgericht* held that the plaintiff was indeed still an employee of the defendant and had to be employed by the defendant. The defendant appealed to the *Landesarbeitsgericht* (LAG) of Hessen. The LAG rejected the claims. The plaintiff then appealed to the *Bundesarbeitsgericht* (BAG).

Judgment

The BAG rejected the plaintiff's appeal. It held that in a situation such as this, where the plaintiff had first sued the transferee in order to establish an employment relationship with that party and then entered into a settlement agreement according to which a transfer of the employment relationship had never taken place, he had forfeited his right to subsequently object to the transfer and claim continued employment with the transferor.

Section 613a BGB provides that an employee may object in writing to the transfer of his or her employment relationship within one month of receipt of notification. However, this deadline does not apply if the notification given by the transferee does not comply with legal requirements, a situation that occurs quite often in Germany – as it did in this case, where the defendant had failed to provide the correct information.

Normally, the plaintiff would have been able to enforce his right to object to the transfer of undertaking, as it had only been five months since the transfer had taken place. The Court nevertheless held that, in this case, his right to object had been forfeited, even if the statutory deadline for the objection had not expired.
Usually, the forfeiture of a right under German Law requires that the employee has not exercised this right for a certain time (element of time) and has given the impression that he will not exercise this right in the future (element of circumstance). Although only five months had passed and the plaintiff had included a clause in his settlement agreement with the new caterer that he retained the right to object to the transfer of undertaking vis-a-vis the transferor (his former employer), the Court held that he had forfeited his right by his behaviour, given that the transfer had actually taken place and had become undisputed in the course of a lawsuit.

By settling his lawsuit (with a large severance payment), the plaintiff had disposed (*disponieren*) of his employment relationship with the transferee. This gave his former employer the right to assume that the plain-tiff would not exercise his *Widerspruch* right. Exercising that right constituted contradictory behaviour and this was a violation of the obligation of good faith set out in section 242 BGB, according to which a party that has an obligation must discharge that obligation according to the requirements of good faith, taking customary practice into consideration. Moreover, allowing the plaintiff to exercise his *Widerspruch* right would lead to him retain his original employment contract with the transferor, in which case he would have been able to enter into a termination agreement with the transferor, thereby disposing of one and the same employment contract twice.

Commentary

This judgment increases legal certainty. Given the fact that information letters concerning transfer of undertakings rarely comply with all legal requirements in Germany, transferors are often faced with a long period during which the employee can claim a continuing employment relationship. Forfeiture of the right to object the transfer is one of the few defences the transferor can use. "You can't have it both ways" is the message sent to the plaintiff in this case. He cannot dispose of his employment relationship with the transferee, then object to the transfer and claim the same employment relationship with the transferor, possibly getting severance payments from both possible employers.

Comments from other jurisdictions

Austria (Daniela Krömer): The problem of long periods of uncertainty for the transferor following a transfer, does not arise very often in Austria, as the right to object to a transfer is limited to certain, legally defined situations. Employees can only object if either the transferee does not continue with its contractual agreement in relation to a company pension, or if the transferee does not take on board the protection against termination contained in the collective agreement applicable at the transferor. In addition, in just a very few other situations, the Supreme Court has granted additional rights to object to a transfer (e.g. where a works council representative would have lost his position as a works council representative). In the cases defined in law, employees can object within a month after they have been informed of the facts of the transfer or have otherwise acquired that knowledge.

As the right to object depends on very specific circumstances, not many transferors are faced with situations in which employees can claim a continuing employment relationship. The period of time to object in Austria is, however, only triggered by knowledge of the transfer. It can be assumed that the courts would expect employees to obtain the necessary information in a timely way so that they can exercise their right to object to the transfer, although to the author's knowledge, no case law exists on this.

In addition, under Austrian law it seems unlikely that a transferee and an employer could contractually agree that no transfer has taken place. In any event, a contract at the expense of a third party (*Vertrag zu Lasten Dritter*), does not bind that third party, namely the transferor.

United Kingdom (Bethan Carney): The normal outcome in the UK if an employee objects to a transfer in advance is that the transfer operates to terminate their contract of employment but they are not treated as dismissed. From this point they are not employed by either transferor or transferee and have no claims against either – it is the equivalent of a resignation. This is in accordance with the ECJ decision of *Katsikas*

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v Konstantinidis 1993 IRLR 179 which held that an employee could not be compelled to work for a transferee but neither were Member States obliged to provide for the employment contract to continue with the transferor in the event of the employee objecting to the transfer. What happens to the employment contract in this situation has been left to the discretion of the Member States.

There is an exception, however, where the transfer would involve a substantial and detrimental change to the working conditions of the individual. In these circumstances, the employee may object in anticipation of the proposed change, their employment terminates on the date of the transfer and they retain the right to claim for unfair dismissal against the transferor. Liability in these circumstances will not transfer to the transferee.

There is no provision in the UK transfer of undertakings legislation for employees to object after the date of the transfer. However, where an employee does not know about the prospective change of employer or the identity of the new employer and they resign as soon as they become aware of the facts, this has been held by the High Court to constitute an objection to the transfer even when it occurs after the date of the transfer (*New ISG Ltd v Vernon 2008 ICR 319*). It would not be possible in the UK for an employee to wait as long as one month after the transfer before objecting. The employee in the case of New ISG Ltd resigned two days after the transfer.

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Parties: Unknown
Court: Bundesarbeitsgericht (Federal Labour Court)
Date: 17 October 2013
Case number: 8 AZR 974/12
Hardcopy publication: NZA 2014, p. 774
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2014/42

Cross-border transfer of undertakings, focussing on Germany, UK and the Netherlands (ARTICLE)

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1. Introduction

Undertakings are increasingly being transferred to foreign companies. Neither the Transfer of Undertaking Directive 2001/23/EC (the 'Directive') nor, to my knowledge, Member States' regulations stipulate how to apply labour law provisions to a transfer between Member States. A crucial question is which national law applies. Transposition of a directive by a Member State does not in itself lead to uniform legislation within the EU. As long as the aim of a directive is achieved, the Member States may implement the directive in the way that best suits their legal system. In addition, Directive 2001/23/EC is a minimum harmonisation directive. Article 8 allows Member States to grant employees rights that are more favourable than the directive requires. As a result of choices made by Member States, domestic laws on transfer of undertakings vary across the EU. This article focuses on the issue of the conflict of law when dealing with a cross-border transfer. It also examines, where appropriate, the jurisdiction of the courts.

Cross-border transfers can take different forms. This article considers situations where not only the ownership of a business is transferred to another Member State, but its activities also move to that other Member State. It analyses the issues that can arise under the law in force in Germany, the UK and the Netherlands. It does not address problems concerning employee participation within the meaning of Article 6 of the Directive.

2. The territorial scope of Directive 2001/23/EC

Although the Directive is silent on transfer of undertakings between Member States, neither the Directive nor its underlying principles stand in the way of applying it to cross-border transfers, but the territorial scope of the Directive is not limited to intra-state transfers. Article 1(2) provides: 'This Directive shall apply where and in so far as the undertaking, business or part of the undertaking of business to be transferred is situated within the territorial scope of the Treaty'. Thus, the relevant criterion for determining the Directive's territorial scope is the situation of the economic entity on the date of the transfer. As long as the undertaking to be transferred is situated in the European Union, the transfer falls within the scope of the Directive, irrespective whether the transferor and transferee are governed by the law of the same Member State.

Most Member States do not have a specific provision on cross-border transfers and generally, this is not a problem. In the case of the Dutch and German Civil Codes, the wording of the text is not specifically restricted to the territory of the Netherlands or Germany. Hence, the implementation law can be said to be in line with the Directive. This view is endorsed by Dutch and German case law.[1]
The situation in the UK is somewhat different. The legislation on transfers of undertaking, known as TUPE, specifically requires the undertaking to be established in the UK immediately prior to the transfer. An example where this was the case in a cross-border context, was adjudicated by the Employment Appeal Tribunal.[2] In this 2011 case, the undertaking was moved from the UK to a company whose premises were based in Israel. The employees were told that, if they refused to move to Israel, they would be made redundant. None of the employees moved to Israel and, accordingly, they were dismissed. When the trade union lodged a claim against both the transferor and the transferee, the defendants argued that TUPE did not apply where a business was transferred overseas. The Employment Appeal Tribunal dismissed this argument, holding that a purposive approach to TUPE required that the employees should be protected even if the transfer were across borders.

1 See for the Netherlands: Ktr. Eindhoven 9 September 2008, EELC 2009/2 and JAR 2008/271; Ktr. Tilburg 27 July 2007, JAR 2007/259; Ktr. Zaandam 26 September 2007, JAR 2008/67; Ktr. Amsterdam 8 August 1995, KG 1995/339 and, for Germany: BAG 13 December 2013, ArbRAktuell 2013, 209; BAG 26 May 2011, EELC 2012/1 and NZA 2011, 1143.
2 Employment Appeal Tribunal 12 December 2007, EELC 2011/3, No. UKEAT/0171/07/CEA.

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The wording of TUPE appears to conform to the Directive, in that Article 1(2) of the Directive refers to the place of the undertaking prior to the transfer. There is, however, a difference in perspective. In its current wording TUPE does not deal with the situation where an economic entity that was previously situated elsewhere in the EU transfers into the UK. This may be a problem in relation to the applicable law (see section 5.2).

3. Can there be a transfer of an undertaking when the business is relocated abroad?

The Directive only applies when dealing with transfer of undertakings. The transfer of an undertaking requires a legal transfer or merger of an economic entity that retains its identity. The Court of Justice of the European Union ('CJEU') gave 'transfer of undertaking' a uniform meaning and in this respect, the laws of the Member States are uniformly applied. However, the Directive does not specify whether it applies to situations where the business is physically transferred across borders. Some argue that a great distance between the old and new locations automatically leads to a significant change in the organisational structure of the undertaking, with the result that the identity is not retained. The relocation is then considered as a closure of the business rather than a transfer of the undertaking. I do not support this view.[3] In my view, the geographical relocation of the place of business does not, of itself, preclude the operation from being regarded as a transfer of undertaking.

This does not mean that the relocation of the economic entity is of no relevance. Relocation is one of the factors in determining whether the entity retains its identity under the *Spijkers*-criteria as formulated by the CJEU in 1997.[4] The importance of this factor depends on the nature of the sector in which the transfer takes place. The majority of the personnel will not be prepared to move when the distance between the transferor's and transferee's business is too great. As a result, in a labour-intensive sector there will generally be no transfer of the undertaking and the situation will be considered as a closure of the business. In a capital-intensive business, however, the transfer of (the majority of) the personnel is less relevant when assessing whether the entity retains its identity. This is illustrated by the decision of the German *Bundesarbeitsgericht* of 26 May 2011.[5] The *Bundesarbeitsgericht* treated the relocation of the business from Germany to Switzerland as a transfer based on the reasoning that the Swiss buyer bought the department's equipment, machinery and inventory and also took over the customer lists and continued producing existing orders.

One more comment of practical concern: it is not uncommon for the transfer of a business to be phased. Let me give an example. A German company purchases a factory in the UK, not by way of a share transaction, but through an asset purchase agreement. The German transferee has now become the owner of the factory and the employer of its staff. A few months later, the factory's activities and equipment are physically relocated to Germany. The question arises as to whether the decision to relocate is linked to the transfer of the undertaking. If not, the Directive does not apply to the decision to relocate and the personnel of the transferred business can easily be dismissed. It depends of course on the circumstances of the specific case whether the relocation will be regarded as a separate decision. A decisive factor is the time period between the asset purchase agreement and the relocation. For the rest of this article, it is assumed that the decision to purchase and the decision to relocate are linked and that these decisions are treated as a transfer of undertaking within the meaning of the Directive.

4. Conflict of law

Article 1(2) of the Directive does not contain special rules for determining the applicable law in the case of a cross-border transfer and so provides no guidance as to which law should be applied in relation to a cross-border transfer. This means that the transfer will be governed by the general rules on choice of law. The Rome I Regulation ('Rome I') determines which country's law applies to an individual employment relationship.[6] Rome I is binding and directly applicable in each Member State in all respects without any transposition being required or, indeed, allowed (Article 249 TFEU).

The basic principle underlying Rome I is that of free choice, but it does contain specific rules relating to individual employment contracts. The CJEU has repeatedly held that the rules deriving from the Directive are 'mandatory rules'.[7] There is, however, debate about whether the rules are mandatory provisions from which no derogation can be made by contract (Article 8(2) Rome I) or overriding mandatory provisions having their own scope rule (Article 9 Rome I). This is more than a mere academic debate. Take the following example. The business concerned is situated in the Netherlands. Some of the personnel live across the borders in Germany and also perform a big part of their job in a German establishment. Which implementation law is applicable when the Dutch business is transferred? According to Article 8(2) of Rome I, the law of the Member State where the employee habitually carries out his work or, if he does not habitually carry out his work in one country, the place of business through which he was engaged is situated, applies. In addition, if it appears that, as a whole, a contract is more closely connected with the law of another country, then the law of that other country will apply. For the personnel that work in the German establishment in this example, the result of applying Article 8 (2) of Rome I will be German that implementation law applies. In contrast, Article 9 Rome I provides that the law of the Member State where the undertaking is situated applies. The applicability of the transfer of undertaking rules in this case is not determined by the law governing the employment contract but by its own scope, i.e. the place of the undertaking. In the example Article 9 of Rome I leads to the conclusion that Dutch implementation law applies.

In 2008, the Dutch lower court established the applicable law in the context of a cross-border transfer using the mandatory rules provided in Article 8(2) Rome I.[8] The German *Bundesarbeitsgericht* ruled in the same vein in 2011.[9] An argument in favour of this approach is that the labour law rights deriving from the Directive are claimed on the basis of the individual employment contract, creating a direct link between the Directive and the individual employment contract. A disadvantage of this view is that the applicable law can differ from employee to employee, depending on the law governing the individual employment contract. That may be an undesirable outcome. Besides that, Article 1

3 See also B.W. Feudner, Grenzüberschreitende Anwendung des 613a BGB, NZA 1999, p. 1184.
4 CJEU 18 March 1986, C-24/85 (*Spijkers*).
5 BAG 26 May 2011, *EELC* 2012/1 and NZA 2011, 1143.
6 Council Regulation (EC) No. 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008, p. 6.
7 See CJEU 10 February 1988, C-324/86 (*Daddy's Dance Hall*) and ECJ (6 November 2003, C-4/01 (*Serene Martin*).
8 Ktr. Eindhoven 9 September 2008, *EELC* 2009/2, and *JAR* 2008/271.
9 Bundesarbeitsgericht 26 May 2011, *EELC* 2012/1 and *NZA* 2011, 1143.

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of the Directive names the undertaking as the subject of the transfer, not the individual employee. This indicates that the Directive is of an extra-contractual nature and serves a higher interest than that of each individual employment contract as such. The latter aspect leads me to the conclusion that the provisions of the Directive qualify as overriding mandatory rules in the meaning of Article 9 Rome I. As a result, the law of the Member State where the undertaking is situated is applicable to claims based on the Directive. Dutch implementation law applies in the example of the transfer of a business situated in the Netherlands.

5. Applying the rules concerning conflict of law

A distinction should be made between two situations, one where the employee does not wish to relocate with the business and the other where the employee follows the business to another Member State. Both situations are discussed below. A dispute about whether the legal transfer or merger qualifies as a transfer of undertaking within the meaning of the Directive must always be answered according to the law where the undertaking is situated before the transfer. Normally this causes no problems, as the CJEU gave a clear definition of 'transfer of undertaking'.

5.1. Where the employee does not wish to be relocated

In most cross-border transfers, the majority of the personnel will not be prepared to move, if only because the distance between the transferor's and transferee's business is too great. This will regularly be the case when the business is relocated to a country outside the European Union or to a non-neighbouring Member State. Article 3 of the Directive states that the employees remain entitled to all their terms of employment even if they are transferred. The terms of employment include the location of the workplace. This does not, however, mean that the employees are entitled to continue their work in the 'old' Member State. The Directive does not merely protect the rights of employees in the event of a transfer, but it is also takes account of the employer's freedom to conduct its business.[10] The transferee has the right to demand that employees accept a change of workplace. When the distance to the new location is too far, however, this constitutes a substantial change to the working conditions in the meaning of Article 4 of the Directive. In this way, the Directive strikes a balance between its two underlying principles: the protection of employees and freedom to conduct business.[11]

In the example of a Dutch business transferring to (eastern) Germany or the UK, there will usually be a substantial change to working conditions. In such a case, the question of applicable law is crucial, because the legal consequences of objecting to moving abroad differ across the Member States. Under Dutch law, employees transfer automatically. If they object to the transfer, their employment contract terminates on the day of the transfer. If there is a substantial change to the working conditions, they can ask a judge to grant them compensation, but ultimately they lose their jobs. In the UK, employees can object to the transfer in two different ways. Employees are treated as having been dismissed if the transfer involves a substantial change to working conditions and are treated as having resigned if there are no changes to working conditions. In the first situation, the employees have the right to bring claims for statutory redundancy pay or unfair dismissal. Hence, in the Netherlands as well as in the UK employees are deemed to resign when they refuse to work abroad. In Germany, by contrast, employees have a so-called *Widerspruchsrecht*. According to this, employees can oppose the transfer and continue to work under an employment contract with the transferor (assuming the transferor does not cease to exist, as will frequently be the case).

Usually, any objections will be directed against the transferor before the transfer is concluded. There is no doubt that the court of the Member State where the employee performs his activities is competent and, in addition, the provisions of that Member State's law apply. The situation before the transfer has no international aspect. However, it is rather different if the employee lodges a claim against the transferee after the transfer. This might be necessary, especially if the transferor ceases to exist as a result of the transfer and/or lacks financial resources. If the defendant is domiciled in the European Union (except Denmark), the Brussels I Regulation ('Brussels I') determines jurisdiction.[12] Article 19 of Brussels I determines jurisdiction on the basis of the place where the employee habitually carries out his work or *the last place where he did so*. Thus, the relocation of the business is of no relevance for the jurisdiction of the court and the employee can lodge a plea against the foreign transferee in a court in the Member State in which he performed his work before the transfer.

Then comes the difficult question of which law the competent court should apply. If, as argued before, Article 9 Rome I governs the rights and obligations of the parties with respect to the transfer of the undertaking, it can be argued that the law of the new Member State will apply after relocation to claims lodged against the transferee. On the other hand, one could argue that the claim relating to an objection to relocation is more closely connected to the situation prior to the transfer. In my opinion, if the employee has not worked in the relocated business, the latter argument should prevail. In the example of the transfer of a business from the Netherlands to a foreign country, Dutch implementation law applies when employees object to relocation irrespective whether the action is brought against the transferor prior to the transfer or the transferee after the transfer.

5.2. Where the employee follows the business abroad

Where a cross-border transfer takes place between two neighbouring countries, the employee can agree to accompany the business abroad. Article 3 of the Directive ensures that the transferor's rights and obligations automatically transfer to the transferee by operation of law. As a result, the employee can claim continued employment abroad with the transferee on the same terms and conditions as he had prior to the transfer.

If the transferee offers the employee continued employment on inferior terms, the employee can make a claim against the transferee in a court within the Member State where he works after the transfer (Article 19 Brussels I). The law of the Member State in which the undertaking is relocated applies (Article 9 Rome I). This might be disadvantageous to transferred employees, especially in relation to collective labour rights deriving from the employment contract.

The systems for collective agreements differ across the Member States. There is a risk that a court (especially a foreign court) might not recognise certain claims deriving from a collective agreement that applied to the employment contracts before the transfer. The risk

10 CJEU 18 July 2013, C-426/11 (*Parkwood Leisure Ltd.*).
11 This is also the case when the business is relocated within the same Member State.
12 Council Regulation (EC) No. 44/2001 of 22 November 2000 on jurisdiction and the recognition and enforcements of judgments in civil and commercial matters, OJ L 12, 16.1.2001, p. 1.

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exists especially for Dutch employees, as the Dutch collective labour system is very complex. Further, Member States can choose to limit - to a year at most - the period for observing those collective rights. German law provides for such a limit, but Dutch law does not. Transfer of undertakings can also give rise to claims based on prohibition against dismissal. Article 4 of the Directive determines that a transfer 'shall not in itself constitute grounds for dismissal by the transferor or the transferee'. After a transfer a claim based on this prohibition must be lodged in a court in the new Member State (Article 19 Brussels I) and the law of the new Member State must be applied. This is because the undertaking has relocated to the new Member State and the employee has agreed to work abroad. Therefore, the claim is related to the situation after the transfer (Article 9 Rome I). In the example, Dutch workers who relocate to Germany would have to lodge a claim against their dismissal in a German court and German implementation law would govern the dispute.

What about UK law? In section 2 of this article I noted that TUPE did not cover the transfer of an economic entity previously situated elsewhere. Does that mean that employees who decide to relocate to the UK lack any protection at all? The answer is in the negative. Rome I has direct and immediate effect and overrides the territorial limitation of TUPE. Accordingly, the transferred employees can claim protection under TUPE after the transfer. Dutch workers who relocate from the Netherlands to the UK can lodge a claim against the British transferee claiming continued employment on the same conditions that they had prior to the transfer from the Netherlands.

