EELA
European Employment Lawyers Association

EELA JOURNAL

European Employment Law Cases

Edition 2015 | 1

Portugal: "Secret" Facebook posting leads to dismissal

Slovenia: Compulsory retirement unlawful

France: Supreme Court reverses cadre/non-cadre doctrine

UK: Redundancy during maternity leave - when to offer vacancy?

Finland: No information duty until final agreement on sale of business

Sdu

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

Members of EELA automatically receive electronic copies of each edition. The cost of this is included in the membership fee. Paper copies can be obtained at an additional cost of 50 euros per year.

EELA

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

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

EELA currently has approximately 1,280 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. In November of each year, EELA holds a seminar in Brussels in cooperation with the Academy of European Law (ERA). Information on EELA and how to become a member is available at www.eela.org.

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INTRODUCTION

This issue of EELC includes 17 case reports from 14 national courts and one article on momentous recent changes in Italian dismissal law, as well as summaries of eight ECJ judgments, two opinions of Advocates-General and five referrals to the ECJ.

No fewer than eight case reports relate to claims of discrimination. This illustrates the growing importance of the topic for employment lawyers. The French Supreme Court has reversed its controversial doctrine on the *cadre/non-cadre* distinction. Danish courts have had to rule on a question that is not one of employment law, but should nevertheless be interesting to many lawyers, given that some forms of unequal treatment with respect to the provision of goods and services are unlawful and that more forms may follow. The Danish case reported in this issue of EELC concerned a hairdresser who advertised men's and women's haircuts at different prices, perhaps a rather banal issue, but one that illustrates rather nicely the difficulties of applying discrimination law to everyday life.

The English courts have tackled two issues that every employment lawyer comes across but that remain vexed: how to sanction repeated and disruptive sickness absences by an employee who is disabled and what to do when a woman's position becomes redundant during her maternity leave. A Latvian Supreme Court judgment addresses a similar issue, where an employee's position became redundant during her parental leave. The French Supreme Court has ruled on the notoriously difficult issue of whether to admit evidence that has been collected unlawfully. In that case, an employee had sent over a thousand personal emails in a short span of time despite a warning that using the company's IT equipment for private purposes would be sanctioned. The company had complied with all of its obligations relating to personnel monitoring with one exception: it had submitted its notification to the data protection authority late. On the one hand, excluding evidence of employee misconduct seems quite a heavy penalty for failure to comply with a formality. On the other, such an exclusion may be the only effective deterrent against employers breaching the data protection rules. The *Cour de cassation* ruled in favour of the employee, something that would probably not have happened in all EU jurisdictions.

The Dutch judgment reported in this issue deals with wage deductions from posted workers. It ties in with the Recent Enforcement Directive and with the ECJ's judgment of 12 February 2015 in the *Elektrobudowa* case. That judgment seems to indicate a move away from the ECJ's free movement approach in *Laval*. The tide seems favourable for lawyers acting for clients who claim to be victims of "social dumping".
There will be no regular 2015-2 edition of EELC. Instead, subscribers to EELC will receive an updated copy a 400+ page book with the English language texts of the international and EU legal instruments (treaties, conventions, regulations, directives, framework agreements, etc) that are most relevant to European practitioners of labour and employment law.

Readers of EELC are encouraged to report judgments delivered by courts in their jurisdiction that could be relevant to employment lawyers in other European jurisdictions.

Peter Vas Nunes, general editor

Note: the authors of the article published in EELC 2011 nr 90 have requested the following note to be published: "The article expresses the view of both authors, however paragraphs 1 and 2 have been materially redacted by Prof. R. Mastroianni and paragraphs 3, 4 and 5 by Dr. Valeria Capuano".

2015/1

No obligation to inform employee representatives of transfer of business entity until final agreement (FI)

CONTRIBUTORS KAJ SWANLJUNG AND JOHANNA ELLONEN*

Summary
The management of a company informed the employee representatives that part of the company's business – its stone building materials department – had been sold. It did so immediately after the purchase agreement was executed, 7½ hours before the transfer of ownership. The two responsible directors were prosecuted for violation of the Finnish Act on Co-operation within Undertakings (the "Codetermination Act"). At first instance, they were fined, but on appeal the court acquitted them. The Court of Appeal found that there was no legal obligation to inform the employee representatives until after reaching final agreement on the transfer of an undertaking and that the directors had informed the representatives "in good time" as provided by the law transposing Article 7 of the Acquired Rights Directive in Finland.

Facts
The defendants in this criminal case were, respectively, the CEO and the COO of Tulikivi Oyj, a publicly listed company and a manufacturer of stone products such as fireplaces and sauna stoves, as well as stone building materials. On 14 April 2011, the company issued a press release stating that it was considering focusing on its core functions and divesting the stone building material business. On the same day, the CEO was instructed by the Board of Directors to sell the business. In compliance with this instruction, the CEO entered into negotiations with a number of potential buyers. In the course of May and early June 2011, the employee representatives were informed that the company was contemplating transferring this part of the business and focussing on its core functions and were told about the potential effects of this on the employees.

On 15 June 2011, one of the potential buyers, Vientikivi Oy, made a conditional offer of purchase. The same day, the Board authorised the CEO to sell the business to Vientikivi Oy on condition that agreement was reached on the terms of the sale. At this point, no agreement had yet been reached on the fundamental issues, including the purchase price, or on a number of other elements of the transaction. Moreover, there was no Letter of Intent, Heads of Agreement or any other document explaining the status of the negotiations.

There were phone conversations on 28 and 29 June and the parties reached a mutual understanding about the terms of the sale on 30 June around 1 p.m. Immediately after this, the parties signed a business purchase agreement, under which Tulikivi sold its stone building materials business to Vientikivi by means of an asset transfer, which was to take effect on 1 July 2011. The employee representatives were informed of the sale of the company between 16:30 and 18:00, 7½ hours before the transfer was to take effect. The company also issued a press release about the sale.

It is not known whether the staff of the transferee were informed of the transfer and, if so, at what time.

The prosecutor brought charges against the CEO and COO, who had mainly been responsible for the negotiations, claiming that they had neglected their duty to inform the employee representatives in good time prior to a transfer of the undertaking. The Codetermination Act provides that the transferor and the transferee involved in a transfer are required to provide certain information to the employee representatives about the transfer in good time before its completion. Finnish law and case law do not contain explicit guidelines explaining what is meant in practice by "in good time". Therefore, it is not clear what the minimum requirements are for providing the information. However, an executive who intentionally or negligently fails to provide the information may be sentenced to a fine.

The Codetermination Act implements the information obligation provided for in Article 7(1) of the Acquired Rights Directive, which provides that the transferor and transferee must provide their employee representatives with certain information "in good time, before the transfer is carried out". The Finnish Codetermination Acts repeats this wording.
Under Finnish law, there is no other consultation obligation in connection with the transfer of an undertaking.

The lower court found that the management had neglected its duty to provide information to the employee representatives, ruling, *inter alia*, that a mere 7½ hours prior to the actual transfer could not be considered to fulfil the requirement of "in good time" before completion of the transfer. It considered that the parties could have provided the information sooner, for example, a couple of days prior to 30 June, at a point when the parties had a serious intention to conclude the transaction or, alternatively, the parties could have agreed for the transfer to take effect on a later date - after the duty to provide information had been fulfilled.

The lower court ordered both defendants to pay fines. They appealed to the Court of Appeal in Turku.

Judgment
The Court of Appeal ruled, in accordance with a decision of the Helsinki Court of Appeal in a similar case, that there was no obligation to provide the information to the employee representatives before the final agreement on the business transfer has been concluded. The Court examined in detail the evidence about when the final agreement to sell the business was reached and concluded that the essential terms of the sale not had been agreed until 30 June 2011, just before the signing of the business purchase agreement. The Court also found that the employee representatives had been informed right after the business purchase agreement had been signed. On these grounds, the court reversed the lower court's judgment and ruled that information had been provided to the employee representatives in good time.

Commentary
The court's decision was simple and straightforward and the prosecutor did not apply for leave to appeal to the Supreme Court. Therefore, the same question could end up being considered by the courts again. The court did not take a stand on the specifics of how many hours or days before a transaction is carried out would be enough to be considered "in good time". But the court was very clear that there is no obligation to provide the information until the final agreement has been reached.

What is key about this judgment is that there was strong evidence that the mutual understanding had only been reached on 30 June 2011 and the business purchase agreement prepared and the employee representatives informed straight afterwards. If the evidence had been different, the end result could have been different too. The evidence also showed that the employee representatives had been provided with preliminary information about the business transfer and its possible effects on the employees in May and June and this may have had an effect on the end result.

Comments from other jurisdictions

Czech Republic (Nataša Randlová): According to Czech law, the transferor and transferee must consult the employee representatives or, if none, they must inform the affected employees of (at least) the matters required by statute, no later than 30 days before the transfer is effective. Breach of the consultation or information duties may be sanctioned with a fine or, more seriously, may entitle the employees to claim damages.

In the Czech Republic, it would be risky, therefore, for an employer to do what was done in this case. In similar circumstances, we would advise the employer to agree a later start date for the transfer so that the employees could be properly informed.

The Netherlands (Peter Vas Nunes): What a world of difference between Finland and the Netherlands when it comes to worker influence on management decisions. It is almost inconceivable that the management of a Dutch company with a works council (compulsory for all 50+ companies) would get away with selling the company's business without involving the works council in the sale of their company well before the final decision was made. The Dutch Works Councils Act requires management to seek the works council's advice on a (proposed) decision of this type no later than the stage at which the works council's advice can have "real influence" on the decision-making process.

Romania (Andreea Suciu, Andreea Tortov): Romanian law expressly provides that both the transferor and transferee must inform the employee representatives, or the employees themselves if there are no employee representatives, about the transfer in writing, 30 days prior to the transfer.

The transferor and transferee must inform the employee representatives of: the date or proposed date for the transfer; the reasons for the transfer; the legal, economic and social consequences for the workforce; any planned measures in relation to the employees; and their anticipated new working conditions.

Moreover, this obligation exists even if the decision to go ahead with the transfer was taken by a company controlling the transferor.