Another issue concerns statutory labour law rights. So far, dismissal law has not been harmonized in the European Union. As a result, existing national dismissal systems vary fundamentally. The German *Bundesarbeitsgericht* in 2007 had to rule about the possible transfer of statutory labour law rights in an inter-state context.[13] The case concerned the transfer of dismissal law rights in the context of companies that met certain thresholds. The employee enjoyed these rights before the transfer and claimed that the rights had transferred, despite the fact that the transferee did not meet the thresholds. The *Bundesarbeitsgericht* ruled that statutory rights were not protected under the Directive, meaning they do not have to be maintained in the event of a transfer. This view can be extended to a cross-border situation. Hence, the employee after the transfer is subject to foreign labour law. The argument that the Directive should not apply because the employees will be subject to foreign labour law and this will have a negative impact, has no chance of success. This argument was pleaded before the Dutch lower court in 2008.[14] The case was about the relocation of a business from the Netherlands to Belgium. The plaintiffs claimed that Belgian employment law, Belgian social insurance and Belgian taxes had a detrimental impact compared to the situation prior to the transfer. The judge stated that the employees had the right not to be transferred and were, in accordance with Dutch law, free to resign (see section 5.1). The Directive, therefore, covered the issue and there was no reason to reject the cross-border transfer based on the change of governing law.

6. Concluding remarks

Cross-border transfers remain a complex area. The case law of the Netherlands, Germany and the UK give some guidance as to how to handle a cross-border transfer upon relocation of a business. The national judgments in these countries make clear that the Directive applies in cross-border situations. Whether the physical relocation of the business might prevent the transfer has to be determined on a case-by-case basis and especially depends on the type of business to be transferred. It is clear, however, that geographical relocation itself does not preclude the operation from being regarded as the transfer of an undertaking.

Overall, it seems that the general conflict of law rules provide more or less clear guidance on which Member State's law applies to a cross-border transfer. In most situations, employees do not follow the business abroad and the matter is unproblematic. However, long distance will lead to a substantial change to the working conditions and the legal consequences will flow from the law of the Member State where the business was located before the transfer, irrespective whether any claim is directed against the transferor or transferee. Only when the employee decides to accompany the business abroad will the labour law provisions deriving from the Directive apply as transposed by the foreign country concerned. This can be a disadvantage for employees, especially if the 'new' Member State has implemented the collective labour law provisions more strictly. This is not because of the conflict of law provisions, but because the Directive is a minimal harmonisation directive.

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13 Bundesarbeitsgericht 15 February 2007, *AZR* 397/06.
14 Ktr. Eindhoven 9 September 2008, *EELC* 2009/2, *JAR* 2008/271.

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2014/43

Supreme Court rules on equal pay and on redundancy selection criteria (PL)

CONTRIBUTOR MARCIN WUJCZYK*

Summary
The Polish Supreme Court recently clarified the criteria to be applied when selecting staff for redundancy, as well as the burden of proof in cases of 'justified discrimination' and unequal pay.

Facts
The plaintiff in this case was a clerk, Ms U.P. She was employed at a shipyard, in a department consisting of four clerks who did more or less similar (but overlapping) work. It is not known whether Ms U.P.'s colleagues were men or women. On 10 August 2010 the shipyard's management gave the plaintiff notice of termination, applying a three month notice period. Thus, the plaintiff's employment ended on 30 November 2010. The reason given for the dismissal was that the shipyard was experiencing a downturn in work and that therefore one clerical position was being removed, making one of the clerks redundant. The plaintiff's work was taken over by one of her colleagues.

The plaintiff brought legal proceedings against the shipyard. She made two unrelated claims:
1. she claimed compensation for unfair dismissal, alleging that not she but one of her colleagues should have been selected for redundancy;
2. she claimed compensation for discrimination, alleging that she had been paid less than her three colleagues in breach of the rules on equal treatment.

The court of first instance and the appellate court found in favour of the plaintiff. They held:
- (re 1.) that the defendant had failed to compare adequately the work performed by the plaintiff and her colleagues;
- (re 2.) that the plaintiff had for many years been paid less than her colleagues even though their work was similar and the defendant had failed to provide evidence of objective reasons for the pay differential.

The shipyard appealed to the Supreme Court.

Judgment
As far as the unfair dismissal claim was concerned, the Supreme Court referenced Article 45 of the Labour Code, which requires dismissals to be 'justified'. This means that a dismissal may not be arbitrary. In the event an employee is dismissed for business reasons, the employer must base its selection for redundancy on objective and fair criteria, taking account of both parties' legitimate interests. The Supreme Court listed the principal criteria, namely, the employee's:
- professional qualifications, skills and professional experience;
- performance;
- professional attitude;
- ability to work in a team;
- availability;
- suitability for the position in question in general;
- length of service.

However, in certain circumstances, it may be legitimate, or even necessary, to depart from these criteria.

The Supreme Court found that the lower courts had failed to apply them properly.

As far as the pay discrimination claim was concerned, the Supreme Court observed that the principle of equality does not mean that everyone performing similar work should be paid the same salary. There can be legitimate reasons for paying some more than others, for instance to grade employees according to their potential for development or to reward high performance. An employee who brings a pay discrimination claim must present and, where necessary, prove facts from which it may be presumed that (i) one or more comparators perform the same work or work of equal value as the plaintiff; (ii) those comparators are paid more; and (iii) the reason for the pay differential is unlawful. It is not until the plaintiff has provided sufficient *prima facie* evidence in respect of these facts that the burden of proof shifts to the employer to justify the pay differential.

The Supreme Court found that the lower courts had failed to establish that the plaintiff had provided such *prima facie* evidence of discrimination. For these reasons, the Supreme Court overturned the appellate court's judgment and ordered a retrial by that court.

Commentary
The arguments presented by the Supreme Court in this judgment should be broadly approved.

In terms of the criteria for dismissing an employee, it should be noted that Poland has not ratified Convention No. 158 of the International Labour Organisation, which requires there to be a "valid reason" underlying the termination of an employment contract. But Article 45 of the Polish Labour Code requires each employment contract termination to be properly "justified". It means that there must be objective reasons to suggest that an employer may terminate an employment relationship. In a series of sentences explaining "justified terminations", the Polish Supreme Court underlined that Article 45 is a general clause, offering a general way of assessing grounds for termination.

It also noted that termination with notice constitutes a normal and typical way of unilaterally terminating employment contracts concluded for an indefinite period. Under the ordinary rules for the termination of employment contracts, the employer can give notice of termination, provided it correctly selects employees for termination. Therefore, employees should be aware that the employer can terminate employees for its own reasons, except during periods when their employment is protected against termination. No extraordinary circumstances are required for the employer to exercise its discretion.

Nevertheless, if the reason for the termination involves a reduction of staff requiring the employer to select employees for redundancy, termination will only be justified where the selection process was conducted based on objective criteria. The law provides no list of objective criteria nor any guidance on this, but the case reported here clarifies which criteria should be taken into account - as listed above. An employer should be guided first of all by the employee's professional qualifications, skills and professional experience and his or her performance. Only then it should consider such criteria as the

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employee's attitude or availability, for example. However, the Supreme Court also explained that in some cases, the employer can decide that the criteria normally perceived as the most important can be regarded as secondary in the circumstances, but it did not say what kind of cases those were. They may be, for example, where skills and experience are less important in the context than an employee's potential for development or his or her willingness to change workplaces.

It is worth noting, (though the Supreme Court did not consider this in the case at hand), that there is some debate in Poland as to whether the termination notice given to an employee should set out the criteria used for selecting employees for dismissal and if so how this requirement should be formulated. Recently, the Supreme Court has changed its standpoint on this, saying that employers should include the criteria used for selecting employees in order to allow employees to check whether they were justified pursuant to Article 45 of the Labour Code.

Where the employer is carrying out a collective dismissal, the selection criteria it uses must be included as part of the information and consultation procedure provided by law, (the rules about this being contained in the law transposing Council Directive 98/59/EC). In the case at hand, the dismissal was not part of a collective dismissal because the number of dismissed employees was too small. The Collective Dismissals Act did apply in certain respects, however, because the dismissals were not related to the employee. Therefore, severance had to be paid, but the employer had no obligation to conduct a consultation and information procedure.

In terms of unequal pay, the Supreme Court's ruling appears to me to be correct. Article 183a of the Labour Code sets out the most obviously discriminatory criteria, but the list is not exhaustive. Therefore it must be assumed that any distinction that is not objective may be considered discriminatory. For example, if the employer discriminates between employees based on their appearance, this could be discriminatory even though it is not listed in Article 183a of the Labour Code. However, the Labour Code does clearly address discrimination in terms of pay, stating in Article 183c that "employees have the right to equal pay for equal work or work of equal value".

Nevertheless, any consideration of whether an employee has been discriminated against in terms of pay should not only consist of a comparison of remuneration. The courts will also look at any differences between the competencies of the employees and assess their work and contribution to the employer's business. Slight differences in the pay of individual employees holding similar posts could, for example, be the result of the employer's financial policy or economic situation. Its actions will only be discriminatory if an employee's pay differs significantly from that of other employees performing the same work or work of equal value.

The Supreme Court rightly says that the employee must be able to, at least, set out a *prima facie* case to support the allegation of discrimination. Only at that point will the burden of proof shift to the employer to prove there was no discrimination. However, it should be noted that in most cases it is extremely difficult for an employee even to establish a *prima facie* case, as the employee usually does not have the necessary information and this could lead employees' cases failing at the first hurdle. In my view, this situation leads to injustice and is contrary to the principles enshrined in EU law. But until there is some clearer ECJ case law on this point the Supreme Court is unlikely to soften its position.

Comments from other jurisdictions

Austria (Daniela Krömer): In general, the Austrian solution to the problem posed does not differ. The claimant needs to establish that there is an unlawful reason for the pay gap, such as direct or indirect gender discrimination. In addition, the general principle of equal treatment in employment relationships (*Arbeitsrechtlicher Gleichbehandlungsgrundsatz*) can be invoked: an employer cannot treat a minority of employees worse than the majority, unless there is a justification for the difference in treatment. The employee could have invoked that principle in this case and the employer would then have had to explain and prove the reason for the difference in pay.

Germany (Dagmar Hellenkemper): The selection criteria for termination for operational reasons are very limited in Germany. In fact, there are only four statutory criteria that the employer has to respect in the selection process: (1) employee's seniority, (2) age, (3) duties to support dependents and (4) severe disability. Exemptions can be made if a particular employee's continued employment is in the justified operational interest of the employer, in particular due to his or her knowledge, skills and performance or in order to ensure a balanced personnel structure in the establishment. The burden of proof usually falls on the employer if he makes an exemption for certain employees. In the Polish case reported here, as data for all the other employed clerks within the shipyard is not provided, it cannot be determined from a German point of view whether the termination would have been considered valid.

As for the pay discrimination claim, the German principles are in line with the decision of the Polish Supreme Court. It has to be shown by the employee that one or more comparators perform the same work or work of equal value, those comparators are paid more and that there is no reason for the differential treatment.

Subjects: (1) Redundancy selection criteria, (2) pay discrimination
Parties: U.P. – v – *G. Spólka Akcyjna*
Court: *Sad Najwyzszy* (Supreme Court)
Date: 3 June 2014
Case Number: III PK 126/13
Internet publication: http://www.sn.pl/sites/orzecznictwo/Orzeczenia3/III%20PK%20126-13.pdf

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2014/44

Constitutional Court strikes down law requiring disclosure of pregnancy (HU)

CONTRIBUTOR GABRIELLA ORMAI*

Summary
The Hungarian Constitutional Court has found a provision of the new 2012 Labour Code to be unconstitutional. Based on that law pregnant employees and employees undergoing fertility treatment are protected from dismissal. The new provision obliged these employees to disclose their condition before receiving a notice of dismissal from the employer. Failure to do so caused employees to lose the right to rely on the prohibition of termination during pregnancy/fertility treatment. The court held that the provision is unconstitutional as it breached the constitutional rules on privacy, dignity and equal treatment.

Facts
The old Labour Code, which was in force until 30 June 2012, contained provisions protecting pregnant employees, employees who had recently given birth and employees who were undergoing fertility treatment (collectively: 'pregnant employees') against dismissal. These provisions were amended by the new Labour Code (in force since 1 July 2012).

Under the old law, a pregnant employee was protected from dismissal. The law did not specifically require the employee to inform the employer of her pregnancy and therefore an employer could not know whether a dismissal was valid. To mitigate the burden of this on employers, the courts also considered the employees' obligation to keep the employer informed of all relevant circumstances, known as the "good faith cooperation duty", and held the view that if an employee intentionally concealed a pregnancy when the employer gave notice of dismissal to the employee, this did not comply with that duty. However, this requirement could not apply in cases of employees who were not aware of their pregnancy at the time of receiving notice of their dismissal.

Pregnant employees who were given notice of dismissal had 30 days to challenge the notice. A challenge would render the notice unlawful and the employee could demand reinstatement and damages. In the event the employee was unaware of her pregnancy at the time of receiving the notice, she still could challenge the notice, but the deadline for doing so was not completely clear. In one instance, the courts accepted a claim for illegal termination two years after notice had been given.[1]

On 1 July 2012 the new Labour Code came into force. The new law requires pregnant employees to inform their employer of their condition before notice of termination is given if they wish to rely on the rule prohibiting termination during pregnancy. An employee who fails to comply with this obligation and is subsequently given notice of termination can no longer rely on the rules on dismissal protection. The new rule was based on the good faith cooperation duty. Given that an employee may not know that she is to be dismissed until receipt of the notice of dismissal (by which time it may be too late to inform her employer of her condition), the new rule effectively forces pregnant employees to reveal their condition to their employer immediately.

The Ombudsman challenged the constitutionality of the new law. He did so based on two groups of arguments: the right to human dignity and right to the privacy. He applied to the Constitutional Court for a ruling.

Judgment
On 30 May 2014, the Constitutional Court found the new law to violate the Constitution (now known as the "Fundamental Law") and, therefore, to be invalid and ineffective. The court based its decision on the following considerations.

The fact that an employee is pregnant forms part of her private sphere and this information is protected as personal data under the Hungarian Fundamental Law. The court emphasised that the information would be disclosed in the context of a hierarchical relationship between the employer and the employee, and whilst in theory it is voluntary, in practice it is required if the employee wishes to be able to rely on the dismissal protection during pregnancy.

The requirement to provide prior notice of pregnancy is independent of the employer's intention to terminate the employment relationship. The Labour Code cannot be interpreted as allowing the employee to inform her employer of her pregnancy or fertility treatment at the time a dismissal notice is given (as was the view of a number of legal commentators). The statutory provision requires the female employee to inform her employer of a matter within the sphere of her privacy independently of the employer's intention to issue a dismissal notice. The court ruled that the requirement for employees to provide prior notice of pregnancy in order to be protected from dismissal is not a proportionate restriction on the right to privacy and human dignity, and is therefore unconstitutional.

In terms of the right to private life, dignity and data protection on one side and the pregnancy dismissal protection on the other, the court found that there was no reasonable necessity for the employer to be informed of matters within the employee's private sphere unless and until the employer demonstrates an intention to terminate the employment relationship. The court noted that the employer may ask the employee immediately before giving notice of dismissal whether she is aware of any circumstances creating dismissal protection. Given health and safety requirements, in some circumstances, employers are already under a duty to do this.

As for maternity protection, the court referred to several international treaties and conventions on the protection of women against dismissal during pregnancy or maternity leave. The court relied, *inter alia*, on Article 10 of Directive 92/85/EEC, which specifically requires Member States to prohibit dismissal during pregnancy and maternity leave (see the ECJ's rulings in *Webb*, case C-32/93, and *Tele Danmark*, case C-109/00); on the Charter of Fundamental Rights of the European Union, which protects the family and stipulates a right to protection against dismissal for reasons connected with maternity (Article 33); and on Article 8 of the European Social Charter, which contains a prohibition against dismissal during maternity leave.

As for equal treatment, based on the principle of non-discrimination provided in, for example, Directive 76/207 (now Directive 2006/54), the protection of women against dismissal must be acknowledged for the duration of pregnancy and maternity leave. The court referred to the

1 This case was adjudicated under the old Labour Code, when the six month time-bar rule – which was introduced by the new Labour Code – was not yet in force.

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ECJ's ruling in *Mary Brown*, case C-394/96. The court also considered the situation of employees who are not aware of their pregnancy at the time dismissal notice is given. Since such employees cannot comply with the requirement to give prior notice, they are later excluded from reliance on dismissal protection. Therefore the relevant provision of the Labour Code also breaches the general requirement of the Hungarian Fundamental Law for equal treatment.

The Constitutional Court's ruling only covers the prior notice requirement in the Labour Code in relation to dismissal. The Labour Code still contains the rule that, as a condition precedent for protection, the employee must inform the employer of her pregnancy, but based on the court's decision, it will be sufficient if the employee informs her employer of her protected status, not before, but at the point when the employer issues a dismissal notice.
Note that the ruling does not change the fact that employees must inform their employer about their pregnancy to benefit from special rules on working time and health and safety, as they apply to pregnant mothers.

Commentary
Obviously, the best course of action for an employer is to ask employees who are to be given notice of termination whether they are aware of any circumstances giving rise to special dismissal protection. They should do this immediately before giving notice, and should record the question as well as the employee's answer in writing. If a pregnant employee answers that she is not aware of any such circumstances, but becomes aware that at the time she replied she was actually pregnant – in our view – she should be able to claim for dismissal protection provided she can prove this.

If the employer has not asked a pregnant employee whether she is pregnant, but simply gives notice of termination, we believe the employee should still be able to claim dismissal protection. It is also possible that the employer and employee agree that the notice of dismissal should be revoked. If the employee refuses to agree, the employer could challenge this in court relying on the defence of mistake. If the employee challenges the notice of dismissal in court, the employer may argue that the employee failed to notify the employer of her pregnancy, thereby violating her good faith cooperation duty.

Comments from other jurisdictions
Austria (Manuel Schallar): in line with the requirements of European law (i.e. the Maternity Directive 92/85) the Austrian legal system provides significant protection for mothers before and after childbirth, as implemented in the Maternity Protection Act (*Mutterschutzgesetz, the 'MSchG'*). As with the Hungarian Labour Code 2012, § 10 of the *MSchG* requires the disclosure of the pregnancy for full dismissal protection to be provided. However, the disclosure may be made up to five working days after the dismissal or – if the employee is prevented from informing the employer through no fault of her own, particularly if she does not know she is pregnant – it is sufficient that the pregnancy is disclosed without undue delay after the reason preventing her from informing the employer has ceased to exist.

Denmark (Mariann Norrbom): In contrast to Hungarian and Dutch law, the Danish implementation of the Maternity Directive (the Danish Act on Equal Treatment of Men and Women) does not prohibit the dismissal of pregnant employees, although it does prohibit the dismissal of employees on grounds of pregnancy. Further, if a pregnant employee is dismissed, the burden of proving that she was not dismissed in whole or in part because of her pregnancy is on the employer. In cases where the employee was pregnant when she was given notice and the employer was not aware of her pregnancy, the burden of proof is still on the employer.

Under Danish case law, however, the fact that the employer was unaware of the employee's pregnancy when she was given notice will generally make it possible for the employer to discharge the burden of proof. In an assessment of whether the employee was dismissed because of her pregnancy, the timing of the employer's decision to dismiss the employee is crucial. If the decision to dismiss the employee was made before the employee informed the employer of her pregnancy, there is a presumption that no discrimination occurred (i.e. dismissal on grounds of pregnancy), and in this case the courts would most likely rule in favour of the employer. Thus, unlike Hungarian and Dutch law, there is no subsequent time bar allowing the employee to nullify the dismissal on grounds of pregnancy.

Germany (Dagmar Hellenkemper): Under German Law, the dismissal of pregnant employees is prohibited and can be challenged up to two weeks after the notice of termination. However, if the employee is unaware of the pregnancy, she can challenge the dismissal immediately (unverzüglich) after she becomes aware of the pregnancy.

In another context, the employee has an obligation to inform the employer of the pregnancy right away if the job of the employee in question could not be carried out whilst pregnant or could potentially harm the unborn child.

However, German Law does not extend the protection to women undergoing fertility treatment or planning an in vitro pregnancy. To this extent, one German court has argued that even the serious planning of a pregnancy does not offer protection of the employee. The Court determined that the employee had in fact not yet been pregnant as her fertilized ovum had not yet been implanted in her uterus - thus allowing the employer to dismiss her.

The Netherlands (Peter Vas Nunes): Article 10 of Maternity Directive 92/85 requires the Member States to take the necessary measures to prohibit the dismissal of pregnant workers, workers who have recently given birth and workers who are breastfeeding during the period from the beginning of their pregnancy to the end of their maternity leave, save in exceptional cases. Accordingly, Dutch law prohibits dismissal during this period, regardless of whether the employer is aware of the pregnancy. An employee who has been given notice in breach of this prohibition can nullify the notice within two months, in which case the notice is deemed not to have been given and the employment continues. Strangely, Dutch law does not contain a provision that would allow a pregnant employee to invoke the nullity of her dismissal after the two-month time bar has expired, for example in the event she was not aware of her pregnancy until afterwards. There is no case law on that situation, perhaps because in the vast majority of cases, notice cannot be given until after a dismissal permit has been issued, and the permit application usually lasts at least one month.