Although there is no sanction for failure to observe the duty to inform as such, the law provides that failure to meet obligations relating to transfer of undertakings (including the duty to inform) is sanctionable with a fine of between RON 1,500 (approximately € 340) and RON 3,000 (approximately € 680).

Thus, if a situation such as the one described happened in Romania, the company would probably have been fined. However, the management of the company would not have been prosecuted personally for failure to inform the employee representatives, as there is no such offence in the Criminal Code and the failure would be classified as simply a misdemeanour.

Slovak Republic (Beáta Kartíková): In contrast to some other jurisdictions, Slovakia is quite specific about how much notice should be given upon transfer of undertakings. According to the Slovak Labour Code an the transferor and transferee are obliged to inform the employee representatives, or if none, the employees themselves, in writing no later than one month before the transfer of employment rights and obligations. This leaves no room for the courts to consider the question of what is "in good time".

Interestingly, this also affects the contractual freedom of employers (e.g. in the case of a sale of business) since the effectiveness of their contract is dependent on compliance with this rule.

Slovak law also lists the information that needs to be given, which must include the date or proposed date of the transfer, the reasons for it, the legal, economic and social implications of the transfer for employees and any planned measures that will be applied to the employees. In practice, failure to comply with these conditions may result in a fine being imposed by an inspection authority, but the transfer cannot be declared invalid as a result of failure to inform. In our view, the decision of the Finnish Court of Appeal frustrates the purpose of provisions originally intended to protect employees.

Subject: Transfer of undertakings – information and consultation
Parties: Prosecutor – v – J. Toivonen and M. Vauhkonen as directors of Tulikivi Oyj
Court: *Turun hovioikeus Turku (*Appeal Court of Turku)
Date: 3 December 2014
Case number: R13/2005
Internet publication: not published

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2015/2

Economic identity of a petrol station (GE)

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Summary

To determine whether the conditions for the transfer of an organised economic entity are met, it is necessary to consider all the facts characterising the transaction, including the type of business concerned, whether tangible assets and the majority of its employees are being taken over, its customers and the degree of similarity between the activities carried on before and after the transfer.

Facts

The plaintiff had been employed full-time by the second defendant (defendant 2), who was the leaseholder of a petrol station in an international port, since 1994. The petrol station (building, pumps, equipment, etc.) was owned by an oil company that also supplied the petrol. The station included a shop. Most of the customers of the

petrol station were regulars. With some of them, special contracts existed, allowing them to purchase petrol on credit and with special discounts. About 80% of the customer base were treated in this way.

The oil company terminated the contract with defendant 2 with effect from September 2011. Defendant 2 left the petrol station business. He issued termination letters to all 16 employees (eight full-time and eight temporary employees) "in case no transfer of undertaking had taken place". The petrol station was subsequently turned into an (unleased) automatic petrol station without a shop, allowing for payment by credit card only.

Sometime before the oil company terminated its contract with defendant 2, it had built a new petrol station at about 800m from the automatic petrol station and leased it to defendant 1, who took up business end of September or beginning of October 2011.

All 16 employees applied as a group and offered their services to defendant 1, who did not take up their offer, but later employed three or four full-time employees and three or four temporary employees. He did not take over any of the equipment of the first petrol station, except for several cooking pots. The building, the contracts with the oil company and the organisation of the petrol station were similar to the original ones. However, defendant 1 did not take over any of the special contracts with regular customers of defendant 2, nor did he make any contracts of this kind himself.

One of the full-time employees not offered employment by defendant 1 brought legal proceedings against him. She argued that her employment relationship had been transferred to defendant 1 as a result of a transfer of the undertaking. She argued that, as the core business of a petrol station was the sale of petrol on behalf of the same delivering oil company, it did not matter that the (old) equipment from the first station had not been taken down and reused at the new station. Had the oil company continued to supply the first petrol station, she said this equipment would have been replaced in the near future.

The *Arbeitsgericht* in Rostock ruled that no transfer of the undertaking had taken place. The plaintiff and defendant 2 appealed to the *Landesarbeitsgericht* (LAG) of Mecklenburg-Vorpommern. The LAG rejected the claims. The plaintiff then appealed to the *Bundesarbeitsgericht* (BAG) where defendant 2 intervened on behalf of the plaintiff.

Judgment

The BAG rejected the plaintiff's appeal. It held that the economic identity of a petrol station consisted mainly in a particular location, equipment, customer base and employees. The circumstances in question did not indicate the transfer of an undertaking.

In its reasoning, the Court relied on the argumentation of the ECJ in the cases *"Amatori"* (C-458/12) and *"Günney-Görres and Demir"* (C-232/04). It held that there is a transfer of an undertaking in cases where there is the transfer of an economic entity which retains its identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity. Whether that activity is central or ancillary does not change the assessment of the situation.

The decisive criterion for establishing the existence of a transfer within the meaning of Section 613a of the German Civil Code is, therefore, whether the entity in question retains its identity and is either continued or resumed.

In order to determine whether the conditions for the transfer of an organised economic entity are met, the Court deemed it necessary to consider all the facts characterizing the transaction, including the type of undertaking concerned; whether or not its tangible assets, such as buildings and movable property, transferred; the value of its intangible assets at the time of the transfer; whether the majority of its employees were taken over by the new employer; whether its customers transferred and the degree of similarity between the activities carried on before and after the transfer.

In the case at hand, the BAG first established that the petrol station was indeed a separate and independent economic entity. The buildings and assets of the petrol station were characterised as an organized grouping of persons and assets consisting of the petrol station equipment, with underground tanks, eight petrol pumps, a special carriageway, roofing, a pillar indicating petrol prices and a shop. All of these were used to serve a particular purpose: the sale of petrol on behalf of the supplying oil company and the sale of its own products in the shop. Over 80% of the customers were regulars, which the BAG concluded would be an asset in the form of a customer base.

The method of operation of the new petrol station did not differ much from that of the original one. Also, the location of the new petrol station was no more than 800m from the old one. However, these facts alone did not offer sufficient indication that there had been a transfer, as most of the petrol stations supplied by the same oil company were structured in a similar way.

As to the assets of the petrol station (tanks, pumps, roofing etc.), the BAG held that the fact that those had not been taken over by defendant 1 presented a strong argument against a transfer. It continued its reasoning by rejecting the assumption made by the plaintiff that a change of leaseholder and the purchase of new equipment in the original location would have been treated as a transfer. For the BAG, in order to determine whether there had been a transfer, it was necessary to assess the circumstances as a whole. .

In addition, the majority of the employees had not been taken over by the new employer. Only half (or less) of the personnel were employed at the new petrol station. It did not matter to the court that the other staff had not applied to defendant 1 again after the group application because defendant 1 provided less favourable working conditions.

The Court also considered the fact that the customer base had not been taken over, as the special contracts allowing customers to purchase petrol on account with discounts had not been continued by defendant 1. The court also took into account the fact that this case was not similar to *Merckx* and *Neuhuys* (ECJ C-171/94 and C-172/94), as it held that brand loyalty did not exist in the same way with petrol as it does with car brands. Hence, the Court concluded that no transfer had taken place.

The Court also denied the plaintiffs' request for a referral for a preliminary ruling to the ECJ, as it found that it was for the national court to establish on the facts whether there had been a transfer.

Commentary
The Court based its judgment on the European guidelines on transfer of undertakings and emphasised that employing half or less of the original staff is not sufficient indication of a transfer of an undertaking. In an earlier decision, the BAG had held that the "majority of the personnel" meant more than half of the head-count of the staff (58% in that case). In order to determine whether the economic entity had been preserved and important assets had transferred, it was crucial to establish the core business of the entity in question. In this case, the assets belonging to the petrol station (petrol tank, pumps etc.) had not been transferred. The hypothetical replacement of equipment for maintenance reasons was irrelevant. This factor weighed even more heavily in this case, as the petrol station remained as an automatic outlet in its old location and the hypothetical transferee was a different and newly-opened business.

Comments from other jurisdictions
Croatia (Dina Vlahov): The case at hand would most probably be decided by the Croatian courts in the same way as the German Bundesarbeitsgericht. The transfer of an undertaking is deemed to have taken place if the undertaking (or part of one), or a business activity (or part of one) is transferred to a new employer based on a legal agreement or by operation of law, whilst retaining its economic integrity. 'Economic integrity' consists of objective factors (i.e. the means to do the work), subjective factors (i.e. business activity, knowledge and experience of employees) and organisational components. It follows that in order to transfer an undertaking, all three elements must be transferred.

The Croatian Supreme Court has also determined that an undertaking must transfer in its entirety and the mere transfer of its assets may not constitute a transfer (Vrhovni sud, Revr-592/07, 12 September 2007). This might have applied to the case reported above. As the assets and established business practices of the first petrol station had not been transferred to the second one, it could not be concluded that the economic integrity was retained and therefore a transfer did not occur. However, bearing in mind that the petrol stations were owned by the oil company and that defendant 2 was simply a leaseholder, the question arises as to what the nature of the undertaking actually was. In our view, defendant 2's undertaking consisted mainly in its know-how, its employees and its established customer base and it is not important that assets were not transferred. More significant factors were whether defendant 1 had employed the majority of defendant 2's employees and whether it continued to work with its regular customers. As this was not the case, our view is that there was no transfer of the undertaking.

Please note that Croatian case law about this is scarce and our conclusions are mainly based on our interpretation of statute.

One further thought - if the oil company had not leased the petrol station purely in the form of petrol station infrastructure, but as an existing undertaking with an ongoing business activity composed of the elements we have described, defendant 2's employment agreements would have transferred back to the oil company after the expiry of the lease. This would have been a transfer of the undertaking from defendant 1 as transferor to the oil company as transferee. Then, in order to turn the petrol station into an automatic one, the oil company would have had to terminate the employment agreements.

The Netherlands (Peter Vas Nunes): Let us assume that the original petrol station was in operation until the date on which the contract between the oil company and defendant 2 ended. Could the plaintiff not have argued that she transferred to the oil company on that date? It only after taking over the operation of the petrol station from defendant 2 (even if only one second later) that the oil company proceeded to convert it into an automatic, unmanned station. In this reasoning, it is the oil company that should have dismissed the employees.

Subject: Transfer of undertakings
Parties: unknown
Court: *Bundesarbeitsgericht* (Federal Labour Court)
Date: 18 September 2014
Case number: 8 AZR 733/13
Hardcopy publication: NZA 2015, p. 97
Internet-publication: www.bundesarbeitsgericht.de → Entscheidungen → type case number in "Aktenzeichen"

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2015/3

Sex discriminatory decision not to rehire does not lead to reinstatement (CZ)

CONTRIBUTOR MICHAL VRAJÍK*

Summary
The burden of proof of alleged discrimination in Czech labour law cases is distributed between the parties in compliance with the relevant EU Directives. The plaintiff must first present facts based on which it can be presumed that he or she was subject to discrimination and only then is the defendant required to try to prove that the principle of equal treatment was not breached. In cases where the alleged discrimination was caused by a selection procedure in which another candidate was successful and was offered the job, in order to have a chance of success, the plaintiff must also claim that the selection procedure itself was discriminatory.

Facts
The plaintiff in this case had been a female employee of the Charles University in Prague since December 1997. Her initial three-year contract had been extended in 2000 by two more years, until the end of 2002. In October 2002 the Defendant started a selection procedure to find a new employee for the plaintiff's position. The plaintiff participated in the selection procedure but was not successful and lost to another candidate.

In November 2005 (just before the expiry of the three-year time-bar for a monetary claim), the plaintiff filed an action with the court, seeking cancellation of the selection procedure and its results, an order for the employer to reconsider her candidacy and damages for non-pecuniary harm amounting to CZK 1,200,000 (approximately EUR 41,000, based on exchange rate as of the date on which the action was filed). The plaintiff claimed in particular that during her employment with the defendant she had been subject to mobbing and sexual harassment by her direct superior. In May 2002 she had informed the defendant about this, but was merely given a letter in July 2002 informing her that the defendant felt free to exercise its right to start a selection procedure for her position.

The employment contracts with male employees were extended without any selection procedure. Therefore, the plaintiff felt that she was subject to discrimination and unequal treatment on grounds of sex.

The court of first instance dismissed the action because there was insufficient evidence that the selection procedure had been started either as retaliation for her complaint about harassment or that the results of the selection procedure were rigged in order to harm her. Therefore, no discrimination or unequal treatment was proven. The appellate court confirmed the decision of the court of first instance, stating (i) that the plaintiff did not prove that she was treated in an unfavourable way and (ii) that the defendant did prove that it had not breached the duty of equal treatment, as specified in Article 4(1) of EU Directive 97/80/EC (the directive on burden of proof in sex discrimination cases, repealed in 2006 by the Recast Directive 2006/54).

The plaintiff then filed an extraordinary appeal to the Supreme Court, arguing that the she was subject to direct discrimination on grounds of sex, as provided in the EU Directive 76/207 (as amended by Directive 2002/73/EC). The plaintiff also argued that according to Czech procedural regulations, a statement that a participant was directly or indirectly discriminated against because of gender shall be considered proven by the court in labour law cases unless it is proved to the contrary in the proceedings.

Judgment
The Supreme Court dismissed the extraordinary appeal, so confirming the decisions of the courts of first and second instance. Regarding the individual claims of the plaintiff, the Supreme Court explained that:

- The positions of the academic staff of a public university are occupied based on a selection procedure. A selection procedure does not have to be held in the case of repeated employment of the same employee in the same position. In such cases, it is up to the university to decide whether to hold a selection procedure. The Supreme Court also explained that in this case, cancellation of the selection procedure and its results would not remedy the alleged discrimination, as the plaintiff's employment would still have terminated by the end of 2002 due to the expiration of her definite term contract.
- The employment contract had been entered into in 1997 and extended in 2000, which was before the alleged discrimination started. Therefore, the fact that the plaintiff was employed on the basis of a fixed-term contract and not on a permanent contract was not, in itself, discriminatory. The plaintiff must have been aware that she had no right to an extension of her contract. Moreover, an employer cannot unilaterally decide on questions of employment that are subject to the agreement of both parties.
- The plaintiff cannot be awarded the claimed compensation simply on the basis that she did not carry the burden of proof. The Supreme Court explained that the Czech procedural regulations implementing the provisions of EU Directive 97/80/EC must be interpreted to mean that the plaintiff must present facts from which it can be presumed that discrimination took place. However, the plaintiff did not claim that the selection committee voted in a discriminatory way. The mere fact that there was a selection procedure and that it had certain outcomes cannot of itself be considered as revenge against the employee. By contrast, the defendant proved that about half of all the successful candidates in its selection procedures are female. Therefore, no discrimination on grounds of sex was proven.

Commentary
The judgment of the Supreme Court once again confirms that in labour law cases of alleged discrimination, the preponderance of the burden of proof is with the defendant, but not from start to finish of the proceedings. The plaintiff must first present facts based on which it can be presumed that the plaintiff was subject to discrimination. Only if sufficient facts are presented must the defendant prove that it did not breach the principle of equal treatment.

The judgment went further. The Supreme Court explained that in cases where a plaintiff claims he or she was discriminated against by a selection procedure, the plaintiff must also present facts showing that the selection procedure itself was discriminatory and that either the selection criteria or voting of the selection committee

was discriminatory. Otherwise, an action to remedy discrimination cannot succeed.

Comments from other jurisdictions
The Netherlands (Peter Vas Nunes): The judgment, as reported above, does not reveal why the plaintiff had to undergo a competitive selection procedure in order to have her contract extended, whereas her male comparators did not. Did the courts not ask the employer to explain this? The courts seem to have accepted the employer's claim to have discretion to decide whether to extend the plaintiff's contract provided she could not prove the decision to make the extension conditional on a selection procedure was not in retaliation for her complaint and the selection was not rigged.

Subject: discrimination, unequal treatment
Parties: MUDr. K. G. – v – Univerzita Karlova v Praze (Charles University in Prague)
Court: *Nejvyšší soud České republiky* (Supreme Court of the Czech Republic)
Date: 16 January 2015
Case number: 21 Cdo 1165/2013
Hard copy publication: -
Internet publication: http://www.nsoud.cz/

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2015/4

Burden of proof in mobbing, dignity and discrimination cases (CR)

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Summary
The Supreme Court has rejected the distinction that the lower courts previously made between harassment by the employer ('mobbing') and violation of the employee's dignity, for which special burden of proof rules existed until 2010. In addition, the Supreme Court held that an employer may not discriminate against an employee on the grounds of his level of education.

Facts
The plaintiff in this case was a highly qualified manager. He held a university degree in Civil Engineering and Architecture. His position within the construction company that employed him (the defendant) was Manager I. In the recent past the defendant had tried to dismiss him, but he had brought legal proceedings and in 2001 the dismissal was nullified and he was awarded compensation. The legal proceedings did not help to improve the working relationship between the parties.

In 2002, the defendant demoted the plaintiff to the level of Manager II and relocated him to another workplace. There, he allegedly experienced harassment and discrimination. He was instructed to do things that were not included in his job description, such as driving employees to construction sites (even though he lacked the appropriate driving licence and the company had drivers for that purpose); he was given a room without a telephone whereas all of his colleagues had telephones; and he was subjected to behaviour that he found humiliating. The situation became so bad that he had to seek psychiatric help.

In 2006, the plaintiff brought legal proceedings against his employer. He claimed damages on the grounds that his personality rights had been violated and that his mental health had suffered on account of harassment by his employer (mobbing), as a result of which he had lost dignity, honour and reputation and his health had been impaired. This claim was based on the Croatian Labour Act as it stood at that time (the Labour Act 2004).

In the course of the proceedings an expert witness concluded that the plaintiff suffered from anxiety disorder, that this disorder was caused exclusively by the situation at his workplace, that his feelings of degradation, humiliation and isolation were caused by the type of work he was instructed to perform and that his condition was related to the fact that he had been treated differently (unequally) to other employees in similar positions.

The court of first instance drew a distinction between mobbing and violation of dignity. The relevance of the distinction lay in the different rules on burden of proof. According to the court, an employee who brings a claim based on mobbing, which in essence is a discrimination claim, bears the burden of proof that he has been mobbed. By contrast, an employee who claims that his dignity has been violated by the employer only needs to allege the violation, following which, the employer bears the burden of disproving it.

The plaintiff failed to adduce sufficient evidence of mobbing and the mobbing claim was therefore dismissed. Mobbing is a type of discrimination defined in the Labour Act 2004. That Act contains an exhaustive list of discrimination grounds. The fact that an employee is more (or less) highly educated than his colleagues is not listed and it does not entitle him to preferential treatment.

The plaintiff appealed to the Court of Appeal, but without success. He then appealed to the Supreme Court.

Judgment
The Supreme Court held that the distinction made by the lower courts between mobbing and violation of dignity was a false one. The Labour Act 2004 obliges employers to protect the dignity of their employees. This includes protecting them against harassment (mobbing) by the employer. Therefore, the lower courts should have applied the burden of proof rules that apply to violation of dignity. In other words, the employer should have been required to prove that the plaintiff's dignity had not been violated.

Secondly, the Supreme Court held that the plaintiff's claim was based on the fact that his level of education was different from that of his comparators. The Labour Act prohibits discrimination on the following grounds: race, skin colour, gender, sexual orientation, marital status, family responsibilities, age, language, religion, political or other opinion, national or social origin, wealth, birth, social status, membership or non-membership of a political party or trade union and physical or psychological disability.

The lower courts correctly held that this is an exhaustive list *(numerus clausus)* and that it does not include discrimination on grounds of education. However, discrimination on that ground is prohibited by the Constitution, which provides that "everyone" has rights and freedoms

regardless of race, skin colour, gender, language, religion, political or other opinion, national or social origin, wealth, birth, education, social status and other characteristics. The Constitution is of a higher order than other legislation and therefore discrimination on the basis of a person's education is prohibited even though the Labour Act 2004 is silent on it.

For these two reasons, the Supreme Court nullified the lower courts' judgments and ordered a retrial by the court of first instance. Unfortunately we have no information about what has happened since the Supreme Court's judgment.

Commentary
This case was litigated on the basis of the Labour Act 2004, which predated Croatia's accession to the EU. In 2008, Croatia transposed the EU directives that apply to discrimination in employment.