There is, however, some case law on the issue of when pregnancy begins (other than in *in vitro* situations). In 1990, the Supreme Court was called upon to rule in the following situation. A female employee was dismissed on 31 March. Some time later, she claimed that she was pregnant on that date. She submitted a doctor's certificate that stated that, according to the employee (i.e. not according to the doctor), the

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first day of her last menstruation period was 15 March and that she must therefore have been pregnant on 31 March. She gave birth on 24 December. The Supreme Court reasoned that (i) if it appears from the date of birth that the pregnancy could have existed on the date claimed by the employee, then (ii) it must be accepted that that is the case unless the employer proves that it was not the case. How an employer is to deliver such evidence is not clear to me.

United Kingdom (Bethan Carney): Unlike in Hungary and the Netherlands it is possible to dismiss a pregnant employee in the UK. However, employees are regarded as unfairly dismissed if the reason or the principal reason for the dismissal is a reason relating to pregnancy, maternity or childbirth, maternity leave or any of the other family-related types of leave (adoption, parental, paternity leave or time off for dependents). If the employee has sufficient service to claim unfair dismissal (two years), the employee is not obliged to prove their case, they simply have to produce some evidence to create a presumption that dismissal was for one of the inadmissible reasons. If the employer wants to argue that dismissal was for a different reason it will have to prove that and also prove that the reason was one of the statutorily prescribed fair reasons (conduct, capability, redundancy, etc). However, if the employee has less than two years service, they are required to prove that the reason for dismissal was an inadmissible one (e.g. connected to pregnancy). They are not required to have any particular length of service in order to bring the claim of automatic unfair dismissal, it merely affects the burden of proof. For a claim for automatically unfair dismissal for a reason connected with pregnancy to succeed the employer must know or believe (or at the very least, suspect) that the employee is pregnant. An automatically unfair dismissal on one of the proscribed grounds will almost certainly also be pregnancy, maternity or sex discrimination.

Subject: Discrimination/gender, termination/maternity protection
Parties: Ombudsman
Court: *Magyarország Alkotmánybírósága* (Hungarian Constitutional Court)
Date: 30 May 2014
Case number: 17/2014 (V.30)
Publication: http://www.kozlonyok.hu/kozlonyok/Kozlonyok/1/PDF/2014/17.pdf (pages 787-799)

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2014/45

Unproven accusation of sexual harassment: no reason for dismissal (AT)

CONTRIBUTOR CHRISTINA HIESSL*

Summary
An employee who claims to be a victim of sexual harassment by a superior must not be dismissed for loss of trust and confidence, unless the employer can prove that the accusations were false.

Facts
The plaintiff in this case was employed as a bus driver by the municipality of Vienna and assigned to *Wiener Linien GmbH & Co KG*, the Viennese public transport company. On 28 October 2007, she approached the municipality with a complaint against her immediate superior at *Wiener Linien*, claiming that she had suffered sexual harassment on several occasions. According to the complainant, her superior had repeatedly bothered her with sexual innuendos, 'compliments' about her body and questions about her husband's sexual performance. He had offered her help in drafting a report in exchange for meeting him 'in private', and in one instance had grabbed both of her breasts, asking whether they were 'real'.

The municipality started disciplinary proceedings against the plaintiff's superior, in the course of which the Vienna Commission for Equal Treatment was involved. When an expert opinion issued by that Commission concluded that it could not be established that the alleged instances of harassment had actually taken place, the plaintiff was dismissed summarily and without compensation, with the approval of the municipality's Staff Representatives Commission. The legal basis relied on was section 45(2) 1 of the Vienna Contracted Staff Act (Wiener Vertragsbedienstetenordnung, 'VBO 1995'), which states that gross insult and defamation of the employer or a colleague is a reason for immediate dismissal.

The plaintiff brought a claim before the Vienna Labour and Social Court, seeking to declare her dismissal void. The court rejected the claim, holding that all an employer needs to do to justify immediate dismissal based on section 45 of the VBO 1995, is to establish that the employee's behaviour has had serious consequences for her superior's reputation and has endangered his position in the organisation. Such serious misbehaviour entitles the employer to proceed to immediate dismissal without compensation, unless the employee proves that her behaviour was justified by legitimate interests.

The plaintiff appealed to the *Oberlandesgericht Wien*. It overturned the first instance court's judgment and ordered the municipality to reinstate the plaintiff in her former position. The municipality appealed to the Supreme Court, relying on a 1989 precedent (9ObA186/89), in which the Supreme Court, in a nearly identical situation, had held that it was for the employee to prove that her colleague had indeed harassed her (as she claimed before the police) and that failure to provide sufficient evidence entitled the employer to dismiss her for loss of trust and confidence.

Judgment
The judgement delivered by the Supreme Court is exceptional in terms of the clarity in which it expressly departs from its earlier case law, stating that the 1989 precedent must be declared inapplicable in light of political developments in the preceding decades – most notably on the European level. The judgment cites the crucial provisions of the Recast Equal Treatment Directive 2006/54 and its predecessors Directives 97/80 (burden of proof) and 2002/73 amending 76/207 (equal treatment for men and women), in particular Article 19(1) of Directive 2006/54:
"1. Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment."

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and Article 24:
"Member States shall introduce into their national legal systems such measures as are necessary to protect employees, [...] against dismissal or other adverse treatment by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment."

The court also cites the principle of effectiveness and finds that it would be clearly irreconcilable with these provisions to produce a legal precedent that places the full burden of proof on the employee.

Accordingly, the Supreme Court upheld the main findings of the second-instance judgment: an employee claiming to be a victim of sexual harassment can be dismissed for this reason only if the employer proves that the accusations were not accurate. In this case, the first instance judgment showed that there was no proof of this in relation to the physical assault. The allegation of earlier verbal harassment was not addressed in the evidence and so that the Supreme Court referred the case back to the first instance court for completion.

Commentary
As stated above, the Supreme Court's ruling is of striking clarity, which leaves little to add in terms of its outcome. Yet, the fact that the Court refers to several provisions of European law without clarifying which of them it considers applicable in the case warrants a closer look at the EU provisions at issue.

The burden of proof standards contained in Article 19 of the Recast Directive provide that the claimant need only adduce "facts from which it may be presumed that there has been [...] discrimination" in order to shift the burden of proof to the respondent. Although this is intended to strengthen the equal treatment standards of the directive, in practice, in situations where it boils down to one word against the other (which are very frequent), it is questionable how helpful this is. If Article 19 is interpreted to apply in such a situation, this could lead to some disproportionate outcomes: in the case at issue, it would imply that the superior should be found guilty based on the mere accusation of sexual harassment in any judicial or administrative procedure brought against him by the claimant (though not in a criminal procedure: see Article 19 (5)).

In addition, there is little European-level guidance on the threshold for when it can be 'presumed' that discrimination has taken place. This would suggest that there should be concrete reasons that raise doubts about the defendant's version of the story – such as an employer's refusal to disclose relevant documents (case Kelly[1]) or a renewed job advertisement for a post for which a female applicant had not been considered despite her apparently suitable qualifications (case Meister[2]). Concrete reasons such as these are typically be missing from sexual harassment cases, as there are usually no witnesses, but only the perpetrator and the victim. This would suggest that in the case at hand, Article 19 should be relied on because apart from the allegation of the claimant there are simply no "facts from which it may be presumed" that she was a victim of harassment.

Precisely for this reason it is all the more important that Article 24 of the Recast Directive should expressly apply to any complaint or proceedings 'aimed at enforcing compliance with the principle of equal treatment', irrespective of the outcome of those proceedings. This Article ensures that even victims who cannot prove their case under the more favourable standards of proof set out in Article 19 will at least be protected from retaliatory actions by the employer – the most important of which being dismissal as a 'sanction' for bringing the claim.

However, a question arises as to whether all claims of sexual harassment are automatically protected by Article 24, or whether it has to be established that the complaint is 'aimed at enforcing compliance...', rather than being a conscious false accusation to discredit a colleague (as was suggested by the employer in the present case). Clearly, the directive should not be used to grant protection in cases of abuse. At the same time, it would be incompatible with the principle of effectiveness if the plaintiff were required to prove the aim of her claim, as that would hardly be possible in practice. It follows that the only reasonable interpretation of Article 24 is that it applies to every complaint based on the directive, except if it can be proven that the claim was abusive. Since in the present case neither side could prove their allegations, Article 24 shields the employee from dismissal as a sanction for her actions.
The seemingly contradictory outcome of the case at issue – that the plaintiff lost her case in the disciplinary proceedings against her superior, but won her appeal against her own dismissal – appears to be the only reasonable outcome in line with European law. Action against discrimination and harassment must be supported as far as possible as long as this is not at the cost of disproportionate interferences with the rights of others.

Comments from other jurisdictions
Germany (Paul Schreiner): The German situation is comparable to the Austrian. If an employer wants to terminate employment it has to prove that there is sufficient reason for doing so. As I understand the case it could not be established that the plaintiff was actually harassed. To find a sufficient reason for termination, the employer would need to establish that she violated her duties in accusing her superior of harassing her. This can be the case, if there is sufficient proof that the superior did nothing at all and the plaintiff was deliberately falsely accusing him. This however was not the case here, it was just not proven that there had been harassment. Therefore, the accusation could not been proved, which does not mean that it was untrue. This being said, one has to say that the plaintiff probably did not violate her duties. That renders the termination void.

Subject: Sexual harassment – burden of proof
Parties: J.W. (employee) – v - Municipality of Vienna
Court: Oberster Gerichtshof (Supreme Court)
Date: 26 May 2014
Case Number: 8ObA55/13s
Internet publication: http://www.ris.bka.gv.at/Jus→

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1 CJEU, 21 July 2011, Case C-104/10.
2 CJEU, 19 April 2012, Case C-415/10.

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2014/46

Employer not permitted to increase disciplinary sanction on appeal (UK)

CONTRIBUTOR RICHARD LISTER*

Summary
The Court of Appeal has upheld a High Court decision that an employer was not entitled to increase an employee's disciplinary sanction on appeal, because its contractual disciplinary procedure did not expressly permit this to happen.

Background
Employers normally allow employees the right to bring an internal appeal against the imposition of a disciplinary penalty. In the UK, this is recommended as good practice by the conciliation service ACAS (the Advisory, Conciliation and Arbitration Service) in its statutory *Code of Practice on Disciplinary and Grievance Procedures*. Consequently, this is normally a requirement for a fair dismissal process in terms of the unfair dismissal provisions of the Employment Rights Act 1996 (ERA).

An employee appeals, of course, in the hope that the disciplinary sanction will be reduced or removed altogether. However, there is always the risk that those hearing the appeal might take a more severe approach than the original decision-maker and increase the sanction. Some disciplinary procedures expressly provide for this possibility, so the employee is forewarned that the sanction could go up as well as down. But what if the employer's policy is silent on the issue – is it still permitted to increase the sanction following an appeal?

Facts
Ms McMillan worked for Airedale Foundation NHS Trust. She was disciplined for misconduct and issued with a final written warning under the Trust's disciplinary procedure. She appealed against this decision. The Trust told her that the appeal would be a rehearing of her case and the panel would be entitled to determine its own outcome "*in terms of the sanction applied*" – meaning the penalty could be increased as well as reduced.

The appeal panel upheld the allegations and indicated orally that they thought Ms McMillan's employment was untenable. However, before any sanction was actually applied, she withdrew her appeal and applied to the High Court for an injunction preventing the Trust from increasing the sanction of a final warning by dismissing her.

The Trust's disciplinary procedure was expressly incorporated into Ms McMillan's contract of employment. It was set out in two documents: one contained details of the formal procedures and defined misconduct; the other (the Trust's code) included information about sanctions. The code also covered appeals, saying that an employee could appeal against a warning or dismissal and there would be no further right of appeal. Neither document said anything about increasing sanctions on appeal.

The High Court decided that Ms McMillan's employment contract did not allow the appeal panel to increase a disciplinary sanction. It granted an injunction preventing the Trust from reconvening the appeal panel to consider the matter any further. The Trust appealed against this decision to the Court of Appeal.

Court of Appeal Judgment
The Court of Appeal agreed with the High Court and held that, on the wording of the Trust's contractual procedures, it was not entitled to increase the disciplinary warning on appeal.

In reaching this decision, the Court was particularly influenced by the precise wording of the Trust's procedures. These gave a right of appeal "*against a warning or dismissal*", which indicated that the appeal was intended to benefit the employee and not the employer. There was also no further right of appeal, meaning the employee was unable to appeal if a more serious sanction such as dismissal was applied. The Trust's code also expressly referred to a guide to disciplinary procedures published by ACAS – separate from its *Code of Practice* - which says that an appeal should not result in an increased sanction.

The Court held that the Trust was bound by the terms of its own contractual procedure, so imposing an increased sanction on Ms McMillan would be in breach of contract. The injunction preventing the Trust from doing so was therefore upheld.

Commentary
The result in this case is perhaps unsurprising, given the Trust had a binding contractual disciplinary procedure which gave a limited right of appeal. But there are wider implications arising from the case and the comments of the Court of Appeal.

The first point to note is that the remedy of an injunction, which prevents an employer from taking action to dismiss an employee, will only be available if the disciplinary procedure is part of the employee's contract of employment. UK law requires details of where to find disciplinary procedures to be included in an employee's statement of terms of employment, but many employers expressly make the disciplinary procedures themselves non-contractual. An employer's failure to follow non-contractual procedures may make a dismissal *unfair* under the ERA, but it would not allow an employee to apply for an injunction on the basis of breach of contract.

The judgment makes clear that an employer can still expressly provide in its procedure for a sanction to be increased as well as reduced on appeal. The Court of Appeal said that there was nothing wrong with that in principle. Although ACAS's guide suggested that sanctions should not be increased in this way, this was not legally binding.

The Court also recognised a potential problem, if an employer does not have this contractual right, where a full appeal uncovers new evidence which makes the original misconduct more serious. Is the employer's only option to start the disciplinary process again? The Court thought that this could be dealt with by a court using its discretionary powers. If the employer was justified in acting outside the contractual procedure and had otherwise acted fairly - particularly if a further right of appeal had been offered - the court could refuse to grant the injunction even if the employer had acted in breach of contract.

Taking these points together, it seems that the option of increasing a disciplinary sanction on appeal is still open to employers. To be confident that this approach is permissible, the right to increase the sanction should be expressly included in the disciplinary procedure. If new evidence is uncovered at the appeal stage, it may be fair to increase the sanction even if this is not expressly permitted in the applicable procedure. However, if this involves a dismissal, it may be prudent to allow a further appeal against this decision - otherwise the employee

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is very likely to have a valid claim for unfair dismissal under the ERA.

Comments from other jurisdictions
Germany (Paul Schreiner): German law does not provide for an obligation of the employer to have a disciplinary procedure, therefore regulations such as the one described above hardly exist. Where a sanction is imposed by the employer, the employee is free to appeal against it at the labour court. The labour court however can only judge on the validity of the sanction and not replace it by a more drastic sanction.

Subject: Disciplinary procedures; unfair dismissal
Parties: McMillan - v - Airedale NHS Foundation Trust
Court: Court of Appeal
Date: 21 July 2014
Case number: [2014] EWCA Civ 1031
Internet publication: http://www.bailii.org/ew/cases/EWCA/Civ/2014/1031.html

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2014/47

Another case where terminated staff were awarded damages against their former employer's shareholder (FR)

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Summary
Liability in tort is an alternative way for redundant employees to seek damages from a parent company, even where that company has no 'co-employment' relationship.

Facts
Capdevielle was a company that specialised in the manufacture of chairs or seats (*sièges*). In 2005 it underwent a restructuring in which 166 employees lost their jobs. In 2008 its shares were sold to Sofarec, the French subsidiary of the Luxembourg investment fund GMS Investment. In 2010, Capdevielle went into receivership; a liquidator was appointed and all its employees lost their jobs.

Judgment
A number of redundant employees brought an action against both Sofarec and GMS Investment for tortious liability for having taken detrimental decisions leading to the liquidation of Capdevielle. In particular, they alleged that:

1. Sofarec/GMS did nothing to address Capdevielle's huge cash flow and other financial problems;
2. Sofarec/GMS caused Capdevielle to spend unjustifiable and disproportionate amounts, including on several financial, commercial and marketing studies. One of these studies produced a memorandum entitled "How to reignite the sustainable competitiveness of Capdevielle". The memorandum consisted of only a few pages and cost the company € 425,000, a sum corresponding to the annual remuneration of seven executives;
3. Sofarec/GMS caused Capdevielle to enter into a trademark agreement in which Capdevielle sold some of its trademark rights to Sofarec for € 299,000, the purchase price being set off against the company's debt to Sofarec.

The Court of Appeal of Pau, in its decision of 7 February 2013, agreed with the plaintiffs that the price of the memorandum had been exorbitant and not justified by need; that the trademark transfer did nothing but worsen an already bad situation; and that the behaviour of Sofarec/GMS was tortious towards the employees. The court upheld the claim and ordered Sofarec and GMS Investment jointly and severally to pay each employee € 3,000 in damages.

Sofarec appealed the decision before the French Supreme Court, arguing that a parent company can only be held liable if it is involved in the management of its subsidiary, whereas in the case at hand there was no interference of Sofarec in the management of Capdevielle, whose decisions were taken independently by its own directors.

The French Supreme Court dismissed the appeal and confirmed the Court of Appeal's decision, holding that *"Sofarec, directly or indirectly through GMS Investment, had made decisions detrimental to Capdevielle, which had aggravated the difficult economic situation of the latter, decisions that were not useful for Capdevielle but purely in the interests of its sole shareholder. Therefore, the Court of Appeal had rightly concluded that these companies, by their faulty and blameworthy lack of responsibility, had contributed to the insolvency of Capdevielle and the loss of employees' jobs"*.

Commentary
EELC previously reported a 2011 Supreme Court judgment in a somewhat similar case and with a similar outcome (see EELC 2012/3 nr 6). In that case, the shareholder of a company that went into receivership and dismissed its staff was also held liable, but on the basis of a different legal doctrine. In the 2011 case, the Supreme Court applied the doctrine of co-employership. In the case reported here, the court held the shareholder (and its parent company) to be liable on the basis of the general doctrine of tort (*délit*). This commentary will explore the similarities and the differences between both doctrines.

The position of the Supreme Court in this decision is not new; indeed it had set the principle of tortious liability of parent companies in a similar case where the parent company in that case (with no 'co-employment' situation) had taken detrimental decisions on behalf of its subsidiary, leading to the dismissal of its staff. In its ruling, the Supreme Court held *"the employees are entitled to bring an action in tort against the [parent] company even though the latter is not their employer"*.[1]

The confirmation of this principle by the Supreme Court opens the door to an alternative for employees to seek damages from the parent company, not through employment law (i.e. co-employment), but through tort law.

"Co-employment" is a legal technique which allows a court to identify involvement of a company – not being the direct employer - in the employment relationships with employees of another company in the group, resulting in the joint liability of the two companies. According to case law, there is co-employment when there is *"confluence of*

1 Cass Soc. 28 September 2010, No. 09-41243.

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interests, activities and management between different entities".

The Supreme Court has recently begun to make it harder for courts to identify co-employment relationships. In a recent decision, it held that "*a company belonging to a group can only be considered as a joint employer in respect of the staff employed by another company in the group if there is between them a confluence of interests, activities and management manifested by involvement in the other entity's economic and social management* beyond the necessary coordination of their economic activities and the state of economic domination this can generate *[...] The fact that the directors of the subsidiary are appointed from the group and that the parent company has taken part in the overall policy for group decisions affecting the future of its subsidiary, along with being committed to financing the social plan for the site closure of its subsidiary, are insufficient reasons to characterize the parent company as having a co-employment relationship*".[2]

As the case law requirements for recognition of co-employment relationships have become more stringent, tortious liability now appears to be the best way for redundant employees to seek damages from parent companies. Under Articles 1382 and 1383 of the French Civil Code, tortious liability can be engaged where three elements can be proved: fault, damage and causal link.

In this case, the employees had not brought a co-employment relationship claim against Sofarec and GMS Investment, but only an action in tort. After reviewing the facts, the Supreme Court recognized the three elements of tortious liability and required Sofarec and GMS Investment jointly and severally to pay to each redundant employee € 3,000 in damages for failing to retain their jobs or to enable them to be reclassified and for failing to allow them the opportunity to benefit from a well-funded social plan.

The approach taken in this case by the Supreme Court shows two major differences with co-employment based decisions. Firstly, it seems generally easier to establish liability in tort on the parent company than it is to establish liability under co-employment. In this case, the Court noted that the parent company had taken decisions that had worsened the situation of its subsidiary, based on the parent company's sole interests. However, secondly, the consequences in tort are less severe. In this case, the amount awarded for the loss of opportunity to benefit from a more generous social plan was € 3,000 per employee, which is well below the sanction for unfair termination in co-employment situations.