The Labour Act 2004 contained similar burden of proof rules in respect of discrimination as apply under the EU directives. In other words, the employee needs to establish facts from which discrimination may be presumed, following which the burden of proof shifts to the employer.

However, the Labour Act 2004 also contained special rules for claims based on violation of dignity, which is a sub-species of discrimination. All the employee needed to do in this type of proceedings was allege violation of dignity and the burden of proof would shift to the employer. This special arrangement was abolished in 2010.

The Labour Act 2004 talks of "harassment at work" and this is known by the general public as "mobbing". The term "mobbing" does not appear in the legislation. Mobbing is considered to have always existed, but is only recently being recognized as having a distinct and negative impact on employment relations. Since mobbing is not defined in law, it is interwoven with discrimination and harassment. There was an attempt in 2007 to define mobbing specifically by means of a special Act and provide appropriate protection against it, but this has not resulted in new law.

The reason why the lower instance courts erred may be because of lack of experience of the subject matter. According to information from the Municipal Court in Zagreb, between 2005 and 2010, there have only been 89 first instance cases where discrimination was claimed. Of these, only 21 have been completed within those five years. There have been verdicts in only eight of them, the rest having been either withdrawn or rejected.

Comments from other juridictions
Germany (Dagmar Hellenkemper): Unfortunately, it is not clear why the plaintiff in this case was discriminated against or had been a victim of mobbing because of his "higher education". However, Directive 2000/78/EC and its German transposition, the AGG(Allgemeines Gleichbehandlungsgesetz) currently only prohibits discrimination on the grounds of race or ethnic origin, gender, religion or belief, disability, age or sexual orientation. This list is seen as exhaustive in Germany and German Courts for example rejected claims for damages when a plaintiff argued she had been discriminated against because of her weight (cf. Schreiner/Hellenkemper, Being Overweight does not constitute a disability, EELC 2014/55) and ruled that the employers' behaviour could only be seen as discrimination if the plaintiff was overweight to the point where it presented a disability.
The legal aspect of the burden of proof follows the general rule in Germany that the burden of proof lies with the person who brings forth the claim. The burden of proof in mobbing cases therefore lies with the victimized employee. He has to outline all actions the mobbing, German Courts often require the victim to present some kind of "mobbing diary".

Subject: discrimination, other grounds (education level); harassment
Parties: V.B. – v – C.K. Plc
Court: *Vrhovni sud Republike Hrvatske* (Supreme Court of the Republic of Croatia)
Date: 2 March 2011
Case number: VSRH Revr 1648/2009-2
Internet publication: www.iusinfo.hr→fill in case number in second space next to Trazi po

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2015/5

Supreme Court reverses doctrine on cadre/non-cadre discrimination (FR)

CONTRIBUTORS CLAIRE TOUMIEUX AND SUSAN EKRAMI*

Summary
Different treatment in terms of benefits amongst different categories of employees, set by company or collective bargaining agreements and negotiated with representative trade unions, is presumed to be justified.

Facts
The CGT National Federation of Staff in Research, Consulting and Prevention Companies (the 'Union') is not party to the 'SYNTEC' collective bargaining agreement (the 'Agreement'). The Union brought a legal action before the French High Court seeking a declaration that several provisions of the Agreement were unlawful and void. It claimed the provisions were in breach of the principle of equal treatment because they afforded greater advantages to executive employees *(cadres)* than to non-executive employees *(non-cadres)*. These included a longer notice period and a more generous dismissal indemnity. The Union also applied for an injunction to bring together all signatory trade unions and employers' associations to the negotiating table to make the provisions compliant with the principle of equal treatment.

Judgment
The Union's legal action was dismissed by both the High Court and the Court of Appeals of Paris. The latter, in its decision of 30 May 2013 held that the differential treatment set by the Agreement with respect to various benefits between cadres and non-cadres employees was objectively justified, notably by the specific and different nature of their responsibilities.

The Union appealed the decision before the French Supreme Court and

it upheld the decision of the Court of Appeals, ruling that *"differential treatment between different categories of employees by means of (industry-wide or company-level) collective bargaining agreements which have been negotiated and signed by the representative trade unions invested with the power to defend the employees' rights and interests (as the employees have directly participated in voting for them), are presumed justified. Therefore, it is up to employees who challenge those differences to demonstrate that they are unrelated to any consideration of a professional nature"*. The Supreme Court further held that the Court of Appeals had correctly dismissed the claim, as the Union had not established that the differential treatment was unrelated to any professional consideration.

Commentary

It seems the French Supreme Court has finally decided to reverse its longstanding position, as established in the well-known "Pain" case[1] that *"belonging to different professional categories cannot per se justify allocation of a benefit", that "any difference in treatment amongst employees should be based on objective reasons"* and that the reality and relevance of these reasons must be verifiable by a judge.

The *Pain* case was heard in 2009 and concerned differential treatment set by a company-level agreement. A non-executive salesperson hired by DHL Express, challenged his entitlement to only 25 annual paid holidays under the applicable company agreement, compared to his fellow executive colleagues who were entitled to 30 paid holidays. He brought legal action seeking payment of arrears in the form of paid leave. The employee's claim was upheld by the Supreme Court.

The Supreme Court has made several decisions since 2009 that support the conclusion it reached in *Pain* and this has had the effect of an earthquake in France. The distinction between executive and non-executive employees is an important one and the majority of collective bargaining agreements provide different amounts of benefits to each category (e.g. in terms of the dismissal indemnity, notice periods, sick pay and the retirement indemnity).

Up till now, when an employee claimed the benefit of an advantage reserved to another category of worker, the burden of proof lay with the employer to justify - under judicial control - the relevance of the advantage set out in the collective bargaining agreement. Similar reasoning also had to be applied to any inequality amongst employees that derived from a unilateral decision by the employer.

However, proof of objective reasons in many cases was not an easy task, especially when the benefit in question had been granted by a collective bargaining agreement at national level. How could the employer be expected to justify differences negotiated by social partners at the national level? And how could it possibly provide objective reasons, not having directly participated in the negotiations – given that most of the national collective bargaining agreements are several decades old?

With this new decision of 27 January 2015, the French Supreme Court has finally decided to reverse its logic by setting a new principle, which is that the differences in treatment between different categories of employees in a collective bargaining agreement (whether at national or company level) are presumed to be justified, as those differences have been negotiated with the unions that are the guardians of employees' rights and interests.

We can only commend this, as it significantly reduces the legal uncertainty created in 2009. Now that the burden of proof has been reversed, it is no longer enough for an employee to claim the existence of a differential treatment in benefits. The employee will need to demonstrate that the treatment is unrelated to any professional consideration. With this decision the Supreme Court hopefully closes the Pandora's Box that it opened back in 2009.

Finally, it is worth noting that the ruling of the Supreme Court is clear that this new reasoning only applies to differential treatment originating from collective agreements negotiated with the unions. Any differential treatment resulting from the employer's unilateral decisions remains subject to the Supreme Court's previous case law.

Subject: Unequal treatment other than on expressly prohibited grounds
Parties: Fédération nationale des personnels des sociétés d'études de conseil et de protection CGT – v - Fédération des syndicats des sociétés d'études et de conseils et Chambre d'Ingénierie et du conseil de France
Court: *Cour de cassation* (French Supreme Court)
Date: 27 January 2015
Case Number: No 13-22.179
Hard copy publication: Official Journal
Internet publication: www.legifrance.gouv.fr→judiciaire→cour de cassation→Numéro d'affaire = 13-22179

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2015/6

Constitutional Court: compulsory retirement is unlawful sex discrimination (SL)

CONTRIBUTOR MISA TOMINEC*

Summary

In reviewing the legality of the law providing for the automatic termination of the employment agreements of public servants, the Constitutional Court concluded that public finance considerations do not, in principle, provide sufficient justification for the unequal treatment of women. It rejected a claim of age discrimination.

Background

With the aim of curtailing state spending at the peak of economic crisis, the National Assembly of the Republic of Slovenia *(Državni zbor Republike Slovenije)* adopted the Public Finance Act (*Zakon o uravnoteženju javnih financ*, the 'PFA') in 2012. One of the austerity measures introduced by the PFA was automatic termination of the employment agreements of public servants who were eligible to draw State retirement pension. Under the PFA, this automatic termination could only be circumvented if the public servant and the employer agreed to continue the employment relationship on the basis that this was necessary to ensure work could continue undisturbed.

At the time PFA came into force, the conditions for eligibility for

1 Cass. soc. July 1st, 2009 n° 07-42.675 (reported in EELC 2010/51)

retirement pension were different for men and women, pursuant to the Pension and Disability Insurance Act *(Zakon o pokojninskem in invalidskem zavarovanju)*. The retirement age for women was, as a rule, lower than for men[1]. As a result, women employed in the public sector tended to lose their jobs at a younger age than their male colleagues.

Facts

Following implementation of the PFA, the Human Rights Ombudsman of the Republic of Slovenia *(Varuh človekovih pravic)* filed a request to the Constitutional Court (*Ustavno sodišče*, the 'CC') to review the legality both generally and under the Constitution itself *(zahteva za presojo ustavnosti in zakonitosti)* of the automatic termination provisions of the PFA. The initiative for this came from the Rector of the largest Slovenian university, the University of Ljubljana. The request asserted that the measure had seriously adverse consequences for elderly professors and, for the universities themselves, both in the short and long term.

The claim expressed in the request that the rules were unconstitutional was mainly built on two core arguments, both referring to breach of the right to equality before the law, as enshrined in section 14 of the Constitution of the Republic of Slovenia *(Ustava Republike Slo-venije)*.

Firstly, the request claimed that the introduction of automatic termination had exposed elderly employees in the public sector to the risk that their employers would make arbitrary decisions about whether to agree to continuance of their employment relationships and that this unjustifiably placed them in a precarious situation.

The second argument was that automatic termination under the PFA constituted unequal treatment and discrimination against women. As both the statutory retirement age and the employment period were lower for women and these two factors triggered automatic termination, women's contracts were being terminated at an earlier age than those of men. This was putting women in the public sector in an unfavourable position compared to their male col-leagues and was an unlawful infringement of their right to equal opportunities and equal treatment.

Judgment

The CC thoroughly examined each of these arguments and came to the following conclu-sions:

1. Age discrimination

First, the CC established that automatic termination, as provided in the PFA, was in fact une-qual treatment. But in order to determine whether this unequal treatment was unconstitutional (and therefore unlawful), the CC considered whether the measure pursued a legitimate aim and, if so, whether the means to achieve that aim were proportionate. This proportionality test consisted of assessing whether automatic termination was adequate and necessary as well as whether it was proportionate in the narrow sense.[2]

In its assessment, the CC gave particular consideration to the guidance on legitimate aims objectively and reasonably justifying age discrimination provided under Council Directive 2000/78/EC,[3] as well as the case law of the European Court of Justice('ECJ') on that directive. Following the position taken by the ECJ, the CC held that the main objectives of the measures contained in the PFA, which were to curtail state spending and make the public finances sustainable, did not constitute a legitimate aim, sufficiently justifying age discrimination. However, after examining the government's response, the CC decided that sufficient justification for automatic terminations was nonetheless provided for through additional objectives pursued by the PFA – particularly the balancing of the age structure in the public sector, i.e. that the mix of old and young civil servants should be more balanced. It was therefore finally established by the CC that the age discrimination inflicted by means of automatic termination was permissible under Slovenian law.

2. Discrimination against women

The CC applied the proportionality test to the question of sex discrimination, with due con-sideration to the relevant provisions of Directive 2006/54/ES[4] as well as the case law of the ECJ, but the CC found no legitimate aims justifying the breach. As a result, the CC concluded that automatic termination was unconstitutional insofar as it affects women, as they would not have met the conditions for drawing the retirement pension that apply to male public servants (i.e. the statutory pension age and the prescribed employment period).

The unconstitutional provisions of the PFA were ordered to be eliminated by law within six months of the CC's judgment. In the interim, the employment agreements of women employed in the public sector could only be terminated automatically if the conditions for the re-tirement pension applicable to men were fulfilled. The judgment was put into effect in December 2014, when an amendment to the PFA came into force.

Commentary

The prohibition against discrimination in employment undoubtedly forms one of the core pillars of modern employment law and it is safeguarded in national and EU law and under the conventions of the International Labour Organisation. The judgment of the CC addresses the unequal treatment of employees under state austerity measures – something that is at particular risk of arising in turbulent economic times.

The main conclusion to be drawn from the decision of the CC is that measures aimed at curtailing state spending (including automatic termination) do not, in principle, provide sufficient justification either for age discrimination or unequal treatment of women. Either of them might, however, be considered justified if the measures are underpinned by (additional) legitimate objectives (such as balancing of the age structure of the public sector). In our view, as the decision was reached mainly by interpreting EU law, the relevance of findings of the CC far surpass our national boundaries. The conclusions are potentially relevant to any jurisdiction within the EU.

1 To start collecting State retirement benefits, an individual must satisfy two conditions: he or she must have reached a certain minimum age and must have been employed for a minimum period. The longer the length of service, the lower the minimum age.

2 I.e. an assessment of whether the benefits to the community of automatic termination outweighed the negative consequences to the individual.

3 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Official Journal L303, 2 December 2000, p. 0016 – 0022.

4 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 (recast), Official Journal L 204, 26 July 2006, p. 0023 – 0036.

Comments from other jurisdictions
Germany (Dagmar Hellenkemper): In a country that has slowly increased the pension entry age to 67, such a claim seems surprising. In Germany, a male worker probably would have brought claim in order to have his entry age reduced, on grounds of sex discrimination. In fact, such a claim has been filed in Austria a few years ago. However, the entry age is and has been the same for men and women in Germany.

Subject: Sex and age discrimination
Parties: -
Court: *Ustavno sodišče Republike Slovenije* (Constitutional Court of the Republic of Slovenia)
Date: 14 November 2013
Case number: U-I-146/12-35
Internet Publication: go to "http://www.us-rs.si/en/" → go to "advance search" → enter case number under "search query"

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2015/7

Equal treatment at the hairdresser? (DK)

CONTRIBUTOR MARIANN NORRBOM*

Summary
In Denmark, it is prohibited to discriminate on grounds of gender both within the labour market and in the wider world. Consequently, the freedom of contract of both vendors and suppliers is limited by the fact that they must not discriminate on the basis of gender when selling products, supplying services and entering into contracts. This principle is set out in s2 of the Danish Gender Equality Act, which is based on the Directive on equal treatment of men and women outside the labour market (Directive 2004/113/EC).

If a person feels discriminated against on grounds of gender, he or she may file a complaint to the Danish Board of Equal Treatment. If the Board finds that the defendant has breached the Danish Gender Equality Act it can award compensation to the complainant. If the defendant disagrees with the decision of the Board and decides not to comply with its ruling, the Board can bring an action against the defendant in the civil courts. The defendant also has the opportunity to take legal action against the Board.

Facts
Almost two years ago, there was a good deal of media attention given to the Board's decision to allow a complaint against a hairdresser's sign advertising a higher price for "women's haircuts" than for men's haircuts" brought by a woman with short hair. The Board held that there was no objective justification for the difference in price on gender alone. The complainant was awarded approximately € 335 in compensation. Three months later, the Board issued a similar decision on a complaint against another hairdresser.

The two hairdressers brought the decisions before the civil courts. The case was referred from the district court to the Danish High Court, because it was considered to be a test case. The two hairdressers argued that the terms "women's haircut" and "men's haircut" are used for two very different services: the techniques applied, the materials used and the time required all differ considerably.

Decision
Initially, the court stated that the Board had established an assumption of direct discrimination[1] due to the fact that the two hairdressers advertised different prices for a "women's haircut" and a "men's haircut". Yet, the court ruled in favour of the hairdressers, stating that the hairdressing services differed and that the terms "women's haircut" and "men's haircut" used in advertising could not in themselves be deemed to be discriminatory. This meant that the hairdressers had proved that the principle of equal treatment had not been breached.

In its judgment, the court stated that there was no basis for finding discrimination based on the definition of sex discrimination provided in the Danish Gender Equality Act, the preparatory notes to this Act, Directive 2004/113/EC or the case law of the Danish courts and the European Court. The names of the services, the gender of customers normally accessing those services and the types of service themselves (which are well-established in customer's minds) do not of themselves amount to sex discrimination. Accordingly, the court held that the terms "women's haircut" and "men's haircut" could not in themselves be deemed to be gender discriminatory.

The court did, however, note that if a hairdresser were to refuse a short-haired female customer a "men's haircut" by reason of her gender, that would constitute direct discrimination. But that was not the case in the two decisions brought before the court, as the two customers had not asked the hairdressers to explain their prices.

Commentary
The judgment illustrates that targeting differently-priced professional services towards either men or women, including haircutting services, does not constitute gender discrimination if the difference is based on objective facts, such as differences in techniques and time required, and as long as the services directed at a certain gender are not exclusively reserved for that gender. In the case in question, the crucial point was that a short-haired woman can ask for a "men's haircut" - as the price must not be based solely on her gender.

Comments from other jurisdictions
Greece (Harry Karampelis KG Law Firm):

Directive 2004/113
In the EU, the scope of application of the principle of equal treatment of men and women was broadened with the adoption of Directive 2004/113, implementing the principle of equal treatment between men and women in terms of access to and the supply of goods and services. This is the first directive addressing gender equality issues outside the field of employment. The preamble to this Directive recognizes that discrimination based on sex, including harassment and sexual harassment, also takes place in areas outside the labour market and can be equally damaging, acting as a barrier to the full and successful

1 Although the Board of Equal Treatment's decision does not state this explicitly, its reasoning suggests that it saw the gender discrimination as being indirect and therefore justifiable. However, in the procedure before the court, the Board, as the defendant, took the primary position that the discrimination was in fact direct but, in the alternative, that it was indirect. It is not uncommon in Denmark to hedge one's bets by claiming both direct and indirect discrimination.

integration of men and women into economic and social life. Directive 2004/113 applies to all those who provide goods and services in both the public and private sectors, but outside the sphere of private and family life (Article 3(1)). The Directive does not apply to the content of media, advertising or education (Article 3(3)). The principle of equal treatment means that there must be no direct or indirect discrimination based on sex, including less favourable treatment of women for reasons of pregnancy and maternity. However, more favourable provisions for women in relation to pregnancy and maternity are not contrary to the principle of equal treatment. The Directive further prohibits harassment and sexual harassment and any instruction to discriminate (Article 4). Positive action is permitted under Article 6 of the Directive.

However, the Directive allows various exceptions to the principle of equal treatment, even in cases of direct sex discrimination. Article 4(5) stipulates that the Directive shall not preclude differences in treatment if the provision of the goods and services exclusively or primarily to members of one sex is justified by a legitimate aim and the means chosen to achieve that aim are appropriate and necessary. The Directive thus has no closed system of exceptions in the case of direct discrimination, as the other sex equality directives do, and it therefore offers less protection against direct sex discrimination.

The Directive also contains specific provisions regarding actuarial factors in insurance contracts. Insurance contracts are often offered on different terms to men and women, both as regards the premiums and the benefits, in particular in private pension schemes. These differences are based on the fact that, on average, women live longer than men and that the insurance companies therefore run a higher financial risk in insuring women than men. Article 5(1) therefore stipulates: *"Member States shall ensure that in all new contracts (...) the use of sex as a factor in the calculation of premiums and benefits shall not result in differences in individuals' premiums and benefits. Member States have the possibility to derogate from this provision"* (Article 5(2)). However, in all new contracts concluded after 21 December 2007, the use of sex as a factor in the calculation of premiums and benefits may not result in differences in individual premiums and benefits (Article 5(1)). In the *Test-Achats* case (C-236/09), the ECJ considered the derogation to this rule, as provided in Article 5(2), as invalid with effect from 21 December 2012. In any event, costs related to pregnancy and maternity may not result in differences in individual premiums and benefits (Article 5(3)).

Gender equality in access to and supply of goods and services in Greece
The evolution of gender equality legislation and policy in Greece has been formed both by a radical feminist movement in the 1970s and 1980s and a series of steps in terms of EU legislation. The fact that Greece has been a member of the EC has contributed greatly in terms of employment policy, but even so, direct discrimination has not been eradicated, while indirect discrimination has not been adequately addressed by institutions, employers or employees.