Future court decisions will tell us if actions in tort will become the new trend for employees seeking damages. This may depend on whether the sanctions imposed by the courts remain low.

Nevertheless, this decision is another reason why parent companies should be careful when taking decisions that impact on their subsidiaries. They should particularly avoid thinking that they can get away with justifying decisions that are detrimental to their subsidiaries' interests for their own profit.

Comments from other jurisdictions

The Netherlands (Peter Vas Nunes): my understanding of the author's Commentary on this case report is that in France there are two legal doctrines that a former employee can apply in an effort to claim compensation for redundancy-related loss from his former employer's shareholder:

1. co-employership
2. tort

and that until recently shareholder liability was, as a rule, based on 1° but that now 2° is being used.

The Dutch courts have for many years applied doctrine 2°. Essentially, the Supreme Court accepts that if the bonds between a shareholder and its subsidiary are close as a result of intensive involvement/interference by the shareholder in the subsidiary's business, the shareholder may have a duty of care vis-à-vis the subsidiary's employees. One situation in which this duty can be said to have been breached is where the subsidiary's financial difficulties have been caused by the shareholder favouring itself over the interests of the subsidiary. In such cases the courts may (but do not easily) accept tort. The courts are reluctant to accept co-employership, reserving this technique for extreme cases of abuse or lack of independent identity.

Subject: Parent company liability
Parties: Employees - v - Sofarec and GMS Investment
Court: Cour de cassation (French Supreme Court)
Date: 8 July 2014
Number: N° 13-15573
Publication: www.legifrance.gouv.fr→jurisprudence judiciaire →nom de la jurisdiction = cour de cassation; numéro d'affaire = case number→rechercher

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2 Cass Soc. 2 July 2014 No. 13-15208.

2014/48

Court should not add new words to a clearly drafted restrictive covenant (UK)

CONTRIBUTOR RICHARD LISTER*

Summary

The Court of Appeal has overturned a decision of the High Court to add words into a non-competition covenant in an employee's contract so that it could be enforced by the employer. Where the meaning of a restriction is clear a court should not interpret it by adding additional words, even if this means the covenant will not be enforceable.

Background

In the UK, the legality of restrictive covenants seeking to prevent employees from carrying out certain activities after their employment has ended is governed by the common law rather than statute. Contractual terms which prevent an ex-employee from dealing with certain customers, working in certain areas or working for competitors are potentially void for being in restraint of trade and contrary to public policy.

A clause of this nature will only be enforceable if the employer can show that it has a legitimate interest it is seeking to protect and that the

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restriction itself extends no further than is reasonable, having regard to the interests of the parties and the public interest. In essence, the narrower the restriction, the more likely it is to be enforceable. This means employers will usually try to ensure that the wording of a restrictive covenant goes no further than necessary, by limiting matters such as the time for which the restriction lasts and the activities covered. If a covenant is too wide, the courts will not re-write it to make it enforceable.

Facts

Prophet plc was a software developer operating in the fresh produce industry. The company sought to enforce a non-competition covenant against its sales manager, Mr Huggett, when he left the business to join a competitor.

The covenant in question prevented Mr Huggett from being involved with any business which competed with Prophet by providing computer software systems to the fresh produce industry, for a period of 12 months after the end of his employment. However, this restriction only applied *"in any area and in connection with any products in, or on, which [the employee] was involved whilst employed hereunder"*.

This wording caused Prophet a potential problem. The nature of the business meant that its software products were unique, so a competitor would never be involved with selling the same products as Mr Huggett had been involved with at Prophet. They might be similar and competing products, but they would be different ones. The wording only appeared to stop Mr Huggett from working with Prophet's products after he left their employment. This suggested the covenant did not protect Prophet at all, as he was free to work for the competitor without being in breach of his contract.

Nonetheless, Prophet applied to the High Court to obtain an injunction preventing Mr Huggett from working for his new employer or any other competitor for 12 months.

High Court Judgment

The High Court agreed that the wording of the covenant was problematic for Prophet. Read literally, it would provide the company with no protection at all, because no competitor would be involved with supplying Prophet's products.

However, the High Court felt that this did not reflect the parties' intentions at the time when they agreed the contract and there had effectively been a drafting error. The judge decided that he could correct this error by adding the words "or similar thereto" to the end of the clause. This would mean the clause reflected the probable true intention of the parties and was the minimum change necessary to produce a commercially sensible result.

Mr Huggett appealed to the Court of Appeal against this decision.

Court of Appeal Judgment

The Court of Appeal recognised that, if a clause was ambiguous, the courts should interpret it in such a way as to produce a commercially sensible solution. However, in this case, the meaning of the clause was clear. The natural meaning of the words "any products" could only mean the Prophet products with which Mr Huggett had been involved when he worked there.

The Court recognised that the person who drafted the covenant may not have thought through the extent to which the wording would be likely to achieve any practical benefit to Prophet, but nothing had "gone wrong" with the drafting. There had been no basis for the judge to add words to the clause to make it commercially effective: *"It was not for the judge nor is it for this court to remake the parties'...bargain. Prophet made its...bed and it must now lie upon it"*.

The Court therefore allowed Mr Huggett's appeal and held that the covenant was void for restraint of trade and unenforceable.

Commentary

The High Court's decision in this case prompted surprised reactions and criticism from commentators. Although there had been previous cases in which courts had interpreted ambiguous wording in an employer's favour, it was highly unusual to add words to a clause that on the face of it was drafted quite clearly. The Court of Appeal's ruling therefore restores the legal status quo, making clear that courts should only interpret restrictive covenants in a commercially effective way if they are drafted ambiguously. Where the wording is clear, the employer will be stuck with the clause even if it fails to achieve what was really intended.

Unfortunately for Prophet, its attempt to draft Mr Huggett's non-competition restriction so that it was enforceable went too far. It avoided having a clause that was too wide to be enforceable, but ended up with wording so narrow that it was unlikely to be of any practical use.

Accordingly, employers need to think carefully about the precise wording of restrictive covenants included in employees' contracts to ensure it achieves their objectives. The restriction should be drafted as narrowly as possible to minimise the risk it will be unenforceable as being in restraint of trade, but not to the extent that it defeats the employer's primary purpose.

Comments from other jurisdictions

Austria (Martin Risak): In Austria the use of restrictive covenants is regulated by law (§ 36 Act on White-Collar Workers, *Angestelltengesetz* and § 2c Act to Adapt Employment Contract Law, *Arbeitsvertragsrechtsanpassungsgesetz*). The law forbids restrictive covenants made with minors and otherwise provides that the restraint cannot last for more than one year after the end of the employment relationship. Only activities in the previous employer's line of business can be forbidden to employees. In addition, restrictive covenants are only valid if the employee's wages exceed € 2,567. Finally, in respect of the type of activity, the time period and geographical area in relation to the employer's business interests, the agreement may not unreasonably impede an employee's advancement (e.g. a ban on subsequent activities, irrespective of location). Further, the employer may not be able to enforce a restrictive covenant if the circumstances leading to the termination of employment were caused by the employer. For example, this would be the case if the employer delayed in paying remuneration or terminated the employment without just cause, though in the latter case the employer may still use the restrictive covenant if it is willing to carry on paying the former employee for the period of the restrictive covenant.

If, as is often the case, a contractual penalty has been agreed in order to ensure the restraint is observed, the employer may only demand payment of the penalty. There is no complementary right to contractual performance. The agreed penalty may also be reduced in court based

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on the principle of equity.

When it comes to interpreting restrictive covenants the general principles for interpreting contracts apply. According to § 914 Civil Code, an ambiguous statement made by one party must be interpreted to the detriment of the party who relies on it. As it is generally the employer who drafts the clause, restrictive covenants are usually interpreted restrictively. However, the courts tend to assume that parties do not agree clauses that have no legal effect and therefore will reformulate them in a way that leaves at least some room for application.

Germany (Dagmar Hellenkemper): While there has not been an explicit decision similar to this in the field of employment law, there has been a case in the sixties dealing with a non-compete clause between a leaseholder and the owner of a business. The non-compete clause was drafted in an unethical way, ultimately rendering it void. The Court held that the clause could not be amended to a non-compete that would be viable, even in the event the parties had agreed on such an amendment. These principles seem to be in line with the British decision.

In Germany, a non-compete must be agreed in writing. The Court determines its enforceability based on the wording of the clause. If the clause has been drafted to allow only for a very limited scope, the interpretation of the clause is limited by the wording of the clause, not allowing the parties or the Court to add further wording in order to extend the scope. It would be – as the British High Court has determined in this case – the employer's loss. The clause can be enforced only in the limited scope – in the case of the British decision the clause would be enforceable, it just would not have any effect on the former employee as long as he is acting outside the scope of the clause.

If the Court determines the clause void, an interpretation of the clause is only allowed if the parties have – in addition to the non-compete clause – agreed on a severability clause making the economic objective the basis for any interpretation. If the non-compete lacks such a severability clause, the non-compete cannot be enforced either.

The Netherlands (Peter Vas Nunes): I feel sorry for Prophet. A Dutch court would have ruled in its favour.

Under Dutch law, agreements are interpreted purposively, even where they are not ambiguous (although ambiguity and the level thereof do play an important rule). Although the courts can and frequently do strike down or water down restrictive covenants that are unreasonable, they reject the argument that such covenants should be construed restrictively rather than purposively if that is detrimental to the (former) employee. Personally, I advise employers to limit the scope of restrictive covenants in order to increase their enforceability, by:

- limiting them in time (12 months is most common, but in many instances six months is sufficient);
- where appropriate, limiting them in geographical scope;
- limiting them in terms of what the former employee may not do, where possible specifying the prohibited competitors.

Additionally, I sometimes add a clause entitling the former employee to compensation (e.g. 50% of last-earned salary) for each month that the covenant is likely to prevent him or her from accepting switchable alternative employment, even though this is not required by law.

Subject: Contracts of employment; restrictive covenants
Parties: Prophet plc – v – Huggett
Court: Court of Appeal
Date: 22 July 2014
Case number: [2014] EWCA Civ 1033
Hard copy publication: [2014] IRLR 797
Internet publication: www.bailii.org/ew/cases/EWCA/Civ/2014/1013.html

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2014/49

Authority to dismiss may be delegated (BU)

CONTRIBUTOR KALINA TCHAKAROVA*

Summary
Until the decision of the Supreme Court of Cassation reported below, contradictory court practice existed regarding the legality of dismissing an employee by a proxy of the employer, other than on disciplinary grounds.

Facts
The Bulgarian rules on employment law are contained in the Labour Code. It is generally held that those rules form part of the rules of civil law, as codified in, inter alia, the Law on Obligations and Contracts. That law allows a party to delegate authority to another party, albeit with certain exceptions. By contrast, the Labour Code is silent on delegation, with one exception. Does this mean that an employer may not delegate its authority, in particular the authority to issue a notice of dismissal? Or can an employer delegate authority under the general doctrine of civil law? This question has been contentious for a couple of years. Several judgments of the Supreme Court of Cassation in the recent past have indicated that an employer must personally make each dismissal decision. Clearly, the approach taken has been causing many practical complications, particularly in large organisations. Moreover, there have been other Supreme Court of Cassation decisions in which delegation of the authority to dismiss has been accepted. Thus, a decision was needed to put an end to this contradictory case law and give clear guidance to those concerned.

Bulgarian law allows Supreme Court panels to request a 'General Meeting' of their Chamber, in this case the Civil Chamber, to issue interpretative decisions. Accordingly, at the request of one of the Supreme Court panels, the deputy chairperson of the Supreme Court of Cassation and chairperson of the Civil Chamber, initiated interpretative case No. 6/2012. The question before the General Meeting was whether an employer may delegate its authority to terminate an employment contract other than by way of imposition of a disciplinary sanction.

Judgment
The General Meeting weighed up the following arguments in order to make its determination:

The arguments against allowing delegation, as contained in some of the decisions of the Supreme Court of Cassation, were:

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- Employment law has such specific characteristics that the general rules of civil law cannot simply be applied; a contract of employment is a personal matter.
- As noted above, the Labour Code is silent on delegation except for one instance, set out in Article 192(1). This specifically allows an employer to delegate its authority to dismiss an employee by way of disciplinary sanction. This implies that the authority to carry out any other type of dismissal may not be delegated.
- Article 8(4) of the Labour Code provides that the employee must perform his or her contractual duties personally. Logically, this applies equally to the employer.

The arguments in favour of allowing delegation, as contained in other decisions of the Supreme Court of Cassation, were:

- Employment law may have specific characteristics, but the Labour Code does not prohibit the delegation of employer authority.
- The argument that because the Labour Code only specifically allows for delegation in cases of disciplinary sanction this implies that delegation is not possible in other circumstances is weak and goes against the general principles of interpretation, as provided for by the Law on Legislative Acts. The fact that the employer may delegate the authority to dismiss by way of disciplinary sanction does not lead logically to the conclusion that it cannot delegate the authority to dismiss for other reasons.
- Article 8(4) of the Labour Code does not provide that the employer's duties must be provided in person (with the exception of cases where the particular contract was concluded based on the employing individual).

Considering these arguments, the General Meeting came to the conclusion that the provisions of the Law on Obligations and Contracts apply in relation to the employer's authority to delegate its authority to dismiss employees, on whatever legal ground. Consequently, an employer may delegate that authority to anyone it wishes, either to someone within the organisation or to a third party.

Commentary

For the last couple of years the 'poor' practice of the Supreme Court of Cassation has been creating serious practical difficulties for local businesses. In order to be on the safe side, employers had to assure that all employment-related documents were signed personally by the registered statutory representatives of the employer, which tended to cause delays in implementing employment-related decisions and an unnecessary burden on statutory representatives.

No reasonable legal interpretation should have led to the conclusion that although there was no specific prohibition against delegation, one should be implied, but many practitioners had felt the need to advise their clients to avoid delegation when terminating employees. The publication of an interpretative decision supporting the proper approach that must be taken by all courts of law nationally was both needed and very much welcomed by practitioners and businesses alike.

Comments from other jurisdictions

Germany (Paul Schreiner): In Germany the employer is free to delegate the authority to dismiss personnel to other persons. The employee however has the right to reject a notice of termination signed by such a person unless he already knows that this person validly represents the employer or is provided with a certificate evidencing the delegation of authority.

The Netherlands (Peter Vas Nunes): To a Dutch lawyer, what strikes one about this judgment is that the issue debated by the Supreme Court was an issue at all. In The Netherlands, no employee who has been dismissed by anyone but the Managing Director personally would even consider challenging the dismissal on the grounds that the individual who signed the notice letter lacked the power to represent the employer. There are two reasons for this. First, the general rules on contract, including those on representation and delegation of authority, apply to employment contracts except where they conflict with the special nature of an employment relationship. I cannot see why allowing a subordinate to dismiss an employee should conflict with the special nature of an employment relationship. Secondly, an unauthorised legal act can be authorised later on with retroactive effect. Suppose, for example, that a department head dismisses one of the employees in his or her department and the employee challenges the dismissal on the ground that the department head lacked the legal authority to execute the dismissal, management could confirm the dismissal later on.

Subject: General doctrine
Parties: Unknown
Court: General Meeting of the Civil Chamber of the Supreme Court of the Republic of Bulgaria
Date: 11 January 2013
Case Number: Interpretative Decision no 6 under interpretative case no 6/2012
Internet publication: http://www.vks.bg/vks_p10_02.htm#

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2014/50

Testing for drug use subject to strict conditions (LU)

CONTRIBUTOR MICHEL MOLITOR*

Summary

Article 8 of the European Convention on Human Rights prohibits an employer from organising drug detection tests unless the testing is justified by the hazardous nature of the employee's job or justified by a serious incident. The tests may only be carried out by a medical doctor, never by the employer itself. In order to protect the employee's private life, the employer cannot have direct access to the results of the tests, but if they confirm the employer's suspicions, it can be given access to the doctor's opinion regarding the employee's (in)ability to perform his work.

Facts

The employer in this case was a manufacturer of dangerous chemicals. On 10 September 2012 a bag was found on the company premises. A notice was posted to advise the owner that he or she could collect the bag. When, after a few days, no-one had claimed the bag, it was opened on 14 September. What appeared to be banned substances (possibly ecstasy, heroin, cocaine and cannabis) were found inside it. Fearing that one or more of the employees might be taking illegal drugs, the company's management decided to ask all employees to submit to a drug detection test on the basis of urine samples. The tests were

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carried out internally by the company on a voluntary basis under the supervision of the managing director, the HR manager and one of the staff representatives. The employees were not informed that a refusal to take the test would lead to dismissal.

The plaintiff in this case was an employee who worked in the analysis and metrology lab and whose work consisted of checking the measuring tools in the lab and the manufacturing plant. He decided not to take the test under the conditions determined by the company's management, but he offered to submit to a drug test administered by someone competent to take such a test, for example a doctor or the police. He did, however, admit that he was a regular cannabis user. On 18 October 2012, he was dismissed with immediate effect on the grounds that he had refused to submit to the test.

The employer then publicly displayed a notice of its decision to dismiss the plaintiff and seven employees who had tested positive. The notice mentioned the names of all eight individuals.

The plaintiff brought legal proceedings against his former employer, claiming compensation for unfair dismissal.

Judgment

The Court began by stating that the employer had failed to provide evidence regarding the nature of the products found on the company premises. It did not produce any analysis report from an accredited laboratory confirming what had been found in the bag. Therefore, the employer did not bring any evidence to justify the seriousness of the incident on which it based its decision to impose a drug detection test on all employees.

The Court found that the letter of dismissal was precise enough in terms of specifying the reason for the dismissal, namely that the employer terminated the employment contract because the employee (1) had admitted to being a regular cannabis user and (2) had refused to submit to the drug detection test. However, the Court considered that the letter did not enunciate with enough precision the effects that the consumption of cannabis could have had on the employee's work, since the letter was not precise about the facts or time.

The Court then noted that the fact the employer had found a bag containing suspicious (though unidentified) content did not mean this was attributable to the plaintiff.

In the opinion of the Court, there was good evidence proving the reasons for the dismissal, i.e. that the employee had admitted being a regular cannabis user and had refused to submit to the test. The Court considered that the issue was whether these facts justified summary dismissal.

The Court then tackled the issue of the lawfulness of the drug detection test. To justify requiring all employees to submit to a drug detection test, the employer argued that it had a legal duty of care in relation to the health and safety of its employees in all respects linked to work. It added that the test had to be imposed on all the employees, regardless of the levels of risk involved in their jobs in order to avoid discrimination.

The Court then observed that in Luxembourg, the Labour Code is silent on drug detection tests at work. It does, however, set out the conditions under which medical tests can be ordered and carried out by the employer.

The Labour Code states that the employer is responsible for taking care of the health and safety of its employees in all respects linked to work. Medical tests may therefore be implemented provided two sets of conditions are respected: first, the test must be limited to employees in hazardous occupations; second, the test can never be carried out by the employer itself, but must be assigned to the occupational health care system. The Code defines which occupations are considered hazardous, namely *"any position involving exposure to a risk of professional illness, a specific risk of accident at work, physical or biological substances likely to be harmful to health, or carcinogenic substances"* or *"any position involving an activity likely to seriously endanger the security and health of other employees or third parties, along with any position involving the control of an installation whose malfunction could seriously endanger the security and health of other employees or third parties"*.

The Court applied Article 8 of the European Convention on Human Rights (ECHR), pointing out that - apart from situations where an employee consumes drugs on the employer's premises - the employer's obligation to protect the security of its employees must to be balanced against the employee's right to private life.

The restriction of a fundamental right is only acceptable if it is a proportionate means of achieving a legitimate aim. The Court's analysis of the decision of the employer to test all employees must therefore be assessed against these two conditions. With respect to the legitimate aim, the Court mentioned two rulings of the European Court of Human Rights (*Madsen – v – Denmark, 58341/00, 7 November 2002 and Wretlund – v – Sweden, 46210/99, 9 March 2004*) to point out that ensuring the safety of a ferry and its crew and passengers or of a nuclear power station are legitimate aims which may require interference with employees' private lives. However, the proportionality condition forbids the detection test to be systematically imposed on all employees, regardless of the nature of their occupation within the company. A drug detection test can only be justified for those in hazardous jobs, and even then, only under the conditions (i) that a serious incident has occurred; (ii) that the test is carried out by a medical practitioner within the occupational health care system; and (iii) that the employer should only be given information about results that could affect the employee's ability to do his or her job.

As the employer in this case carried out the test itself, without entrusting it to the occupational health care system and also without proving that the employee's job was hazardous or that there was potential danger, the test had to be considered unlawful, despite its authorisation by the staff representative. The Court therefore considered the drug detection test to have been unlawful and unethical. Therefore, the plaintiff could not be blamed for having refused to submit to it and he did not commit serious misconduct by doing so.

Finally, the plaintiff's admission that he was a regular cannabis consumer was not, in itself, sufficient reason to distrust him as an employee and could not be considered as evidence that he consumed drugs on company premises or that he might behave in such a way as to threaten the security that the employer is required to maintain.