According to Article 4(2) of the Greek Constitution *"Greek men and women have equal rights and equal obligations"*. Further, in Greece, Directive 2004/113 has been transposed by Law 3769/2009 and the principle of equality beyond the workplace has been incorporated. Pursuant to the Directive, Article 4(3) of Greek Law 3769/2009 stipulates that the law shall not preclude differences in treatment if the provision of goods or services exclusively or primarily to members of one sex is justified by a legitimate aim and the means chosen to achieve that aim are appropriate and necessary. Mirroring the Directive therefore, Greek law has no closed system of exceptions in case of direct discrimination and it therefore offers less protection against direct sex discrimination than the law on gender discrimination in employment.

There are two main institutions responsible for making decision-makers accountable for upholding their gender equality commitments. The Ombudsman is charged with monitoring equality issues in the public sector, while the Union of Consumers monitors the same in the private sector.

Judgment of the Danish High Court
The judgment illustrates that pricing professional services differently based on gender is not gender discrimination in itself, if the difference is based on objective facts. The judgment concerned the limitations imposed by EU Directive 2004/113 on freedom of contract.

The right to contract, that is, the right of one person to take on obligations in exchange for another person taking on obligations in return, is a fundamental, though not all-encompassing, right. It is subject to legal protections against one party seeking to impose discriminatory restrictions on the other. Directive 2004/113 enshrines in EU law the principle of equal treatment between men and women in the access to and supply of goods and services.

The crucial factor for the Court was whether the different pricing of the hairdressing services fell within the ambit of permissible differences in treatment. Differences in treatment may be permitted in the provision of goods and services exclusively or primarily to members of one sex if this is justified by a legitimate aim, and if it is appropriate and necessary.

In our view, the Greek courts would have ruled on the above case in the same way as they did in Denmark, as Law 3769/2009 provides for the same exceptions as those found in the Directive.

Germany (Dagmar Hellenkemper): Finally a Court has addressed the ever lingering question "Why does a womans' haircut cost more than a mans' haircut. There has not been a similar case in Germany yet, but the reasoning of the Danish court seems convincing.

Subject: Sex discrimination
Parties: The Danish organisation for independent hairdressers and cosmeticians representing Cha Cha Cha A/S in bankruptcy and Stender III A/S – v – the Danish Board of Equal Treatment
Court: *The Danish Eastern High Court*
Date: 10 November 2014
Case number: B-2290-13 and B-2520-13
Hard Copy publication: Not yet available
Internet publication: available from info@norrbomvinding.com

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2015/8

No obligation on employer to set aside a disabled employee's final warning for sickness absence (UK)

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Summary
In a case involving recurrent sickness absence that was unlikely to improve, the Employment Appeal Tribunal ('EAT') has overturned findings of unfair dismissal and disability discrimination based on failure to make reasonable adjustments.

Background
The duty to make reasonable adjustments, unique to the protected characteristic of disability, is set out in section 20(3) of the Equality Act 2010, which provides:

"Where A's provision, criterion or practice (PCP) puts a disabled person at a substantial disadvantage in comparison with those who are not disabled, A must take such steps as it is reasonable to have to take to avoid the disadvantage".

If an employer knows (or ought reasonably to know) that a person has a disability and there is a provision, criterion or practice (PCP) which places them at a substantial disadvantage compared to those who are not disabled, they have a duty to make reasonable adjustments. Failure to do so amounts to discrimination.

This case involves an employee of the local authority, the London Borough of Lambeth ('Lambeth'), who had taken a lot of sick leave. Lambeth's sickness policy was to disregard periods of absence relating to a disability. The trigger point for formal action as a result of *other sick leave* was four periods of sickness, or a total of 10 days sickness in a rolling 12 month period.

Facts
Mr Carranza worked for Lambeth before being transferred by a transfer of an undertaking to General Dynamics Information Technology Ltd ('General Dynamics'). He suffered from abdominal adhesions; a condition which Lambeth accepted was a disability. In addition to his disability-related absence, Mr Carranza had enough sickness absences to trigger Lambeth to take formal action. He received a warning, and a final written warning shortly before he was transferred to General Dynamics, having accrued absences of more than 41 weeks over a 3 year period (of which nearly 37 were disability-related).

Mr Carranza, following this, had two further short disability-related absences, before suffering a shoulder injury which resulted in three months' absence (which again triggered the formal procedure and a hearing). Acting on advice from occupational health, the employer took into account that although the shoulder injury was temporary, the adhesions were likely to lead to similar patterns of attendance as they were a lifelong problem. They dismissed Mr Carranza following the hearing, and he subsequently brought two separate claims; one for disability discrimination and the other for unfair dismissal[1].

The Employment Tribunal, hearing the claims together, found by a majority that the employer had failed to make reasonable adjustments. It found that the PCP was a requirement for consistent attendance at work, which put Mr Carrenza at a substantial disadvantage. The Tribunal thought that it would have been a reasonable adjustment to disregard the final written warning. Mr Carranza's unfair dismissal claim was also upheld for the same reason. The Tribunal held that a reasonable employer in these circumstances would have looked in more detail at the context of the warning, rather than taking it at face value.

Judgment
The EAT overturned the Employment Tribunal's findings on both claims[2].

Failure to make reasonable adjustments
The EAT stated that it can be challenging to analyse a claim arising from a dismissal for poor attendance as a claim for failure to make reasonable adjustments.

The PCP in this case did not pose a problem. The EAT agreed with the tribunal's finding that the PCP was a requirement for consistent attendance at work. There was no difficulty here in finding a disadvantage based upon this PCP. The employment appeal tribunal had correctly concluded that Mr Carranza's substantial absence coupled with the taking of occupational health's advice that the absence would continue was such that the respondent was entitled to dismiss him. Therefore, there were clearly no adverse effects from taking occupational health's advice. Mr Carranza based his claim for disability discrimination on the fact that he felt Lambeth had failed to make reasonable adjustments by not disregarding the final written warning.

The issue was in identifying the "step" which it was reasonable for the employer to have to take to avoid the disadvantage. The EAT held that the employer had not failed to make reasonable adjustments for the disability as it had not been required to take the step of disregarding the final written warning in relation to Mr Carranza's absences. The EAT stated that the Employment Tribunal had set out no substantial basis for saying it would be reasonable to disregard the final warning. The fact that the employer had refrained from dismissing Mr Carranza for two short disability-related absences following the final written warning gave no basis for saying that disregarding it altogether would have been an appropriate step.

Unfair dismissal
The finding of unfair dismissal was set aside by the EAT, as the employer had not been required to revisit the final warning. The EAT referred to the 2013 Court of Appeal case of D*avies - v - Sandwell Metropolitan Borough Council* here, which states that there is a limit to the extent to which an employer can be expected to revisit something which took place at an earlier stage of the dismissal process – unless an earlier warning was issued in bad faith, was manifestly improper or

1 It is not known what remedies Mr Carranza sought but it is likely that he asked the tribunal to award him financial compensation. Compensation for discrimination is unlimited and can include an amount for injury to feelings. Discrimination claims can result in high claims, for example for loss of future earnings. Unfair dismissal claims cannot result in awards exceeding the statutory cap, which currently stands at £ 78,355 or 52 weeks' pay, whichever is lower.

2 The outcome of this case is not known, but most likely Mr Carranza went away empty-handed.

was issued without any *prima facie* grounds. It could not possibly have been said here that the final written warning had been issued in bad faith, or that there had been no *prima facie* grounds for doing so, or that it had been manifestly inappropriate to issue it. The Employment Tribunal had therefore erred in finding that the employer either was or might have been required to discount wholly or in part the final written warning.

Commentary
UK law does not positively require employers to disregard periods of absence relating to a disability when considering whether to dismiss someone for lack of capability. In this sense, Lambeth might have been going beyond what the law required. However, the law does require the employer to make 'reasonable adjustments', if a PCP puts the disabled individual at a substantial disadvantage in comparison to non-disabled persons. What is 'reasonable' will depend upon the circumstances of the case.

Cases such as this one, which involve a dismissal for poor attendance may be better considered as claims for discrimination arising from disability or indirect disability discrimination, rather than failure to make adjustments. The EAT appears to be trying to encourage this here, and it is an example of the EAT taking a narrow view of the scope of reasonable adjustments claims in relation to sickness absence procedures and dismissals.
In cases like this where an employer's sickness procedure makes particular provision to discount disability-related absence, it may also be easier to show disadvantage based on a PCP of "consistent attendance at work", rather than one based on the employer's absence management procedure.
This case can also act as a reminder that employers will not be required to re-open a written warning unless there are exceptional circumstances for doing so.

Comments from other jurisdictions
The Netherlands (Peter Vas Nunes): Had this case come before a Dutch court, I expect that a crucial point of debate would have been what the exact reason for the dismissal was. Was it that Mr Carranza had been absent for three months for a reason (shoulder injury) that was not related to his disability? In that case surely there would not have been a PCP that placed him at a substantial disadvantage. Or was the reason for the dismissal occupational health's advice that the adhesions were likely to lead to lifelong attendance problems? In that case he would have been dismissed because of his disability and he could have based his claim on direct disability discrimination without having to resort to claiming breach of the employer's duty to make reasonable adjustments.

Did Lambeth's policy to disregard periods of absence relating to a disability really go beyond what the law required? I would think that not disregarding such periods would be indirectly discriminatory and not justified.
As an aside, Dutch readers will be surprised to learn that in Lambeth an absence of ten days is enough to get one dismissed. Such a harsh policy would be unthinkable in the Netherlands. Dismissing an employee during sickness is even harder than dismissal normally is and dismissal for repeated sickness absence is also difficult.

Subject: Disability discrimination; reasonable adjustments
Parties: General Dynamics Information Technology Ltd - v - Mr A Carranza
Court: *Employment Appeal Tribunal*
Date: 10 October 2014
Case number: UKEAT/0107/14
Hard copy publication:
Internet publication: http://www.bailii.org/uk/cases/UKEAT/2014/0107_14_1010.html

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2015/9

Caste discrimination may be unlawful, but not necessarily (UK)

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Summary
The employment tribunal decision in *Tirkey v Chandhok* (reported in EELC 2014/21) has been appealed to the Employment Appeal Tribunal ('EAT'). The EAT rejected the appeal against the tribunal's decision to allow the claim for caste discrimination to proceed, agreeing with the tribunal that the definition of 'race' in the Equality Act 2010, which includes 'ethnic origin', is wide enough to include caste.