Consequently, the Court considered that the employer's reasons for dismissing the plaintiff were ill-founded and that his dismissal should be declared unfair.

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Commentary

This case gives an interesting additional view of where the boundary between security at the work place and private life should be drawn in the sensitive context of drug consumption. More specifically, the legal issue for the Labour Court here was to determine whether an employee could be dismissed for using cannabis after refusing to submit to a drug detection test which was imposed because some allegedly illegal substances were found on the premises.

Applying Article 8 ECHR, the Court stated that a drug detection test can breach the employee's right to private life because of the sensitive nature of the test results. But in this particular case, the employer went even further in breaching Article 8 ECHR, by displaying a notice of its decision to dismiss the plaintiff and seven other people. This allowed the plaintiff's colleagues to have a glimpse of his private life to which they had no right and this created a breach of his rights with respect to those colleagues.

The decision is welcome because it reaffirms that restrictions on fundamental rights are only permitted where there is a legitimate goal and the action taken is proportionate to it. This should ensure that the breach of the right is minimised. In its decision, the Court went further than the European Court of Human Rights by ruling that before a drug detection test can be approved, the employer must identify that the occupation of the employee is hazardous. In the *Wretlund – v – Sweden* case (9 March 2004), referenced by the Luxembourg Court in the present decision, the European Court of Human Rights ruled that a woman employed as an office cleaner at a nuclear power plant, whose function was to clean the offices at the plant, could lawfully be required to submit to a drug detection test even though she did not have a hazardous job. The Labour Court could have followed the path laid down by the European Court of Human Rights but it decided to go deeper into the protection of employees' fundamental rights.

In this case, the employer produced dangerous chemicals and the employee worked in the analysis and metrology lab whose activities consist of verifying the measuring tools both within the lab and in production. His job could therefore have had an indirect impact on safety or security. However, since the employer did not produce the list of the positions it considered risky and did not clarify how dangerous or otherwise 'metrology' is, the Court ruled that there was no valid reason to submit the plaintiff to a drug detection test, holding that "*the condition of proportionality prohibits the use of systematic detection tests imposed on all employees, without any distinction made regarding the nature of the position*."

What might be surprising, however, is that the Court added, after quoting the ECHR cases, that "*the drug detection test can only be used in relation to hazardous jobs, under the condition that a serious incident justifies its implementation*". The wording implies that both conditions are cumulative. We think that these conditions are alternative, since one cannot reasonably expect an employer to have to wait until a serious incident happens before being allowed to implement a drug detection test. For hazardous jobs, the employer should be allowed to impose a preventive drug detection test without waiting for an incident.

The Court finally considered that the drug detection test was against the law and ethics. This is a strong assessment. An explanation for this might be found in the questionable behaviour of the staff representative, whose role was to protect employees' interests, yet who decided on this occasion to give crucial testimony against the plaintiff - which led to the latter's dismissal. Or, maybe the fact that the employer disclosed the names of the employees who had tested positive or had refused to submit to the test after having clearly stated that submission to the test was voluntary, could have led the Court to made that very unambiguous ruling.

Comments from other jurisdictions

Germany (Dagmar Hellenkemper): It is very likely that a German Court would have come to the same conclusion as the Labour Court of Luxembourg. Drug and alcohol tests are only allowed if they are necessary on grounds of protection or security concerning specific jobs and laid down in laws or specific collective agreements. Random drug testing for all employees regardless of their jobs or the assumed impact of the drug use on their work is unlawful in Germany. That does not mean that drug or alcohol use cannot lead to the termination of the employment contract. If the employment contract specifically prohibits the use of drugs and the employer can prove the infraction of this contractual clause, a termination will be valid. The same will likely apply to an employee, whose abilities are deteriorating because of frequent drug use. An arbitrary drug test such as described in the case above would on the other hand not be submissable evidence to justify a termination of an employment contract.

Subject: Privacy
Parties: Unknown
Court: *Tribunal du travail* (Labour Court of Luxembourg)
Date: 7 November 2013
Case number: 2546/13
Publication: Not available

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2014/51

Potential breakthrough for employee requests for reduced working hours (CZ)

CONTRIBUTOR ONDREJ CHLADA*

Summary

An employer may decline an employee's request for reduced working hours or a different distribution of working hours if the employer has serious operational reasons for doing so, even if the employee applies for the reduction in order to take care of a child under 15 or a disabled person or because she is pregnant. The impact on the business activities of the employer at the time of the employee's request is the crucial consideration in assessing how serious the operational reasons are. If a solution can be found, such as employing someone to cover the employee for the required time, the employer must not decline the employee's request.

Facts

The employee in this case was a municipal clerk. Before the end of her parental leave, she asked her employer to agree to reduce her working time from 5 x 8 = 40 to 5 x 7 = 35 hours per week in order to be able to care for her child. The employer agreed and the employee began

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to work seven hours per day, at a reduced salary, leaving one hour earlier each afternoon. The work that the employee performed during the one hour per day that she ceased to work is referred to below as 'the missing hour's work'.

Under Czech law, a reduction in working hours at the employee's request in order to care for a child or a disabled person is not seen as a change to the contractual terms of employment but as a temporary accommodation that the employer must grant in the absence of compelling operational reasons either to decline the request or to withdraw a previously granted working time reduction.

After about six months, the employer cancelled the employee's permission to work reduced hours and demanded that the employee resume her contractual 40-hour working week. The reason given was that the reduced working hours were causing "serious operational difficulties".

However, the employee did not comply and continued to perform her work only for 35 hours per week. The employer gave her a warning stating that it considered her behaviour to be a breach of her contractual obligations. Eventually, the employer gave the employee notice of termination based on breach of contract.

The employee brought an action claiming that the notice of termination was invalid, since there were no serious operational difficulties justifying the employer's decision. The court, however, accepted the employer's arguments and held that the notice of termination was valid and reasonable.

On appeal, the employee provided evidence that (i) during the period in which she had worked reduced hours, a colleague had done both her own work and the missing hour's work and (ii) the colleague was still working in that way at the time the employer withdrew its permission for her to work reduced hours. Although the employer responded that it had planned to dismiss the colleague within about two months following the withdrawal of permission, the fact remained that she was still carrying out her own work and putting in the missing hour's work at the time of the withdrawal. Based on this fact, the Court of Appeal concluded that at the time of the employer's decision to cancel the employee's short working hours, there were no serious operational difficulties which could justify the cancellation. The Court of Appeal therefore overturned the lower court's decision and declared the notice of termination to be invalid.

Judgment

The employer filed an extraordinary appeal with the Supreme Court of the Czech Republic, claiming that it had been necessary to require the employee to work full time (40 hours per week) in order to ensure that the employer – a municipal office open to the public – was continuously operational on behalf of the public during opening hours. The employer acknowledged that the employee's colleague had for a while managed to do both her own work and the missing hour's work. However, the colleague was scheduled to leave soon after the employer cancelled the employee's reduced working hours' arrangement. Consequently, there would no longer be cover for the missing hour following the colleague's departure.

The Supreme Court confirmed that in a case such as this, it is crucial to determine whether there were serious operational difficulties justifying the refusal of the employee's request to continue working a reduced number of hours. On the one hand, the court reiterated its previous case law, in which it had held:[1]

- that an employee's request for a reduction in working hours in order to take care of a child or disabled person, or because of pregnancy, may only be turned down in the event the reduction threatens to disable the normal operation of the organisation, to disrupt it severely or to jeopardise it;
- that in assessing operational difficulties, it is necessary to take into account factors such as the type of business of the employer, the technical facilities in the workplace, the number of employees, their interchangeability and the employer's financial means.

The Supreme Court also added a new element into the equation, namely whether a new employee could be hired to cover the missing working hours for the duration of the working time reduction. The Court said that an operational threat could be overcome by hiring a new employee.

Based on the facts of the case, the Supreme Court overturned the previous courts' decisions and ordered the court of first instance to decide anew, taking the employer's alleged serious operational difficulties into account.

Commentary

The obligation to accept an employee's request for short working hours in cases where the employee is pregnant, taking care of a child under 15 years or a disabled person is governed by the Czech Labour Code and has been confirmed by previous case law of the Supreme Court. The case law also determines the rules for assessing the operational reasons the employer can use to decline the employee's request.

In 2007, the Supreme Court clearly stipulated that it is at the sole discretion of the employer to decide on the exact number of employees necessary to perform the work. The employer cannot be required to employ an (otherwise) redundant employee in order to be able to accept another employee's request of for short working hours. In the words of the Supreme Court:

"the decision as to whether severe operational reasons prevent the acceptance of the employee's request cannot be affected by the consideration that the alleged disabling, disruption or severe jeopardising of the employer's proper operation would not happen if the employer were to hire another (new) employee."

The new case is a departure from this, but if the employer can now hire new employees in order to allow others to work with short working hours, this will lead to a substantial increase in employees' rights. Employees will only have to prove that the employer had the opportunity to employ someone else as a substitute for the employer to be obliged to accept their request. In more menial jobs, this should be relatively easy to do. Only for senior managers and highly specialised workers will it not be possible to find a substitute. In consequence, the application of this new case law may lead to increases in headcount.

The decision is also controversial because it bears no relation to the case at issue. None of the parties was actually making this argument and so the solution the Supreme Court came up with seems hard to understand. In addition, quite how the new case law and the old can be reconciled seems problematic, as they are in direct conflict.

1 See judgments of 17 December 2003 No. 21 Cdo 1561/2003 and 5 June 2007 No. 21 Cdo 612/2006.

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This suggests that at some point the new case law will be revisited by the Supreme Court, but in the meantime, it has opened up new horizons for some employees.

Comments from other jurisdictions

Germany (Paul Schreiner): The situation in Germany is comparable to that in The Netherlands. The reduction of working time is a reduction of the contractual obligation to render work. The employment contract can be changed either for a limited time or indefinitely, depending on the agreement of the parties. If the employer decides that he no longer wants to be bound by that obligation, he needs to terminate the contract. Such a termination needs to be based on a sufficient reason.

There are different laws under which an employee can demand a reduction of working time. Depending on the law in question, the employer has to show more or less grave operational reasons for a denial. In practice, the situation is comparable to The Netherlands in that, where the position involves administrative work, it is very hard to prove that there is no other option to arrange the work so as to allow the change of working time.

The Netherlands (Peter Vas Nunes): A case such as this would be unthinkable in The Netherlands, for two reasons. First, a reduction of working time would amount to an amendment of the contractual terms. Unless it was clearly temporary, it would be a permanent amendment that could not, in principle, be undone unilaterally by the employer.

Secondly, Dutch employees have the right to apply for a reduction (or an increase!) in their working hours without having to give any reason and, provided certain formalities have been fulfilled, the employer must agree to the reduction unless it (provably) has a very serious reason for turning down the application. The case law goes to show that the courts do not easily accept employers' arguments for refusing part-time work. An argument that it is not reasonably possible, or excessively expensive, to hire a replacement to cover the "missing" working time, would need to be substantiated. Having said this, however, I could imagine that if the employer in the case reported above could convince the court that it needed a clerk during the last hour of the day (say, from 4 to 5 pm), the court would likely accept that it is almost impossible to hire someone, let alone a qualified person, for five one-hour workdays (from 4-5 pm).

In the end, the acceptance of part-time work is probably more culturally than legally determined.

Subject: Working hours
Parties: Employee – v – City of Liberec
Court: *Nejvyšší soud Ceské republiky* (Supreme Court of the Czech Republic)
Date: 9 July 2014
Case number: 21 Cdo 1821/2013
Hard copy publication: -
Internet publication: http://www.nsoud.cz/Judikatura/judikatura_ns.nsf/WebSearch/0F4E9D8577AFF91DC1257D1E004B30F3?openDocument&Highlight=0,

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ECJ COURT WATCH

SUMMARIES BY PETER VAS NUNES

RULINGS

ECJ 23 January 2014, case C-296/12 (*European Commission – v – Kingdom of Belgium*) (FREEDOM TO PROVIDE SERVICES - PENSIONS)

Facts

Contributions paid to pension funds confer a right to a reduction of Belgian income tax only if they have been paid to financial institutions established in Belgium.

Pre-litigation procedure

In 2006, the Commission gave Belgium formal notice that it should submit its observations on the compatibility of its income tax legislation with the EC Treaty. The Commission stated that the legislation restricts (i) the freedom to provide services both of the persons to whom the service (management of a pension fund), is supplied i.e. the depositors, and the freedom of non-Belgian suppliers and (ii) the free movement of capital within the EU, on the basis that Belgian depositors and insurance policy holders will be deterred from transferring pension savings to non-Belgian institutions. Belgium accepted that its pension rules constitute a restriction on providing services within the meaning of Article 56 TFEU. However, it stated that this restriction could be justified by overriding reasons in the public interest. This argument relies on (i) the internal coherence of its tax system; (ii) the need for effective fiscal supervision; and (iii) the need to protect the interests of savers in order to ensure that the pension to which they will be entitled will be paid to them.

ECJ's findings

1. The rules at issue are liable to dissuade Belgians liable to tax from subscribing to an individual or collective savings account or taking out savings insurance with financial institutions established in a Member State other than Belgium. The rules equally, are likely to dissuade institutions from offering their services on the Belgian market. Given that the management of a pension fund is a service within the meaning of Article 57 TFEU, the rules at issue constitute a restriction on providing services. National measures capable of hindering the exercise of fundamental freedoms guaranteed by the TFEU or of making this less attractive may only be allowed if they pursue an objective in the public interest, are appropriate to ensuring the attainment of that objective and do not go beyond what is necessary to attain it (§ 27-32).
2. The need to preserve the coherence of a tax system may justify a restriction on freedom of movement, provided there is a direct link between a tax advantage and a corresponding disadvantage. The factor that may adversely affect the coherence of the Belgian rules is that a person may benefit from a reduction to his Belgian taxable income and subsequently, before retiring, relocate to another Member State, in which case Belgium loses the power to tax the retirement income (at least where Belgium has entered into a double taxation agreement with that other Member State under which retirement income is taxable in the state of residence). However, there is nothing to prevent Belgium from taxing retirement income paid to one of its residents by a financial institution established in another Member State. Consequently, the rules at issue cannot be justified by the need to preserve the coherence of the Belgian tax system (§ 33-40).
3. Directive 77/799 empowers Member States to obtain from the competent authorities of other Member States the information necessary to enable them correctly to assess for tax. Further, there is no reason why the Belgian tax authorities should not request evidence from the person liable to pay tax so that correct assessment for tax can be made. Where appropriate, the authorities may refuse the tax reduction applied for. In those circumstances, justification of the rules at issue by the need for effective fiscal supervision cannot be accepted (§ 41-45).
4. Belgium fails to demonstrate that there are no other means of protecting savers against non-payment of their pensions other than the general rule that payments to institutions established in other Member States and funds managed in other Member States do not qualify for a tax reduction (§ 46-49).

Ruling (judgment)

The ECJ declares that the Kingdom of Belgium has failed to fulfil its obligations under Article 56 TFEU in that it offers a tax reduction in respect of pension contributions only in respect of payments to institutions established in Belgium,.

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

Facts

Following a period of maternity leave, Ms Kultarinta and Ms Novamo took unpaid parental leave. They became pregnant again during this leave. They applied for an interruption of their parental leave and a new period of (paid) maternity leave. In both cases, their employers (respectively, Mehiläinen and Nokia) accepted the interruption of parental leave but refused to pay salary during the new period of maternity leave. They based their refusal on the applicable collective agreements, which provided that, in order to receive remuneration during a period of maternity leave, a worker must move directly from work or paid leave to maternity leave.

National proceedings

Ms Kultarinta and Ms Novamo brought proceedings against their respective employers, claiming compensation for unlawful treatment. The court referred a question to the ECJ regarding the interpretation of Directive 2006/54 on equal treatment between men and women and the Maternity Directive 92/85.

ECJ's findings

1. In order to give a useful answer to the question referred, it is necessary to take into account Directive 96/34 on the Framework Agreement on the implementation of measures to promote equal opportunities and treatment between men and women, by offering them an opportunity to reconcile their work responsibilities with family obligations [*repealed in 2010 and replaced by Directive 2010/18 annexing the Framework Agreement on Parental leave: Editor's note*] (§ 32-35).
2. The choice a worker makes to exercise her right to parental leave should not affect the conditions on which she may decide to take a different form of leave, in this case maternity leave. The effect of a condition that maternity leave can only be taken immediately following a period of work, and not during a period of unpaid

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parental leave, is to require a worker, when she decides to take parental leave, to renounce paid maternity leave in advance in the event that she becomes pregnant during her parental leave (a situation that may not be foreseeable). It must therefore be held that a condition such as that at issue has the effect of dissuading a worker from exercising her right to parental leave. Accordingly, such a condition undermines the effectiveness of Directive 96/34.

Ruling (judgment)

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

ECJ 18 March 2014 (Grand Chamber), case C-363/12 (*Z – v – A Government department and the Board of management of a community school*) ("**Z**"), Irish case (SEX AND DISABILITY DISCRIMINATION)

Facts

Mr and Ms Z are fertile but because Ms Z has no uterus, she cannot support a pregnancy. In 2010 they had a child through a surrogacy arrangement. They are the legal and biological parents, even though the child was born of a surrogate mother. Ms Z applied, but was refused, paid maternity and adoptive leave for the period before the birth.

National proceedings

Ms Z brought an action before the Irish Equality Tribunal. It referred six questions to the ECJ.

ECJ's findings

1. By its first and second questions, the Equality Tribunal asks whether Directive 2006/54 is to be interpreted as meaning that a refusal to provide paid leave equivalent to maternity leave or adoptive leave to a female worker who as a commissioning mother has had a baby through a surrogacy arrangement constitutes discrimination on grounds of sex (§ 46).
2. Under Irish law, a commissioning father who has had a baby through a surrogacy arrangement is treated in the same way as a commissioning mother in a comparable situation, in that he is not entitled to paid leave either. Thus, there is no direct sex discrimination. As regards indirect sex discrimination, there is nothing in the documents submitted to the ECJ to establish that the refusal to grant Ms Z paid leave puts female workers at a particular disadvantage compared to male workers. Consequently, that refusal does not constitute direct or indirect sex discrimination within the meaning of Directive 2006/54. The fact that Ms Z has been responsible for the child from birth does not call this finding into question (§ 47-55).
3. In its judgment in C.D. (case C-167/12), the ECJ ruled that the Maternity Directive 92/85 does not require Member States to provide maternity leave to a commissioning mother (§ 58-59).
4. Directive 2006/54 preserves the freedom of the Member States to grant or not to grant adoption leave. It provides that the conditions for the implementation of adoptive leave, other than dismissal, are outside the scope of the Directive (§ 61-63).
5. By questions 3-6, the Equality Tribunal asks whether a refusal such as that at issue constitutes discrimination on grounds of disability within the meaning of Directive 2000/78 and, if not, whether that directive is valid in the light of the UN Convention on the Rights of Persons with Disabilities, which was approved on behalf of the EU by Council Decision 2010/48 (§ 68).
6. International agreements concluded by the EU prevail over acts of the EU. Hence, Directive 2000/78 must be interpreted in a manner consistent with the UN Convention. This is why, in its judgment in HK Danmark (case C-335/11, also known as "Ring"), the ECJ interpreted the concept of "disability" in Directive 2000/78 as referring to a limitation which results in particular from long-term physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers (§ 69-77).
7. A woman's inability to bear her own child may be a source of great suffering for her. However, this inability does not in itself, in principle, prevent the commissioning mother from having access to, participating in or advancing in employment. Thus, Ms Z's condition does not constitute a "disability" within the meaning of Directive 2000/78 (§ 78-82).
8. The provisions of the said UN Convention are not, as regards their context, provisions that are unconditional and sufficiently precise to have direct effect in EU law (§ 84-90).

Ruling (judgment)

1. Directive 2006/54 [...], in particular Articles 4 and 14 thereof, must be interpreted as meaning that a refusal to provide paid leave equivalent to maternity leave to a female worker, who as a commissioning mother has had a baby through a surrogacy arrangement, does not constitute discrimination on grounds of sex. The situation of such a commissioning mother as regards the grant of adoptive leave is not within the scope of that directive.
2. Council Directive 2000/78 [...] must be interpreted as meaning that a refusal to provide paid leave equivalent to maternity leave or adoptive leave to a female worker who is unable to bear a child and who has availed herself of a surrogacy arrangement does not constitute discrimination on the ground of disability. The validity of that directive cannot be assessed in light of the United Nations Convention on the Rights of Persons with Disabilities, but the directive must, as far as possible, be interpreted in a manner that is consistent with that Convention.