Background
The Equality Act 2010 prohibits discrimination on the grounds of a number of characteristics, 'race' being one of them. Caste is not currently one of the 'protected characteristics', and so caste discrimination is not expressly prohibited. However, Section 9(1) of the Equality Act 2010, which defines race as including 'ethnic or national origins', is non-exhaustive and includes 'colour; nationality; ethnic or national origins'.

Section 9(5) of the Equality Act 2010 (as added by the Enterprise and Regulatory Reform Act 2013 (ERRA)) allows the government to amend Section 9 'so as to provide for caste to be an aspect of race'; but this power has yet to be exercised. In July 2013, the Government Equalities Office announced that before exercising this power, there would be a full public consultation in order to make sure that the legislation is appropriate and fit for purpose. As it stands, no amendments have yet been made, and caste remains outside the statutory definition of race.

Previous case law suggests that ethnic origin should be interpreted widely. In *Mandla - v - Dowell Lee* [1983] 2 AC 548 the House of Lords (now the Supreme Court) considered that the term 'ethnic' is used in a sense that is wider than the strictly 'racial' or 'biological'. Holding that Sikhs were protected from discrimination, the House of Lords held that the term 'ethnic origin' includes religious and cultural factors. The case laid down guidelines for determining 'ethnic origin' and stated that the group in question 'must regard itself, and be regarded by others, as a distinct community' by possession of a long shared history and their own cultural traditions. Following the Supreme Court decision in *R(E) - v - Governing Body of JFS and Another [2010] 2 AC 728*, it is not necessary for each caste to establish that it constitutes its own ethnic group, and nor

is it relevant that an alleged discriminator is of the same ethnic origin.

Facts

The Claimant, Ms Tirkey, worked for the Respondents, Mr and Mrs Chandhok, as a domestic worker. She claimed that they treated her poorly, in a demeaning and humiliating manner, and that this was in part because of her low status. Ms Tirkey argued (by amendment to her original claim) that she was subjected to such treatment because of the Respondents' caste considerations. Ms Tirkey is a member of the Adivasi caste which is known as 'servant caste'. This caste is recognised as being at the lowest point of socio-economic indicators, and individuals belonging to this caste are frequently equated with Dalits (once known as 'untouchables'). Ms Tirkey sought to amend her claim by adding the word 'ethnic' to national origin thereby asserting her ethnic origin as being a further or alternative ground for the disadvantageous treatment.

The Respondents applied to strike out this amendment on the ground that 'caste' did not fall within the definition of race in S.9 Equality Act 2010. The Respondent's grounds of appeal were as follows:

1. Caste was not a protected characteristic in Section 9(1):

The power in Section 9(5) for the government to include caste at some point demonstrates that there was a deliberate decision to omit it from the wording of the original legislation. The Respondents argued that it was not for an Employment Tribunal to anticipate future legislation by holding that Ms Tirkey could bring a claim which included caste as the basis on which discrimination was being alleged.

2. Previous case law on the definition of ethnic origin is to be distinguished:

The cases of *JFS* and *Mandla v Dowell Lee* (above) which had found that Jews and Sikhs were capable of being protected due to their ethnic origin were distinguishable because those cases adopted a purposive interpretation of the meaning of 'ethnic origin' under the Race Relations Act 1976. On the present facts, caste had been singled out for specific statutory provision by Section 9(5), and was not yet covered by the Equality Act 2010.

3. The EC Race Directive was inapplicable:

The Respondents argued that this was inapplicable because a Directive could only have direct vertical effect and not horizontal effect. The present case was between individuals and not against an emanation of the state. Even if applicable, the Respondents argued that as the EC Race Directive is silent on caste, it was a deliberate exclusion, and the government had chosen to make an amendment to the Equality Act under the ERRA 2013. This was seen to be a deliberate exclusion as Article 2 of the directive refers only to 'racial or ethnic origin' whilst the International Convention on the Elimination of all Forms of Racial Discrimination ('ICERD') includes 'descent' as a separate entity to race, colour, national or ethnic origin. Caste discrimination fell within 'descent', meaning that neither descent nor caste as an aspect of descent could be combined with any of the other characteristics.

4. The Respondents also argued that the tribunal was incorrect to hold that caste could come within the scope of the protected characteristic of religion and belief.

Judgment

The EAT dismissed the appeal, and permitted the caste discrimination claim to proceed to a full hearing in the employment tribunal (which has yet to take place).

Langstaff, P, sitting alone, held that although 'caste' as an autonomous concept does not currently fall within the definition of race in section 9(1) of the Equality Act 2010, there may be facts based on caste which are capable of falling within the scope of the race definition. 'Ethnic origins' in section 9(1)(c) has a *'wide and flexible ambit'*, including characteristics determined by descent. Key observations were also made about the circumstances in which it is appropriate to strike out claims based on discrimination.

Addressing the grounds of appeal

In relation to the first three grounds of appeal, the EAT held that Ms Tirkey could bring a claim for caste discrimination based on the wording of the Equality Act 2010 as currently drafted. Whilst caste is not mentioned explicitly in the definition of 'race' in section 9(1), on the facts, Ms Tirkey's caste was held to fall within the 'ethic origins' limb of the definition in section 9(1)(c).

The EAT held further that the fact the government had decided to legislate on this issue, but had not yet done so was not fatal to Ms Tirkey's case. The effect of Section 9(5) of the Equality Act 2010 does not limit the scope of the race definition. It gives power to clarify section 9(1) where issues may not be clear, and is not intended to restrict the application of the race definition. Furthermore, the decisions in the two leading cases of *JFS and Mandla – v - Dowell Lee* remain fully applicable, and give broad scope to the meaning of 'ethnic origins'. On the facts, the EAT held that where caste is linked to concepts of ethnicity, caste should be included within the meaning of 'ethnic origins', given the close links between descent and caste.

The EAT did not choose to comment directly on the fourth ground of appeal.

Other key observations made by the EAT

- The claim must be fully set out in the claim form or response. The EAT observed that the Tribunal went *'well beyond the words of the originating application'*, since Ms Tirkey did not identify to which particular caste she belonged in her claim form. The tribunal Judge set this out as the Adivas people, and relied on material from Wikipedia and material put before the Tribunal by the parties as background information on the caste system. The EAT warned against this approach, emphasising that the case to which a Respondent is required to respond must be set out in the claim form and not in other documents. Such knowledge is vital for litigants to be able to tell if the claim is made in time, to keep costs proportionate and for both the litigant and the tribunal to allocate the correct time for the case.
- The EAT observed that the general approach to striking out claims should be sparing and cautious. To strike out before the full facts have been established will be rare, especially so in discrimination claims. The challenging nature of strike-out applications is particularly apparent where there are language and cultural barriers. In *Anyanwu - v - South Bank Student Union* [2001] ICR 391, Lord Steyn commented that discrimination claims are fact sensitive and should only be struck out in the most obvious cases.

Commentary

The fact that the government is required to amend the Equality Act 2010 to provide expressly that caste is protected, but has not yet done so, did not prevent the claim proceeding on the basis of the current law. Although there is an obligation on the government to amend section 9(1) (under Section 9(5) as amended by the ERRA), the government does not have any firm commitment to introduce changes to the law before the general election in May 2015.

Until the Equality Act 2010 is amended, this EAT decision is helpful in assessing whether caste can amount to an aspect of race. The Judgment provides useful guidance and resolves two conflicting first instance decisions; that of this case and *Naveed - v - Aslam and others ET/1603968/11*. In *Naveed*, an employment tribunal rejected a caste discrimination claim, partly because the government had not yet activated the power in section 9(5) of the Equality Act 2010 to legislate for caste to be an aspect of the race definition.

The EAT was careful to make clear that the Equality Act 2010 should not be read as automatically including caste as a protected characteristic. The claimant's caste in this case was a facet of her descent, which might not be so in every case. Commentary from the EELC German correspondent on our report of the original tribunal decision in EELC 2014/21 suggests that this is similar to the situation in Germany. This comment said that the German anti-discrimination law ('AGG') includes a prohibition against differentiating on the grounds of ethnic origin. Their definition of ethnic origin includes being of a certain people or belonging to a segment of the population that stems from a specific region, shares a specific history or culture and is bound by a common feeling. This means that Ms Tirkey might have been successful in her claim in Germany but other caste discrimination might not be covered.

How broad is the concept of ethnicity? The principles established in *Madla* have been used in subsequent cases to determine whether certain groups can claim to belong to an 'ethnic group'. The Court of Appeal in *Commission for Racial Equality - v - Dutton [1989] IRLR 8* held that Romany Gypsies had a common ethnic origin whilst Irish and Scottish travellers were granted the same status in *O'Leary - v - Allied Domecq Inns Ltd and MacLennan - v - Gypsy Traveller Education and Information Project*.

The question of whether the English, Welsh and Scottish are separate ethnic groups has also been considered in case law with conflicting conclusions being reached. Although the case of *Gwynedd County Council - v - Jones [1986] ICR 833* appeared to support the view that the Welsh and the English had differing ethnic origins, the decisions in the more recent cases of *Northern Joint Police Board - v - Power [1997] IRLR 610 and BBC Scotland - v - Souster [2001] IRLR 150 I* (which related to whether the English and the Scottish could be considered as separate ethnic groups) disagree and mean we should approach this view with caution. However, *Power* and *Souster* both accepted that the English and Scottish had different 'national origins' and so could fall within this limb of the definition of 'race' and therefore bring claims of race discrimination.

Subject: Race Discrimination
Parties: Chandhok and Other - v - Tirkey
Court: *Employment Appeal Tribunal*
Date: 19th December 2014
Case Number: UKEAT/0190/14/KN
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2015/10

Duty to offer woman on maternity leave a suitable alternative vacancy arises when role becomes redundant (UK)

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Summary

The Employment Appeal Tribunal ('EAT') has held that the duty to offer a woman on maternity leave a suitable alternative vacancy under regulation 10 of the Maternity and Parental Leave Regulations 1999 (SI 1999/3312) (the 'MPL Regulations') arises when the employer first becomes aware that her role is redundant, or potentially redundant. The EAT found that if the duty only arose *after* a redundancy or restructuring process was complete, it would undermine the purpose of the legislation.