ECJ 19 June 2014, joined cases C-53/13 and C-80/13 (*Strojírny Prostejov a.s. and ACO Industries Tábor s.r.o. – v – Odvolaci financni reditelství*) ("**Strojírny Prostejov**"), Czech case (FREEDOM OF SERVICE PROVISION - TAX)

Facts

Strojírny Prostejov and ACO Industries are Czech companies. They hired temporary workers ('temps') from Slovak temporary manpower agencies that had branch offices in the Czech Republic. The Czech tax authorities required Strojírny Prostejov and ACO Industries (the user undertakings) to deduct Czech withholding tax from their payments to the manpower agencies. The withholding tax in question is an advance on the income tax owed by the temps. In the case of ACO Industries the withholding tax was calculated on the basis of the assumption that 60% of the manpower agency's invoice consisted of the temps' salaries.

National proceedings

The user undertakings appealed against the tax authorities' decisions.

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They argued that if the manpower agencies had been Czech companies, they would not have had to deduct withholding tax. In that case, the obligation to deduct withholding tax would have rested on the manpower agencies, not on the user undertakings.

Two courts, one at the appellate level and the other being the Supreme Court, referred questions to the ECJ for a preliminary ruling. The appellate court asked whether the position taken by the Czech tax authorities was compatible with Articles 56 and 57 TFEU (freedom to provide services). The Supreme Court's questions also related to Articles 18 (prohibition of nationality discrimination), 45 (freedom of movement for workers) and 49 (right of establishment) TFEU. The Supreme Court also questioned the legality of the 60% assumption.

ECJ's findings

1. The ECJ sees no need to examine the questions in the light of Articles 18, 45 and 49 TFEU. It limits its examination to Article 56, which requires the abolition of any restriction on the freedom to provide services in another Member State (§ 26-36).
2. The withholding obligation entails an administrative burden on user undertakings that hire temps from non-Czech manpower agencies. User undertakings hiring temps from a Czech manpower agency do not have that burden. Consequently, the withholding obligation is liable to render the cross-border hiring of temps less attractive and it affects the right of user undertakings freely to choose cross-border services. It follows that the Czech legislation at issue constitutes a restriction on freedom to provide services, prohibited in principle by Article 56 TFEU (§ 37-42).
3. This restriction may be justified by overriding requirements in the public interest in so far as that interest is not already safeguarded by the rules to which the service provider is subject in its own Member State and in so far as it is appropriate and necessary for obtaining the objective pursued. The need to ensure effective tax collection may constitute such an overriding requirement. However, in this case, the manpower agencies in question have branches in the territory of the host state and the advance payments on the salaries of the temps concerned were in fact made by those branches. It follows that the Czech legislation at issue is not appropriate to ensuring efficient tax collection (§ 43-53).
4. The ECJ has on several occasions held that the prevention of tax evasion and the need for effective fiscal supervision may be relied on to justify restrictions on the exercise of the fundamental freedoms guaranteed by the TFEU. However, a general presumption of tax evasion based on the fact that a service provider is based in another Member State is not sufficient to justify a fiscal measure which compromises the objectives of the TFEU (§ 54-59).
5. There is no need to answer the question on the 60% assumption (§ 61-62).

Ruling (judgment)

Article 56 TFEU precludes legislation, such as that at issue in the main proceedings, under which companies established in one Member State using workers employed and seconded by temporary employment agencies established in another Member State, but operating in the first Member State through a branch, are obliged to withhold tax and to pay to the first Member State an advance payment on the income tax due by those workers, whereas the same obligation is not imposed on companies established in the first Member State which use the services of temporary employment agencies established in that Member State.

ECJ 19 June 2014, case C-507/12 (*Jessy Saint Prix – v – Secretary of State for Work and Pensions, with AIRE Centre intervening*) ("**Saint Prix**"), UK case (FREE MOVEMENT - SOCIAL BENEFITS)

Facts

Ms Saint Prix is a French national. She worked in the UK for one year in 2006/2007. Following that year, she enrolled on a university course. Whilst enrolled, she became pregnant. She withdrew from the university course, found a job, but had to give up that job when the work became too strenuous for her. On 18 March 2008, eleven weeks before her expected date of confinement, she applied for income support pursuant to the UK Social Security Contributions and Benefits Act 1992 and the Income Support (General) Regulations 1987. Those regulations exclude "a person from abroad" from entitlement. However, according to § 21 AA(4) of the regulations "a claimant is not a person from abroad if he is", inter alia, a worker or self-employed person for the purposes of Directive 2009/38 on the right of EU citizens and their family members to move and reside freely within the territory of the Member State (the 'Directive') [now replaced by Directive 492/2011, Editor], or a person within the meaning of Article 7(3) of the Directive. That provision states that an EU citizen who is no longer a worker or self-employed person shall retain the status of worker or self-employed person if, inter alia, he or she "is temporarily unable to work as the result of an illness or accident".

It was common ground that Ms Saint Prix would have been eligible for income support had the authorities not considered her to be "a person from abroad". After she gave birth, she remained in the UK and three months later she resumed work.

National proceedings

Ms Saint Prix's application for income support was rejected. She appealed. The First Tier Tribunal upheld her appeal, but the Upper Tribunal overturned that decision, which was confirmed by the Court of Appeal. Ms Saint Prix brought the matter before the Supreme Court. It asked the ECJ whether a pregnant woman who temporarily gives up work because of her pregnancy is to be considered a "worker" for the purposes of freedom of movement for workers as laid down in Article 45 TFEU and of the right of residence as conferred by Article 7 of the Directive.

ECJ's findings

1. Article 7(3) of the Directive does not expressly envisage the case of a woman who is in a particular situation because of the physical constraints of the late stages of her pregnancy and the aftermath of childbirth. In that regard, the ECJ has consistently held that pregnancy must be clearly distinguished from illness. It follows that a woman who temporarily gives up work because of the late stage of her pregnancy cannot be regarded as a person "temporarily unable to work as the result of an illness" within the meaning of Article 7(3) of the Directive (§ 27-30).
2. According to the ECJ's settled case law, the concept of 'worker' within the meaning of Article 45 TFEU, in so far as it defines the scope of a fundamental freedom, must be interpreted broadly. Freedom of movement for workers entails the right for nationals of Member States to move freely within the territory of other Member States and to stay there for the purposes of seeking employment. It follows that classification as a worker under Article 45 TFEU, and the rights deriving from such status, do not necessarily depend on the actual or continuing existence of an employment relationship (§ 31 - 37).

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3. The fact that the physical restraints of the late stages of pregnancy and childbirth require a woman to give up work during the period needed for recovery does not, in principle, deprive her of the status of 'worker' within the meaning of Article 45 TFEU. The fact that she was not actually available on the employment market of the host Member State for a few months does not mean that she had ceased to belong to that market during the period, provided she returns to work or finds another job within a reasonable period after confinement. In order to determine whether the period that has elapsed between childbirth and starting work again may be regarded as reasonable, the national court concerned should take account of all the specific circumstances of the case in accordance with the Maternity Directive 92/85 (§ 39-45).

Ruling (judgment)

Article 45 TFEU must be interpreted as meaning that a woman who gives up work, or seeking work, because of the physical constraints of the late stages of pregnancy and the aftermath of childbirth retains the status of 'worker', within the meaning of that article, provided she returns to work or finds another job within a reasonable period after the birth of her child.

ECJ 17 July 2014, case C-173/13 (*Maurice and Blandine Leone – v – Garde des Sceaux, ministre de la Justice and Caisse nationale de retraite des agents des collectivités locales*) ("**Leone**"), French case (GENDER DISCRIMINATION - PENSIONS)

Facts

Mr Leone was a civil servant. He and his wife have three children. In 2005, Mr Leone applied for early retirement benefits as provided in Article L. 24 (I)(3) of the French Pensions Code. Briefly, and inasmuch as relevant for the purposes of this summary, this provision, in combination with several other provisions of French law, (i) entitles a civil servant to early retirement with immediate payment of pension and (ii) extra retirement benefits (service credits) equal to four trimesters for each child born before 2004, provided the civil servant has taken an unpaid "career break" of at least two months in the form of maternity leave or parental leave immediately before or shortly after each birth (with similar provisions for adopted and foster children).

National proceedings

Mr Leone's application was refused on the ground that he had not taken any career breaks, and an appeal against this refusal was turned down. Mr and Mrs Leone then began proceedings against the French government and the national pension fund for local civil servants CNRACL, claiming loss suffered as a result of failure by France to comply with EU law. The *Tribunal administratif de Lyon* dismissed their claim. They appealed to the *Cour administrative d'appel de Lyon*, which referred three questions to the ECJ on the interpretation of Article 157 TFEU.

ECJ's findings

1. The ECJ (Fourth Chamber) turns down the request to reassign the case to the Grand Chamber and to reopen the oral procedure (§ 16-27).
2. The ECJ also turns down the French government's request to declare the request for a preliminary ruling inadmissible (§ 28-34).
3. The ECJ observes that, as the rejection of Mr Leone's application for early retirement and service credits predates 1 December 2009, the date on which the Lisbon Treaty entered into force, the questions referred to the ECJ should be addressed in the light of Article 141 EC, the (similar) predecessor of Article 157 TFEU (§ 35).
4. The ECJ also observes that the French provisions on service credits were adopted after the ECJ's judgment in *Griesmar* (C-366/99). In that judgment, the ECJ held that, in reserving service credits for female civil servants, the French legislator had breached Article 141 EC (§ 36-37).
5. The possibility of taking a career break is open to civil servants of both sexes. However, the criterion of having taken at least two months maternity or parental leave benefits many more women than men, given that maternity leave is mandatory, whereas other types of leave, such as parental leave, are optional. Moreover, parental leave is unpaid, does not qualify for the accumulation of pension rights and leads to loss of career advancement rights. Thus, the legislation at issue is indirectly sex-discriminatory (§ 38-51).
6. The purpose of the service credit is to compensate for the career-related disadvantages resulting from career breaks for reason of birth. This constitutes a legitimate social policy aim. However, Mr and Mrs Leone, as well as the Commission, submit that the French Republic substituted a new mechanism for the earlier one that was declared in breach of EU law in *Griesmar*, under the guise of measures which are ostensibly gender-neutral but in reality uphold the earlier mechanism and ensure that the actual effects of those earlier measures will be maintained and perpetuated. The ECJ points out a number of inconsistencies in the legislation that seem to cast doubt on whether it genuinely aims to provide financial compensation for the financial impact of taking career breaks (§ 52-79).
7. The same considerations hold true with respect to the early retirement provision (§ 80-98).
8. The service credit provisions and the early retirement provisions are not covered by subsection 4 of Article 141 EC, which allow Member States to adopt measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers (§ 99-103).

Ruling (judgment)

1. Article 141 EC must be interpreted as meaning that a scheme for early retirement with immediate payment of pension such as that at issue in the main proceedings gives rise to indirect discrimination in terms of pay as between female workers and male workers, contrary to that article, unless it can be justified by objective factors unrelated to any discrimination on grounds of sex, such as a legitimate social policy aim, and is appropriate to achieve that aim and necessary in order to do so. This requires that it genuinely reflect a concern to attain that aim and be pursued in a consistent and systematic manner.
2. Article 141 EC must be interpreted as meaning that a service credit scheme for pension purposes, such as the one at issue in the main proceedings, gives rise to indirect discrimination in terms of pay as between female workers and male workers, contrary to that article, unless it can be justified by objective factors unrelated to any discrimination on grounds of sex, such as a legitimate social policy aim, and is appropriate to achieve that aim and necessary in order to do so. This requires that it genuinely reflect a concern to attain that aim and be pursued in a consistent and systematic manner.
3. Article 141(4) EC must be interpreted as meaning that the measures

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referred to in that provision do not cover national measures such as those at issue in the main proceedings, which merely allow the workers concerned to take early retirement with immediate payment of pension and to grant them a service credit upon their retirement, without providing a remedy for the problems which they may encounter in the course of their professional career.

ECJ 3 September 2014, case C-318/13 (*X – v – Finland*) ("**X**"), Finnish case (GENDER DISCRIMINATION – SOCIAL SECURITY)

Facts

X was injured in an accident at work in 1991. In 2005, the Finnish Insurance Court held that he was entitled to a lump sum payment of compensation for long-term disability. Following this decision, the competent insurance company paid X € 4,197.98. This sum represented X's annual loss multiplied by the number of years he was estimated to continue living based on actuarial statistics. X appealed against this decision, because what he was paid was less than he would have been awarded had he been a woman, given the longer life-expectancy of women. His appeal was rejected in 2008. X then wrote to the Ministry of Social affairs and Health, claiming payment of € 278.89. This sum corresponds to the difference between what X was paid and what he would have been paid had he been a women.

National proceedings

The Helsinki Administrative Court declared X's action inadmissible on the ground that it lacked jurisdiction. X appealed to the Supreme Administrative Court, which referred questions to the ECJ relating to Article 4(1) of Directive 79/7 on equal treatment for men and women in matters of social security.

ECJ's findings

1. The Finnish government argued that the ECJ lacked jurisdiction, given that the accident occurred before Finland joined the EU. The ECJ rejected this argument, because the legal act in question – the rejection of X's appeal in 2008 – postdated Finland's accession. Thus the subject matter of the proceedings in the main case "is not a situation which had produced all its effects" before Finland's accession to the EU (§ 21-24).
2. Although the compensation at issue is paid by a private insurance company, the accident insurance of employees in Finland and the criteria for compensation form part of the "statutory" schemes within the meaning of Directive 79/7. Consequently, the compensation at issue falls within the scope of that directive (§ 25).
3. The Finnish government argues that X is not comparable to a (hypothetical) woman of the same age as X who suffered an identical accident on the same day as he did. Since women have a statistically longer life expectancy than men, the lump-sum compensation to remedy the harm suffered for the remainder of the injured person's life must be higher for women than for men. Consequently, men and women are not comparable in this respect. This argument is not valid. It could, at most justify the unequal treatment, but it does not mean that there is no comparator (§ 29-33).
4. Directive 79/7 does not allow for any relevant derogation from the principle of equal treatment (§ 34-36).
5. The calculation of compensation for an accident at work cannot be made on the basis of a generalisation of average life expectancy. Such a generalisation is likely to lead to discrimination. Therefore, the national scheme at issue cannot be justified and is at odds with directive 79/7 (§ 37-40).
6. Do the provisions of Finnish law at issue constitute a "sufficiently serious" infringement, within the meaning of *Brasserie du Pêcheur* (C-46/93) and *Factortame* (C-48/93), for the Republic of Finland to be liable for X's loss resulting from that Member State's failure to transpose Directive 79/7 fully? As regards the present case, three factors must be taken into account. First, the scope of the principle of equal treatment set out in Article 4(1) of Directive 79/7 and its interpretation have not, to date, been dealt with in an ECJ judgment. Secondly, no national legislation has, to date, been the subject of an action for infringement of Article 4(1) of Directive 79/7. Thirdly, Article 5(2) of Directive 2004/113 allowed Member States until 21 December 2007 to permit proportionate differences in individuals' premiums and benefits where the use of sex is a determining factor in the assessment of risk based on relevant and accurate actuarial and statistical data. Admittedly, the ECJ in Test-Achats (EU:C:2011:100) held this provision to be invalid. However, the fact remains that the provision was there. Moreover, Article 9(1)(h) of Directive 2006/54 allows the use of sex-based actuarial factors, in derogation from the principle of gender equality (§ 41-51).

Ruling (judgment)

Article 4(1) of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security must be interpreted as precluding national legislation on the basis of which the different life expectancies of men and women are applied as an actuarial factor for the calculation of a statutory social benefit payable upon an accident at work, when, by applying this factor, the lump-sum compensation paid to a man is less than that which would be paid to a woman of the same age and in a similar situation.

It is for the referring court to assess whether the conditions for the Member State to be deemed liable are met. Similarly, as regards whether the national legislation at issue in the main proceedings constitutes a 'sufficiently serious' infringement of EU law, that court will have to take into consideration, inter alia, the fact that the Court has not yet ruled on the legality of taking into account a factor based on average life expectancy according to sex in the determination of a benefit paid under a statutory social security system falling within the scope of Directive 79/7. The national court will also have to take into account the right granted to Member States by the EU legislature, set out in Article 5(2) of Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, and Article 9(1)(h) of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation. In addition, that court should bear in mind that the Court held, on 1 March 2011 (C-236/09, EU:C:2011:100), that the first of those provisions was invalid, since it infringed the principle of equal treatment between men and women.

ECJ 11 September 2014, case C-91/13 (*Essent Energie Productie BV – v – Minister van Sociale Zaken en Werkgelegenheid*) ("**Essent**"), Dutch case (FREEDOM OF MOVEMENT – WORK PERMITS)

Facts

Essent is a Dutch company. It contracted with another Dutch company, BIS, to erect scaffolding at one of its power plants. BIS carried out the

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work using staff that were posted to it by a German company, Ekinci. Of the staff, 29 were Turkish nationals. Essent was fined € 264,000 by the Dutch Labour Inspectorate for using the services of non-EU nationals for whom it did not have work permits. Dutch law defines 'employer' within the meaning of the law on the employment of foreign nations (a law abbreviated 'Wav') as anyone who has work carried out by another. Thus, Essent was an employer of the 29 Turkish workers within the meaning of the Wav, even though their actual employer was Ekinci. Those Turkish workers resided and worked legally in Germany.

National proceedings

Essent objected to the fine. The objection was rejected and this was confirmed on appeal. Essent appealed to the highest administrative court in The Netherlands, the *Raad van State*. It referred questions to the ECJ. The questions related to the Association Agreement between the EU and Turkey, in particular the Additional Protocol to that agreement and Decision 1/80 pursuant to it.

ECJ's findings

1. Neither the Additional Protocol nor Decision 1/80 apply to a situation such as the one at issue (§ 21-35).
2. Although the referring court has not asked questions about Articles 56 and 57 TFEU on the freedom to provide services within the EU, the ECJ finds it necessary to provide the court with guidance on those provisions (§ 36).
3. The fact that Essent is not the direct recipient of the service of making the workers in question available, cannot prevent Essent from relying on Articles 56 and 57 TFEU. If Essent were denied that option, it would suffice for The Netherlands to adopt a broad definition of 'employer' in order to obstruct the freedom to provide services within the EU. Since Essent was the only party to be fined, the question as to the compatibility of the Dutch legislation at issue with Article 56 and 57 TFEU is directly relevant to the dispute regarding the lawfulness of the fine (§ 38-43).
4. The legislation at issue prohibits an employer established in a Member State other than the Netherlands from having work carried out in the Netherlands by a non-EU national who does not hold a work permit. The conditions and restrictions in terms of deadlines which have to be met in order to obtain a permit, and the administrative burden involved, impede the making available of third country workers to a user undertaking in the Netherlands by a service-providing undertaking established in another Member State, and, consequently, the provision of services by that undertaking. Whether this restriction on the freedom to provide services is justified by an objective in the public interest must be considered in terms of whether the restriction is necessary in order to pursue that objective effectively and by appropriate means (§ 44-49).
5. Although the desire to avoid disruption to the labour market is undoubtedly an overriding reason in the public interest, workers who are employed by an undertaking established in a Member State and posted to another Member State for the purpose of providing services there do not purport to gain access to the labour market of that second Member State, as they return to their country of origin or residence after the completion of their work. However, a Member State may check that an undertaking in another Member State which posts workers from a non-member country to its territory is not availing itself of the freedom to provide services for a purpose other than the performance of the service concerned. However, these checks must observe the limits imposed by EU law, in particular those stemming from the freedom to provide services, which cannot be merely illusory and whose exercise may not be made subject to the discretion of the authorities (§ 50-53).
6. A Member State retaining on a permanent basis a requirement for a work permit for third country nationals who are made available to an undertaking in its territory by an undertaking established in another Member State exceeds what is necessary to achieve the objective pursued by the Dutch legislation at issue. An obligation on the service provider to provide information as to residence, work permit and social coverage of such third country nationals is less restrictive but just as effective (§ 54-59).

Ruling (judgment)

Articles 56 TFEU and 57 TFEU must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, under which workers who are nationals of non-member countries are made available by an undertaking established in another Member State to a user undertaking established in the first Member State and the user undertaking in the first Member State uses them to carry out work on behalf of another undertaking established in the same Member State, this arrangement is subject to the condition that the workers have been issued with work permits.

ECJ 11 September 2014, case C-328/13 (*Österreichischer Gewerkschaftsbund – v – Wirtschaftskammer Österreich – Fachverband Autobus-, Luftfahrt- und Schifffahrtsunternehmungen*) ("**Gewerkschaftsbund**"), Austrian case (TRANSFER OF UNDERTAKINGS – COLLECTIVE AGREEMENT)

Facts

A union and an employers' association had entered into a collective agreement for a group of airline companies (the parent company) and a specific collective agreement for one of its subsidiaries. On 30 April 2012, the parent company decided to transfer its entire aviation activity to the subsidiary with effect from 1 July 2012, so that the employees would be subject to the conditions laid down in the subsidiary's collective agreement, which were less advantageous than that of the parent company. The employers' association rescinded the parent company's agreement with effect from 30 June 2012. In response, the union rescinded the subsidiary's collective agreement. The result was that the employees in question – who were now employees of the subsidiary – were not covered by any collective agreement. The subsidiary proceeded to apply terms of employment that were considerably less generous than they were before 1 July 2012. The union claimed that the parent company's collective agreement continued to apply. The employers' association argued that a collective agreement which no longer exists on the date of the transfer of a business cannot be mandatorily imposed on the transferees.

National proceedings

The parties litigated to the Supreme Court. It referred to the ECJ questions relating to Article 3(3) of Directive 2001/23, which says as follows:

"*Following the transfer, the transferee shall continue to observe the terms and conditions agreed in any collective agreement on the terms applicable to the transferor under that agreement, until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement.*"

Paragraph 13 of the Austrian law governing transfer of undertakings says as follows:

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"The legal effects of the collective agreement shall continue after its termination in respect of employment relationships which were covered by it immediately before its termination unless a new collective agreement takes effect in respect of those employment relationships or a new individual agreement is concluded with the employees concerned."

ECJ's findings

1. The questions referred for a preliminary ruling are admissible (§ 15-20).
2. Article 3(3) of the Directive requires the terms and conditions put in place by a collective agreement to continue to be observed, without the specific origin of their application being decisive. It follows that those terms and conditions fall within the scope of Article 3(3) irrespective of the method used to make them applicable to the persons concerned (§ 21-28).
3. The objective of Directive 2001/23 is to ensure a fair balance between the interests of the employees, on the one hand, and those of the transferee on the other, and the transferee must be in a position to make the adjustments and changes necessary to carry on its operations. It does not appear that the Austrian transposition hinders the transferee's ability to make such adjustments and changes (§ 29-30).

Ruling (judgment)

Article 3(3) of Council Directive 2001/23 [...] must be interpreted as meaning that the terms and conditions laid down in a collective agreement pursuant to the law of a Member State continue to have effect as regards employment relationships governed by them before the agreement was terminated and constitute 'terms and conditions agreed in any collective agreement' provided the employment relationship is not subject to a new collective agreement or a new individual agreement is not concluded with the employees.

ECJ 18 September 2014, case C-549/13 (*Bundesdruckerei GmbH – v – Stadt Dortmund*) ("**Bundesdruckerei**"), German case (FREEDOM TO PROVIDE SERVICES – PUBLIC PROCUREMENT)

Facts

In May 2013, the City of Dortmund (the 'contracting authority' in this case) issued a call for tenders for a contract relating to the digitalisation of documents. One of the conditions for tendering was that the contractor agreed to pay its employees a minimum hourly wage of € 8.62 and that it would require its subcontractors to comply with that minimum wage. This requirement was based on paragraph 4(3) of a North Rhine Westphalian law that provides that public service contracts may be awarded only to undertakings which have agreed to pay their staff the minimum wage. One of the tenderers was *Bundesdruckerei*. It informed the City of Dortmund that if it were awarded the contract, it would have the services under that contract performed in Poland and that the workers in question would be paid less than € 8.62 per hour. The City of Dortmund replied that it could not waive the minimum hourly wage requirement.

National proceedings

Bundesdruckerei brought an action before the local public procurement board (the 'Board') in order to oblige the City of Dortmund to amend the tendering documents. It argued that Paragraph 4(3) is an unjustified restriction on the freedom to provide services laid down in Article 56 TFEU. The City of Dortmund based its defence on Article 26 of Directive 2004/18 on the coordination of procedures for the award of public contracts, which at that time (in the 2013 version) allowed tenders for public contracts to include conditions concerning "social and environmental considerations". The City of Dortmund relied on the ECJ's ruling in the *Rüffert* case (C-346/06). The Board referred questions to the ECJ.

ECJ's findings

1. *Rüffert* was based on Posting Directive 96/71. Given that the work to be performed in this case was to be performed in Poland, and not by Polish workers posted to Germany, that directive does not apply. The only relevant issue is whether Paragraph 4(3) is compatible with Article 56 TFEU (§ 24-27).
2. The imposition of a minimum wage on subcontractors of a tenderer established in another Member State than that to which the contracting authority belongs and in which minimum rates of pay are lower, constitutes an additional economic burden that may prohibit, impede or render less attractive the provision of their services in the host Member State. Consequently, Paragraph 4(3) is capable of constituting a restriction within the meaning of Article 56 TFEU (§ 28-30).
3. Such a national measure may in principle be justified by the objective of ensuring that employees are paid a reasonable wage in order to avoid social dumping and to avoid penalising competing undertakings which grant a reasonable wage to their employees. However, in so far as it applies solely to public contracts, and not also to contracts in the private sector, such a measure is not appropriate for achieving that objective (see *Rüffert* at § 38-40). (§ 31-32).
4. In any event, Paragraph 4(3) is disproportionate. The minimum wage in question bears no relation to the cost of living in Poland. It cannot be justified in the light of the objective of stability of social security systems (§ 33-35).

Ruling (judgment)

In a situation such as that at issue in the main proceedings, in which a tenderer intends to carry out a public contract using workers employed by a subcontractor established in a different Member State, Article 56 TFEU precludes the application of legislation of the Member State to which that contracting authority belongs requiring that subcontractor to pay its workers the minimum wage fixed by that legislation.

OPINIONS

Opinion of Advocate-General Wahl of 19 June 2014 in case C-179/13 (*Raad van Bestuur van de Sociale Verzekeringsbank – v – L.F. Evans*) ("**Evans**"), Dutch case (NATIONALITY DISCRIMINATION)

Facts

Ms Evans is a British citizen. From 7 November 1973 till 31 May 1980 she worked in The Netherlands. Upon termination of her last job, she received Dutch unemployment benefits. On 17 November 1980, she was hired by the American consulate in Amsterdam. From that time onwards, she paid no Dutch social insurance contributions. Originally, this was because Dutch law exempted consular staff from participation in the Dutch social insurance legislation. In 1999, Ms Evans was offered the option of opting into the Dutch social insurance system, but she elected to stay out of that scheme. In 2008, the authority that administers Dutch state retirement benefits, the *Sociale Verzekeringsbank*, informed her that the period from 18 November 1980 would not be taken into account for the purpose of calculating her entitlement to Dutch state retirement benefits.

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National proceedings

Ms Evans appealed this decision, arguing that her period of employment with the American consulate should count towards calculating her state retirement benefits. The court of first instance, basing its reasoning on the ECJ's judgment in *Boukhalfa* (C-214/94), found in her favour. The *Sociale Verzekeringsbank* appealed. The appellate court referred questions to the ECJ. The first question was whether MS Evans falls within the scope of Regulation 1408/71 [*which applies because Ms Evans' employment terminated before this regulation was replaced by Regulation 883/2004, Editor's note*]. The second question, which only comes into play in the event the first is answered in the negative, is whether refusal to take the period from 18 November 1980 into account constitutes unjustified discrimination on the basis of nationality. Both questions require account to be taken – as from 1986 – of the Vienna Convention on Consular Relations (VCCR).

Opinion

1. In contrast to the *Boekhalfa* case, Ms Evans worked in EU territory. Therefore, it would not be too far-fetched to argue that, purely on the basis of the principle of territoriality, Ms Evans is subject to the legislation of The Netherlands and, consequently, Regulation 1408/71 is applicable to her situation. However, that view is not satisfactory. International law neither requires nor forbids individual Member States to exempt permanently-resident consular employees but leaves it, as a matter of national law, to their discretion to decide. Pursuant to Dutch law, Ms Evans was not subject to Dutch social insurance legislation. Thus, Regulation 1408/71 did not apply to her (§ 41-50).
2. Article 16 of Regulation 1408/71, which deals with diplomatic and consular staff, does not alter this conclusion (§ 51-65).
3. The principle of non-discrimination on the basis of nationality enshrined in Article 45 TFEU, Article 7 of Regulation 1612/68 and Article 3 of Regulation 1408/71 does not only require that comparable situations must not be treated differently, but also that different situations must not be treated in the same way. In the case at hand, Ms Evans' situation is not comparable with that of a Dutch citizen who works at the consulate of a foreign power and who is covered by the Dutch social insurance legislation. Her situation is different, both in fact and at law. In contrast to Dutch citizens, she was not compulsorily insured and was not obliged to contribute to the Dutch social insurance system (§ 66-72).
4. In the event the ECJ holds (i) that Regulation 1408/71 does apply to Ms Evans and (ii) that she is comparable to a Dutch citizen employed at a foreign consulate, she is discriminated against and that discrimination cannot be justified.

Proposed reply

On a proper construction of Articles 2 and 16 of Council Regulation (EEC) No 1408/71 [...], that regulation does not apply at any point during the employment relationship to a national of a Member State who works in another Member State as a member of the administrative or technical service staff of the consulate of a non-Member State if, under the legislation of the host Member State adopted pursuant to Article 71(2) of the [VCCR], that person is excluded from its social security system.

Opinion of Advocate-General Szpunar of 17 July 2014 in joined cases C-22/13, C-61/13 through 63/13 and C-418/13, (*Raffaela Mascolo and others – v – Ministero dell' Università e della Ricerca and Fortuna Russo – v – Commune di Napoli*) ("**Mascolo**"), Italian case, (FIXED-TERM EMPLOYMENT)

Facts

The nine plaintiffs in these cases were employed by Italian (national and local) government to work in schools. They were employed for periods ranging from about four to seven years on the basis of repetitive fixed-term contracts with breaks in between. They considered this to be unlawful and brought actions claiming conversion of their fixed-term contracts into permanent contracts as well as payment of salary for the periods in between their contracts.

National proceedings

The various courts referred questions to the ECJ relating to Clause 5 of the Framework Agreement annexed to Directive 1999/70, which provides:

1. *"To prevent abuse arising from the use of successive fixed-term employment contracts or relationships, Member States, [...] and/or the social partners, shall, where there are no equivalent legal measures to prevent abuse, introduce in a manner which takes account of the needs of specific sectors and/or categories of workers, one or more of the following measures:*
   [a] objective reasons justifying the renewal of such contracts or relationships;
   [b] the maximum total duration of successive fixed-term employment contracts or relationships;
   [c] the number of renewals of such contracts or relationships.
2. *Member States [...] shall, where appropriate, determine under what conditions fixed-term employment contracts or relationships:*
   [a] shall be regarded as 'successive'
   [b] shall be deemed to be contracts or relationships of indefinite duration."

Opinion

1. The Italian legislation at issue is complex. Inasmuch as is relevant for the education sector, the Framework Agreement was transposed into Italian law by Law 165/2001 for state schools and Law 368/2001 for private schools. However, it would appear that the Italian provisions at issue in the main proceedings, which are limited to state schools, are at variance with Law 165/2001. Those provisions essentially come down to the following set of rules. The procedure is that, each school year, 50% of the permanent vacancies in a school are filled by means of competitive selection. The remaining 50% are filled by means of lists. Whenever staff are required pending the completion of the procedures for hiring permanent staff", the individuals at the top of these lists are offered 'replacement' positions for one school year. The place of a person on the list is determined by the number of annual contracts he has had. The referring courts wish to know whether this Italian legislation provides sufficient protection against abuse, as required in said Clause 5 (§ 47-54).
2. Contrary to the submission made to the ECJ by the Greek government, Member States are not free to exempt the education sector, or indeed any sector, from the scope of the Framework Agreement (§ 56-59).
3. The legislation at issue limits neither the number of consecutive fixed-term contracts nor their maximum total duration. The question is therefore whether the legislation contains a preventive measure as provided in Clause 4(1)(a) of the Framework Agreement ("objective reasons justifying the renewal of such contracts or relationships") or, in the absence of such a measure, an "equivalent legal measure" as provided in the first part of Clause 4(1) (§ 62-64).
4. In its judgment in *Kücük* (case C-586/10), the ECJ held that the

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concept of "objective reasons" refers to "precise and concrete circumstances characterising a given activity, which are therefore capable, in the context, of justifying the use of successive fixed-term contracts". A national provision which merely authorises recourse to successive fixed-term contracts in a general and abstract way, does not satisfy this requirement, as it does not contain objective and transparent criteria that the authorities can use to check whether the renewal of contracts is in response to a genuine need, is appropriate for achieving the objective pursued and is necessary for the purpose. A provision such as the one at issue is not contrary to the Framework Agreement *per se*. In an administration with a large work force, it is inevitable that temporary replacements will frequently be necessary when employees are on sick, maternity, parental or other leave. The temporary replacement of employees in those circumstances may be an objective reason, particularly where this also meets a legitimate social policy objective, such as protecting maternity and enabling men and women to reconcile their professional and family obligations. However, the renewal of fixed-term contracts in order to satisfy a need that is in fact permanent is not justified within the meaning of Clause 5(1)(a) of the Framework Agreement. The authorities of the Member State concerned should take into account all the circumstances of the case such as the number and duration of successive contracts concluded with the same person for the purpose of performing the same work. In the main proceedings in this case, the legislation at issue merely authorises recourse to successive fixed-term contracts in an abstract and general manner. This does not permit objective and transparent criteria to be identified (§ 65-70).

5. Even supposing the legislation at issue could be considered to fall within the scope of Clause 5(1)(a), it is still questionable whether it aims to do no more than provide the government with a means to satisfy a truly temporary need for teachers. This does not seem to be the case, as fixed-term contracts are used to fulfil a permanent staffing need (§ 71-74).
6. Although Member States have a wide margin of discretion in determining how to achieve the result envisaged by the Framework Agreement, they must make sure that that result is achieved. The Italian legislation at issue fails to meet this requirement. The Italian government justifies the legislation with two arguments. First, schools need a high degree of flexibility allowing them to match the cyclical and unforeseeable fluctuations in student enrolment with the need to replace staff. Secondly, there are financial considerations (§ 75-76).
7. It is true that schools need flexibility. It is also true that a system of lists alongside competitive selection, can guarantee that teachers are offered fixed-term employment based on objective criteria and that it offers them a reasonable chance of permanent employment. However, there is no deadline for holding competitive selections, and in fact none have been held for over ten years. This means that fixed-term contracts are being used to satisfy a permanent need (§ 77-78).
8. As for the argument regarding financial needs, this cannot justify the use of repetitive fixed-term contracts (§ 79-80).
9. The legislation at issue contains neither adequate measures to prevent the abuse of successive fixed-term contracts nor adequate measures to sanction such abuse (§ 83-85).

Proposed reply

National legislation such as that at issue in the main proceedings which:

- allows for the renewal of fixed-term contracts for the replacement of teaching, support, technical and administrative staff in state education pending competitive selections for hiring permanent educational staff, without it being clear when the competitive selections will take place and without laying down objective and transparent criteria against which to measure whether the renewal of those contracts satisfies a real need and achieves the necessary objective of the legislation; and
- lacks any measure to prevent or sanction abuse of those fixed-term contracts

cannot be regarded as being justified by objective reasons within the meaning of Clause 5 of the Framework Agreement annexed to Directive 1999/70. However, it is up to the national court to determine whether, taking into account the foregoing considerations, such circumstances exist.

Opinion of Advocate-General Wahl of 11 September 2014 in case C-413/13 (*FNV Kunsten Informatie en Media – v – Staat der Nederlanden*), ("**FNV**"), Dutch case (COLLECTIVE AGREEMENT – SOCIAL DUMPING)

Facts

FNV is an association of employees, i.e. a union. Together with an association of self-employed persons, it concluded a collective labour agreement ('CLA') with the employers' association VSR. The CLA provided, *inter alia*, that self-employed musicians must be paid a certain minimum fee. In 2007, the Dutch Competition Board (the 'Nma') took the position that provisions in a CLA relating to minimum fees for self-employed persons are not exempt from the anti-trust provisions of the Nma. As a result of this position, VSR and one of the unions refused to conclude new CLAs beyond 2007.

National proceedings

FNV lodged an action against the Netherlands State before the district court, seeking, essentially, a declaration that anti-trust law does not preclude a provision in a CLA which obliges an employer to respect minimum fees with regard to self-employed persons. The district court dismissed FNV's claims. FNV appealed. The Court of Appeal referred questions to the ECJ for a preliminary ruling. The questions related to Article 101 TFEU, which prohibits and declares void agreements that distort competition. The relevant provision of Dutch anti-trust law is largely inspired by this and the question here was how this related to the so-called "Albany exception". The "Albany exception" refers to the ECJ's case law, starting with the 1999 *Albany* case (C-67/96). According to this, agreements entered into within the framework of collective bargaining between employers and employees and intended to improve employment and working conditions, are excluded from the scope of Article 101 TFEU.

Opinion

1. In the Albany series of cases, the ECJ ruled that collective agreements do not fall within the scope of Article 101 TFEU when two *cumulative* conditions are met: (i) they are entered into in the framework of collective bargaining between employers and employees (the 'first condition'), and (ii) they contribute directly to improving the employment and working conditions of workers (the 'second condition'). Neither condition has been satisfied. The first condition is not satisfied where an agreement, despite resulting from a process of collective bargaining, is (in whole or in part) negotiated and entered into on behalf of self-employed persons. In fact, when trade unions act on behalf of self-employed persons, and not of workers, they can hardly be regarded as 'associations of employees'. As for the

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second condition, ECJ case law has consistently referred to the employment and working conditions of *employees*. To date, the Court has never extended – implicitly or explicitly – its findings to contractual provisions which seek to improve the working conditions of self-employed persons (§ 24-27).

2. The status of self-employed persons and the status of workers are, for the purposes of the EU competition rules, fundamentally different. Workers are not undertakings under the EU competition rules and Article 101 TFEU was not conceived to regulate labour relationships. Conversely, self-employed persons are 'undertakings' under EU competition rules. Accordingly, a trade union acting on behalf of self-employed persons is to be regarded as an 'association of undertakings' within the meaning of Article 101 TFEU (§ 28-32).
3. The status of self-employed persons is clearly different from that of workers, not only under the EU competition rules, but, more generally, under the scheme of the EU Treaties. As a result, the social policy considerations which justified the Albany exception for workers cannot be considered valid with regard to the self-employed. The reason for the distinction drawn by the draftsmen of the Treaties between workers and self-employed persons is rather straightforward: as a general rule, the ways in which the professional activities of those two groups are organised and exercised differ profoundly. One of the key features of any employment relationship is the subordination of the worker to his employer. A self-employed person, on the other hand, follows the instructions of his customers but, generally speaking, they do not wield extensive powers of supervision over him. Furthermore, a self-employed person must assume the commercial and financial risks of the business, whereas a worker normally does not bear any such risk, being entitled to remuneration for the work provided irrespective of the performance of the business. Lastly, while self-employed persons offer goods or services on the market, workers merely offer their labour to a particular employer. Thus, it is inherent in the status of being self-employed that compared to workers, self-employed persons enjoy more independence and flexibility. In return, however, they inevitably have to bear more economic risks and will often find themselves in more unstable and uncertain working relationships. All these aspects seem to be closely interrelated (§ 38-47).
4. FNV stressed in its written observations that the only self-employed persons whose tariffs are regulated by the CLA at issue are those without staff and who, in terms of bargaining power, are in a position relatively similar to that of employees. It is true that in today's economy, the distinction between the traditional categories of worker and self-employed person is at times somewhat blurred. The ECJ has already had to examine a number of cases in which the working relationship between persons did not fall neatly into one or other category, displaying features characteristic of both. There are some self-employed persons who, in terms of their professional relationship with actual or potential customers, are in a position rather similar to that typically existing between a worker and his employer. In particular, some self-employed persons may enjoy very little independence in terms of when, where and how they carry out the tasks assigned. They may also be in a rather weak position at the negotiating table, especially as concerns compensation and working conditions. That is particularly true with regard to the case of the 'false self-employed': employees who are disguised as self-employed in order to avoid the application of certain legislation (for example, labour or fiscal regulations) considered unfavourable by the employer. Another example is the case of self-employed persons who are economically dependent on a sole (or main) customer. However, leaving aside the cases in which there is some circumvention or avoidance of the labour or fiscal rules, which are for the national legislature of each Member State to regulate, there is no valid reason *always* to treat workers and self-employed persons in the same way (§ 50-53).
5. The purpose of collective agreements is to set certain standards that apply across the board to all situations falling within their scope. Thus, they are meant to cover a whole category of professionals, irrespective of the individual circumstances. Yet, the self-employed are a notoriously vast and heterogeneous group. Some of them may have deliberately chosen to offer their services under a particular legal regime, while others may have been forced to do so, in the absence of a more stable employment opportunity. Depending on their skills, competences, experience and reputation, on the one hand, and the circumstances of the case (such as the size and economic power of the customer, the urgency and/or complexity of the service, the number of other professionals available) on the other, their bargaining power may be stronger or weaker than that of their customers. This is in stark contrast to workers, who are traditionally considered to be in an asymmetrical position when negotiating working conditions with employers, because the offer of labour is higher than its demand in all modern western societies. Importantly, self-employed persons may also have profoundly diverging approaches to the prospect of being subject to provisions binding on them all as a group. For example, in the case under consideration, whereas some self-employed musicians may welcome provisions fixing minimum tariffs, others may not. In fact, such provisions can deprive younger or less famous professionals from being able to compete effectively with more experienced or renowned colleagues, by offering their services at more advantageous rates. Without the possibility of competing on price, some self-employed would have far fewer opportunities to win a contract and would risk being marginalised from the job-market entirely (§ 54-56).
6. One could argue that provisions in a collective agreement concluded on behalf of self-employed persons should be covered by the Albany exception to the extent that self-employed persons are in a situation comparable to that of workers, but not when those similarities do not exist. However, that would not be a tenable solution. The CLA at issue does not deal with the 'false self-employed'. Indeed, it is common ground between the parties that the false self-employed fulfil the definition of 'workers' under EU law and so any collective agreement regulating their position would in principle be able to benefit from the Albany exception. The CLA at issue deals with the real self-employed. Consequently, extending to them a general exclusion from the scope of Article 101 TFEU would not only fly in the face of the Treaty provisions on competition law and social policy, but would introduce an element of uncertainty and unpredictability into a system (i.e. that of labour relations), which has a particular need for stability, clarity and transparency (§ 59-64).
7. FNV argues that the purpose of the provisions in question was to improve the working conditions of the **employees** concerned. In particular, the objective pursued by those provisions was to prevent social dumping. FNV maintains that, by providing a counterweight to the potentially lower costs borne by employers when replacing workers with self-employed persons, the provisions in question are intended to ensure that employers do

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not lose all incentive to hire workers. It is true that, when trade unions, within the framework of collective bargaining, negotiate contractual provisions on behalf of and in the interests of workers, the first condition of the Albany exception is manifestly satisfied. However, as for the second condition, only contractual provisions which contribute directly to the improvement of the employment and working conditions are covered by the ECJ's case law. There is no valid reason to afford total immunity from antitrust laws when workers negotiate with employers on matters which only *indirectly* affect their employment or working conditions (§ 67-73).

8. Nevertheless, the protection of current and future employment opportunities for workers can be regarded as a direct improvement to their employment conditions. The risk of social dumping may clearly and immediately affect those conditions, for two reasons. One reason is that having safe and stable employment is clearly even more important for workers than the improvement of, for example, their working hours or annual leave rights. If it were convenient for employers, from an economic point of view, to replace workers with self-employed persons, there would be a risk that many workers might lose their jobs, or be marginalised over time. The elimination of wage competition between workers – which is in itself the very *raison d'être* for collective bargaining – implies that an employer cannot hire other workers for a salary below that set out in the collective agreement. On that basis, and from the perspective of a worker, there is really no difference if he is replaced by a less costly worker or by a less costly self-employed person. Another reason is that if employers can replace workers with other individuals without applying the working conditions laid down in the collective agreement, this may significantly weaken the negotiating position of workers. For instance, how could workers credibly ask for a salary increase if they knew that they could be easily and promptly replaced with self-employed persons who would probably do the same job for lower pay? For these reasons, it must be said that preventing social dumping is an objective that can be legitimately pursued by a collective agreement containing rules affecting self-employed persons and that it may also constitute one of the core subjects of negotiation (§ 74-79)

9. Unlike the cases which the ECJ has examined in the past, the main proceedings concern a collective agreement entered into by trade unions representing both employees and self-employed persons. In addition, its provisions do not regulate any of the traditional aspects of the employer-employee working relationship (such as remuneration, working hours and vacation) but instead the relationship between the employer and another category of professionals: the self-employed. Therefore, in order to assist the referring court in its analysis, it is necessary to consider some additional points concerning the elements that the referring court should take into account in order to decide whom the CLA at issue in fact benefits (§ 84-87).

10. The referring court must decide whether the CLA has been entered into for the benefit of employed musicians or is intended to restrict competition between self-employed persons, in which case it should fall outside the scope of the Albany exception. In examining this, the national court should consider the following two factors.

11. First, the national court should determine whether a real and serious risk of social dumping exists, and, if so, whether the provisions in question are necessary to prevent this. There must be a real possibility that, without the provisions in question, a not-insignificant number of workers might be replaced with self-employed persons at a lower cost. This might occur through the immediate dismissal of workers or through gradual economising (i.e. by not replacing workers whose contracts have come to an end) (§ 89).

12. Second, the national court must investigate whether the provisions in question go beyond what is necessary to achieve the objective of preventing social dumping. Contractual provisions which exceed their stated objective cannot be regarded as of benefit to workers. Some of the provisions may not improve the employment conditions of employees. An example of provisions that go beyond what is necessary would be contractual provisions giving workers higher protection vis-à-vis self-employed persons than vis-à-vis other workers. Provisions which set minimum tariffs for the self-employed at a level significantly higher than the minimum wage for workers could be considered as evidence that the intention underlying the provisions was not to protect against social dumping (§ 92-93).

Proposed reply

Provisions in a collective agreement concluded between an association of employers and trade unions representing employees and self-employed persons, which provide that self-employed persons who, on the basis of a contract for professional services, perform the same work for an employer as the workers, must receive a specific minimum fee, fall:

- within the scope of Article 101 TFEU if they are entered into in the interests of and on behalf of self-employed persons;
- outside the scope of Article 101 TFEU if they are entered into in the interests of and on behalf of employees, whose employment and working conditions they directly improve. It is for the referring court to ascertain whether the provisions at issue directly improve the employment and working conditions of employees, by genuinely and effectively preventing social dumping and not going beyond what is necessary to achieve that objective.

Opinion of Advocate-General Wahl of 18 September 2014 in case C-396/13 (*Sähköalojen ammattiliito ry - v - Elektrobudowa Spólka Akcyjna*) ("**Elektrobudowa**"), Finnish case (FREE MOVEMENT - SOCIAL DUMPING)

Facts

Elektrobudowa is a Polish company. It posted 186 of its Polish employees to work on the construction site of a nuclear power plant in Finland. The employment contracts of the employees were governed by Polish law. The employees claimed that Elektrobudowa had underpaid them, as they had been paid less than the relevant Finnish collective agreements entitled them to. Those collective agreements had been declared universally applicable. The employees assigned their claims to a Finnish union for the purpose of bringing wage claims against their employer on their behalf, as is customary Finnish practice.

National proceedings

Elektrobudowa raised two defences. The first was that Polish law prohibits employees from assigning a wage claim to a third party. The second defence was that the pay claims were incompatible with the Posting Directive 96/71 and with Article 56 TFEU on the freedom to provide services. The court in which the claims were brought referred six questions to the ECJ.

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Opinion

1. Directive 96/71 aims to reconcile the objective of promoting the transnational provision of services and 'fair competition'. It appears to be based on the Commission's response to the ECJ's earlier case law, which gave host Member States wide discretion to apply their domestic labour law to posted workers. However, that response was watered down in the course of the subsequent legislative procedure to such an extent that the end result is a directive which tips the balance in favour of the protection of domestic labour systems. Nevertheless, in its case law following the adoption of Directive 96/71, the ECJ has seemingly shifted its focus from the protection of the domestic labour market to the freedom to provide services. This shift emerges clearly from the ECJ's ruling in *Laval* (EU: C: 2007: 809) (§ 26-32).
2. In *Laval*, the ECJ emphasised the need to guarantee certain minimum rights for posted workers in order to avoid social dumping. On the other hand, the ECJ substantially limits the freedom of Member States to impose standards higher than that minimum, including minimum wages. However, although there is some ECJ case-law on the concept of 'minimum rates of pay', it is not clear what that concept actually means (§ 33-39).
3. The issue of whether the wage claims in this case can be assigned must be determined on the basis of the Rome I Regulation in conjunction with Directive 96/71. Article 4(2) of Rome I provides that the "law governing the assigned or subrogated claim shall determine its assignability". Therefore, it is necessary to determine the law applicable to the wage claims at issue. Given that the employment contracts between Elektrobudowa and the employees in this case provide that they shall be governed by Polish law, and given that Article 3(1) and 8(1) of Rome I accept freedom of choice of law, one could argue, as Elektrobudowa and the Polish government do, that the wage claims are governed by Polish law. This line of argument is not convincing. Article 8(1) admits of the concurrent application of several laws to the same contract. Moreover, Article 23 provides that EU law relating to contractual obligations in connection with particular matters are to be given precedence over choice-of-law rules (§ 40-50).
4. Article 3(1) of Directive 96/7 provides that Member States shall ensure that, whatever the law applicable to the employment relationship, undertakings that post workers to another Member State shall guarantee them certain terms and conditions of employment, including minimum rates of pay, according to the laws of that other Member State. This is an example of choice-of-law rules being overruled by rules of the host Member State, as provided in Article 23 of Rome I (§ 51).
5. Therefore, in so far as the pay claims at issue arise from minimum rates of pay within the meaning of Article 3(1)(c) of Directive 96/71, the question of whether or not those claims are well-founded is to be determined on the basis of Finnish law. It follows that the assignability of those claims is also determined by Finnish law (§ 52-58).
6. Elektrobudowa has argued that the Finnish collective agreement system is not transparent given that it allows domestic employers to conclude alternative collective agreements that take precedence over the one declared universally applicable in the sector concerned. As a consequence, foreign undertakings wishing to provide services in Finland are, in its view, subject to differential treatment. This is indeed a problematic point (§ 60-65).
7. In *Laval*, the ECJ stated that the level of protection provided to posted workers by the law of the host Member State cannot, as a matter of principle, go beyond what is provided for in Article 3(1) of Directive 96/71. In view of that statement, *Laval* has arguably transformed the directive's minimum standard into a ceiling. Moreover, as an exception to the rule that home State legislation is to apply to posted workers, Article 3(1) must be interpreted strictly. However, this approach does not tell us what kind of elements may be included in the 'minimum rates of pay' (§ 66-69).
8. The ECJ attempted to do this in *Isbir* (EU: C: 2013: 711). There, the ECJ held that only elements of remuneration *which do not alter the relationship* between the service provided and the consideration paid in return constitute minimum wage. Although this result has a certain appeal, *Isbir* is not a workable yardstick as regards the competence of Member States to define the concept of minimum rates of pay. *Isbir* is based on an artificial division between, on the one hand, remuneration which is consideration for the work carried out and, on the other hand, other types of remuneration. The limit of the Member States' discretion in determining what constitutes 'minimum rates of pay' can be found by reading Article 3(1) of Directive 96/71 in light of the objective of providing a minimum level of social protection for posted workers and not in light of the protection of the domestic labour market (§ 70-74).
9. The collective agreement at issue in this Finnish case contains different rules for time-based hourly pay and for piecework pay. It obligates employers to offer their employees piecework in order to raise the level of earnings. Elektrobudowa did not do this, paying its posted workers the minimum hourly wage without individually assigning them to pay groups. Further, the workers were not paid a holiday allowance, a daily flat-rate allowance or compensation for travelling time, as specified in the collective agreements. Contrary to the arguments advanced by the union and by most of the intervening governments, there is no reason why anything other than the lowest (time-based) pay (for the lowest pay group) referred to in the collective agreement should be considered the 'minimum' for the purposes of Article 3(1)(c) of Directive 96/71. Anything beyond that minimum will fall foul of Article 56 TFEU. Thus, a Member State may not impose on a foreign employer a specific pay classification (in this case, piecework) or require it to place its posted employees into specific pay groups (§ 79-83).
10. Undertakings posting workers to another Member State must respect not only the minimum rates of pay but also the rules governing <u>paid</u> annual leave in the host Member State. Merely because a part of the pay is provided for in a collective agreement does not exclude it from the concept of pay (§ 84-89).
11. Article 3(1)(c) of Directive 96/71 explicitly mentions overtime pay as a constituent element of minimum pay. However, the content of mandatory rules concerning minimum protection for the purposes of Article 3(1)(c) must respect Article 56 TFEU. Those rules must therefore not make the transnational provision of services less attractive. Although the requirement in this Finnish case to pay flat-rate daily allowances and compensation for travelling time applies equally to domestic and foreign service providers, it is capable of restricting the freedom to provide cross-border services. Is this restriction justified? Although this is for the referring court to determine, it is possible to say the following on the subject (§ 90-98).
12. A flat-rate daily allowance such as the one at issue in the main proceedings is designed to offset additional expenses that may be incurred by an employee during a period of time when he is (temporarily) away from his place of residence. Typically, this is the case in relation to work assignments requiring an overnight stay. While it is not disputed that the employees were hired in Poland, during their posting in Finland they nevertheless stayed

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in accommodation paid for by their employer, in the vicinity of the construction site of the nuclear power plant. In those circumstances, it seems difficult to argue persuasively that the payment of the daily flat-rate allowance is necessary to protect the workers posted. Moreover, if the host Member State were allowed to require an allowance such as the one at issue to be paid to posted workers for the entire period of posting, I am convinced that this would substantially hamper the ability of foreign undertakings to compete with domestic competitors as those undertakings would undoubtedly be deterred by the costs involved in posting workers. By its very nature, the obligation to pay posted workers an allowance such as the flat-rate daily allowance for the *entire* period of their posting would place foreign undertakings at a disadvantage. This seems to be the case because undertakings posting workers to Finland are systematically required to pay that allowance whilst domestic undertakings are not necessarily or systematically required to do so (§ 100-103).

13. The collective agreements at issue require the employer to pay compensation for travelling time to the employees where the daily commute to the place of work takes more than one hour. Travelling to the place where the work is carried out undoubtedly entails not only costs to the employee but also a loss of time. While the daily commute from the accommodation provided by the employer to the place of work cannot be considered actual working time, it is none the less time spent for the purpose of carrying out the services agreed in the employment contract. Furthermore, in the particular circumstances of the present case, it seems that the length of time spent commuting to the place of work is not a matter in respect of which the employees have a free choice, given not only the location of the accommodation paid for by the employer but also the remoteness of the construction site. In that regard, compensating the worker for that time with a specific allowance which is (once the threshold of one hour a day is reached) proportionate to the time spent travelling to work, does, *prima facie*, seem a measure that genuinely contributes to the social protection of workers. However, as with the flat-rate daily allowance, the requirement imposed on foreign undertakings to compensate their posted workers for travelling time does seem to possess a deterrent effect as regards the transnational provision of services. That is so because of the additional costs that that obligation entails. That said, the need to require foreign undertakings to pay that compensation is intimately linked to the factual circumstances of the case at hand. If, for example, as a result of the remoteness of the location of the place of work all domestic workers were entitled to such compensation, then not paying the compensation to posted workers would appear to deprive those workers of the minimum protection required by the host Member State. If, however, this were not the case and some domestic workers were not entitled to that compensation, there is no reason that would justify, from the perspective of the social protection of workers, systematically imposing such a requirement on foreign undertakings. Like the daily allowance, compensation for travelling time can be justified and consequently regarded as necessary from the perspective of the social protection of workers only where a domestic worker who carries out work under similar conditions is, in all circumstances, entitled to payment of that allowance (§ 104-107).

14. In the case before the referring court, Elektrobudowa provided accommodation and meal vouchers for the posted workers concerned. The question that therefore arises is how those benefits ought to be dealt with in determining whether or not the workers have *de facto* received a wage equal to the minimum laid down in the host Member State. Article 3(7) of Directive 96/71 provides that allowances specific to the posting are to be considered as part of the minimum wage, unless they are paid in reimbursement of expenditure actually incurred on account of the posting, such as expenditure on travel, board and lodging. Are we here dealing with reimbursement of expenditure actually incurred as a result of the posting, or something else? Even on a literal interpretation of Article 3(7) the answer to that question appears to be relatively straightforward. After all, although the employer has not reimbursed board and lodging ex post to the employees, it has provided accommodation and meal vouchers to those employees during the posting. It could none the less be argued that those benefits constitute allowances 'specific to the posting' and ought, accordingly, to be taken into consideration in calculating whether or not the posted workers receive a wage corresponding to the minimum standard applicable in the host Member State. However, treating those benefits in that way would help circumvent the purpose of Article 3(7) of Directive 96/71. That provision has the intention of ruling out the possibility of taking into account benefits related to travel and board and lodging for the purposes of calculating minimum wage, in a way that would deprive the workers concerned of the economic counter-value of their work. This is so because all of those benefits are intrinsically linked to the posting of workers. One could argue that the meal vouchers in particular constitute an additional benefit. After all, posted workers have the same food-related expenses when working in their home State. However, the meal vouchers seem none the less necessary to compensate for the higher cost of living in the host Member State. With that in mind, it can hardly be disputed that including the accommodation and meal vouchers provided by the employer in the calculation of minimum wage would in practice lower the overall wage-level of the posted workers concerned below the accepted minimum. The judgment of the Court in *Commission – v – Germany* (EU: C: 2005:220) is particularly useful. There, the Court held that where an employer requires a worker to work under particular conditions, compensation must be provided to the worker for that additional service without this being taken into account for the purpose of calculating the minimum wage. That same idea is reflected in Article 3(7) of Directive 96/71. Indeed, to the extent that taking such benefits into account would alter the balance between the services rendered by the worker and the consideration received in return, in a manner detrimental to the worker, those benefits ought not to be taken into consideration in operating the comparison between the gross amount of wages *de facto* received by the posted workers and the minimum rates of pay required by the legislation of the host Member State. In other words, accommodation and meal vouchers provided by the undertaking posting workers to the host Member State are to be considered reimbursement of expenditure actually incurred on account of the posting. Therefore, they cannot be taken into account in calculating whether or not the workers posted have received wages equal to the minimum laid down in the host Member State (§ 110-114).

15. Finally, the referring court wishes to know whether – to the extent that the benefits in question fall outside the nucleus of mandatory rights laid down in Article 3(1) – they may be construed as matters covered by Article 3(10) of Directive 96/71. That provision allows Member States to apply terms and conditions of employment on matters *other than those referred to*

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in Article 3(1) in so far as this concerns public policy provisions, to undertakings posting workers to their territory. The question must be answered in the negative. Firstly, in accordance with Article 3(10) of Directive 96/71, that provision only applies to terms and conditions of employment covering matters other than those specifically referred to in Article 3(1), first subparagraph, points (a) to (g) in so far as those terms and conditions are applied in compliance with the Treaty. Secondly, it is apparent from the case law of the Court that Article 3(10) must – as an 'exception to an exception' – be interpreted restrictively. More specifically, to fall within the scope of the public policy exception, the provisions in question must be deemed to be so crucial for the protection of the political, social or economic order in the Member State concerned as to require compliance therewith by all persons present in the national territory of that Member State and all legal relationships within that State. For example, rules prohibiting forced labour would, most likely, qualify as such provisions. Particularly mindful of the need to interpret Article 3(10) so as not to compromise the freedom to provide services, the Court has therefore emphasised that 'public policy provisions' are to be construed so as to cover only those mandatory rules that cannot be derogated from and which, by their nature and objective, meet overriding requirements relating to the public interest. In light of this, arguably very narrow, construction of Article 3(10) of Directive 96/71, the elements of remuneration mentioned by the referring court cannot meet the high standard established by the Court in its previous case-law. Most importantly, all of them fall within the scope of Article 3(1)(c) of the directive. Moreover, they all go *beyond* the bare minimum required by legislation and/or collective agreements and cannot, in that sense, be considered necessary to meet overriding requirements relating to the public interest (§ 115-119).

Proposed reply

1. On a proper construction of Article 14(2) of *[... "Rome I"]*, read in conjunction with Article 3(1) of Directive 96/71 EC [...] the question as to whether a posted worker may assign a pay claim against his employer to a trade union in the host Member State is to be determined by the law applicable to the claim in question. To the extent that the claim arises from terms and conditions referred to in Article 3(1) of Directive 96/71, it is the law of the Member State to which the worker is posted that is to be applied, not only with regard to the claim but also with regard to its assignability.
2. On a proper construction of Article 3(1)(c) of Directive 96/71, read in the light of Article 56 TFEU, the concept of minimum rates of pay may cover basic hourly pay according to pay groups, piecework guarantee pay, holiday allowance, flat-rate daily allowances and compensation for daily travelling time, as those employment and working conditions are defined in a collective agreement declared universally applicable within the meaning of Article 3(8) of Directive 96/71 and falling within the scope of the Annex to that directive (or, as the case may be, in other relevant instruments). However:

- the host Member State cannot impose particular pay classifications or pay groups on foreign undertakings posting workers to that State beyond the minimum expressly provided for in such a collective agreement in the host Member State;
- the host Member State cannot impose on foreign undertakings posting workers to that State the obligation to pay a daily flat-rate allowance to the workers posted during the entire period of posting or compensation for travelling time for those workers where the referring court finds that applying those allowances to the foreign undertakings renders the provision of services less attractive and where the payment of the allowances goes beyond what is necessary to attain the objective of the social protection of workers.

3. On a proper construction of Article 3(7) of Directive 96/71, accommodation paid for and meal vouchers provided by an undertaking posting workers in the circumstances of the present case should be regarded as reimbursement of expenditure actually incurred on account of the posting. Therefore, they cannot be taken into account when calculating whether or not the workers posted have received wages equal to the minimum laid down in the host Member State.
4. On a proper construction of Article 3(10) of Directive 96/71, elements of remuneration such as piecework pay, compensation for travelling time and daily allowances provided for in collective agreements that have been declared universally applicable cannot be construed as constituting terms and conditions of employment, the observance of which is necessary to meet overriding requirements relating to the public interest within the meaning of that provision.

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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).

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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 Portugues*): ECJ lacks jurisdiction re reduction of salaries of public service employees (EELC 2013-2).

30 May 2013, C-342/12 (*Worten*): employer may be obligated to make working time records immediately available (EELC 2014-4).

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