The EAT also commented on the relationship between the regulation 10 duty and direct discrimination, as defined in section 18 of the Equality Act 2010 ('EqA 2010'). Section 18 makes it unlawful for an employer to discriminate on grounds of pregnancy or maternity. The EAT found that where the regulation 10 duty is breached by an employer, it did not automatically follow that there would also be a case of direct discrimination under section 18.

Background

It is possible to make a woman on maternity leave redundant in the UK, unlike in some other countries. However, women on maternity leave do have various protections. Regulation 10 of the MPL Regulations means that a woman on maternity leave has the right to be offered a suitable alternative vacancy in a redundancy situation. This is an absolute right, and means in practice that if a suitable vacancy exists, it should be offered automatically without any requirement for the employee to be interviewed or assessed.

A failure by an employer to comply with this requirement renders a dismissal automatically unfair.

Women on maternity leave are also afforded protection by section 18 of the EqA 2010, which makes it unlawful for an employer to discriminate on grounds of pregnancy or maternity.

Facts

In this case, the employee, Mrs W, was on maternity leave from 16 July 2012 to sometime in July 2013 and, as such, was still on maternity leave at the time of her dismissal in April 2013. Her employer had started to plan redundancies in late 2010, though they were not implemented until 2012. As part of a general restructuring exercise, the employer decided to combine the employee's role with another senior role (occupied by a man, Mr P, to create one new role. Both of the affected employees were placed at risk of redundancy in July 2012, though the new role was created a month earlier, in June 2012.

In December 2012, both employees were invited to apply and be interviewed for the newly created role. Mr P was considered a better fit by the employer, and was consequently offered the role in December

2012. Mrs W was put onto the redeployment register, and dismissed on the grounds of redundancy in April 2013.

Mrs W went on to win claims in the employment tribunal ('ET') for breach of regulation 10, automatically unfair dismissal and direct discrimination under section 18 of the EqA 2010.

The employer had argued that the regulation 10 duty had not arisen until the restructuring exercise had been completed, *after* the newly created role had been filled, i.e. the duty arose after Mr P. had been offered the role in December 2012, which would mean that Mrs W's entitlement was to be offered a vacancy if one was available at that time.

However the ET rejected that argument, reasoning instead that Mrs W had had the right to be offered the role once the employer knew that there was a redundancy situation which affected her, i.e. in July 2012 when she had been placed at risk. The employer was also criticised for requiring Mrs W to be interviewed for the newly created role, contrary to the absolute right to be offered a suitable role that is enshrined by regulation 10.

The employer appealed. At the EAT, the ET's decision that there was a breach of section 18 of the EqA 2010 was remitted for re-consideration by the same tribunal panel.

However the EAT broadly agreed with the ET's decision regarding regulation 10.

Judgment

Relationship between regulation 10 and section 18 EqA 2010

The EAT judge explained that in order to show direct discrimination under section 18, a woman does not have to show less favourable treatment, but merely *unfavourable* treatment because of pregnancy or maternity leave. Regulation 10, on the other hand, provides that a woman is entitled to special protection and will be treated as unfairly dismissed if that protection is denied to her.

In this case, the unfavourable treatment was Mrs W's own role being made redundant, and the failure to offer her a suitable alternative vacancy.

The judge said that Mrs W's assertion that a breach of regulation 10 automatically meant that direct discrimination was established was a step *"beyond the language of the statute"* and that while the unfavourable treatment of Mrs W coincided with her being on maternity leave, it did not mean that the unfavourable treatment was because of it.

The judge explained that it was, therefore, necessary to establish *the reason why* the Claimant was treated the way she was.

While the judge recognised that in many cases a finding that regulation 10 had been breached would also answer the question of whether there had been a breach of section 18, she commented that the facts of this particular case allowed for more than one answer. This question was therefore remitted back to the ET.

Scope of the regulation 10 duty

As regards determining when the regulation 10 duty arises, the judge commented that it is largely left open to employers to decide how best to carry out redundancy processes. However if it was also left open to an employer to decide *when* a redundancy occurs, the position could be abused. Referring to the definition of 'redundancy' in section 139 of the Employment Rights Act 1996, the judge held that the ET had been correct to conclude that there was a redundancy when the employer decided that two positions would be removed and replaced by one.

This was because at that point, the requirements of the employer's business for employees to carry out work of a particular kind had ceased or diminished, or were expected to do so. If Mrs W was not provided, therefore, with a suitable alternative vacancy allowing her to avoid being dismissed, her employment would be terminated on the grounds of redundancy.

The judge did accept that regulation 10 does not define the term 'vacancy', and does not expressly oblige an employer to offer every suitable vacancy (or any particular vacancy) if more than one might be suitable. As a result, the judge said that the employer might have satisfied its obligations under regulation 10 if it had offered Mrs W another suitable alternative (i.e. a different vacancy to the one offered to Mr P).

The employer sought to argue that the position in question was not actually a vacancy at all, as it was not open to anyone other than Mrs W and Mr P. However the judge disagreed, commenting that the employer was seeking to define the terms in question through the prism of its own way of proceeding.

While the judge accepted that the employer might have preferred to give the vacancy to Mr P, rather than Mrs W, in her view the employer was obliged to offer it to Mrs W unless it could find some other suitable alternative vacancy to offer.

As regards the interview process that the employer had required, the judge referred to the EAT's judgment in *Eversheds Legal Services - v - de Belin*, in which it was found that the obligation upon the employer is to do that which is reasonably necessary to afford the statutory protection to a woman who is pregnant or on maternity leave.

Doing more than is reasonable necessary would be disproportionate and would put an employer at risk of unlawfully discriminating against others.

In this case, the judge commented that in order to afford Mrs W the necessary statutory protection, the employer had been obliged, upon her position becoming redundant, to assess what available vacancies might have been suitable and to offer one or more of them to Mrs W. She should not have been required to engage in any sort of selection process, and the judge noted that the purpose of the special protection for women on maternity leave was graphically illustrated by the fact that Mrs W had, at the time of the interview, three children under the age of three.

Commentary

It is clear that neither being on maternity leave nor regulation 10 provides a woman with immunity from being considered for redundancy. Indeed, a man can complain of sex discrimination if a woman is not put into a redundancy selection pool simply because she is on maternity leave. However in this case, Mrs W's right to be offered the only vacancy in the proposed restructure effectively amounted to removing her from the redundancy pool altogether.

There is very little case law surrounding the regulation 10 duty, and in particular regarding when the duty arises. The result of this judgment, however, seems to be clear – that an employer ought to offer a vacancy when it becomes aware that the employee's role is redundant or potentially redundant. However this does not answer the question of how likely the redundancy or restructure needs to be in order for the duty to be triggered.

The decision suggests that employers should be aware of the exact point at which a redundancy situation arises, and offer any suitable vacancies from that point onwards. Given the difficulty in establishing exactly when a redundancy situation is in place, it seems sensible for employers to assume that the duty under regulation 10 arises when it first decides to make redundancies.

Comments from other jurisdictions

Denmark (Mariann Norrbom): It is interesting to see that pregnant employees enjoy wider protection under UK law than required under EU discrimination law. In Denmark, it is considered to be in accordance with EU law to make a pregnant employee redundant under certain circumstances, which is also the case in the UK. A Danish employer is required to try to offer the pregnant employee a suitable alternative vacancy. However, according to Danish law the employer is not required to automatically offer a vacancy to a pregnant employee who is placed at risk of redundancy if the employer can justify that another employee is more suitable for the vacancy.

As mentioned in the case report, there is a risk that it will be considered unlawful discrimination against men if a male employee and a pregnant employee are both placed at risk of redundancy and the employer does not consider who is most suitable for the position but automatically gives the vacant position to the pregnant employee even though the male employee is in fact more qualified than the pregnant employee. Unlike the conclusion in this particular case, it is likely that it would be considered disproportionate under Danish law to automatically offer the vacant position to the pregnant employee, thus barring the male employee from having a chance of obtaining the position. Of course, the reason for the dismissal of the male employee would be redundancy, but the choice between him and the female employee would be based on pregnancy only.

Germany (Peter Dworski): In Germany, pregnant employees enjoy a high level of protection against dismissal. In principle, the time of maternity leave lasts from six weeks before the estimated birth date until eight weeks after delivery. However, according to sec. 9 para. 1 of the Maternity Protection Act (MuSchG), the employment relationship of a pregnant employee must not be terminated by the employer during the entire pregnancy up to the expiration of four months following delivery. A termination contrary to the aforementioned provision is null and void if the employer had been aware of the pregnancy or the delivery at the time of the termination or if he has been informed accordingly within two weeks after receipt of the notice letter. A dismissal during pregnancy and maternity leave is only possible in exceptional cases (e.g. an irreparable disruption of the employment relationship due to employee's severe misconduct (criminal offence)) and with the consent of the responsible public authority.

In view of this extensive protection against dismissal, according to German law, an employer has the duty to offer a woman on maternity leave a suitable alternative vacancy when her role is redundant. In In this respect, the judgement is in line with German law. An exceptional case that can justify a termination because of operational reasons is only recognised when there is no possibility for continued employment at all (e.g. the permanent closure of the company) or if the economic existence of the employer is at risk. However, in any case, the prior consent of the responsible public authority has to be obtained.

In regard of possible discrimination, the termination of the employment must not be based on reasons related to the pregnancy or motherhood. Had the employer terminated the employment after the maternity leave, the result would probably have been the same, since in Germany an employer is always under the obligation to seek alternative positions to employ the employee in question resulting from the Unfair Dismissal Protection Act.

The Netherlands (Peter Vas Nunes): Article 10 of Maternity Directive 92/85 prohibits dismissal, save in exceptional circumstances, not only during maternity leave but from the first day of pregnancy. Regulation 10 of the MPL Regulations is very favourable for female employees, but only during the period of their maternity leave. Until that leave begins, a pregnant employee may be dismissed on the ground of redundancy without triggering a "regulation 10 duty".

Subject: Redundancy; Suitable Alternative Vacancies; Maternity Leave
Parties: Sefton Borough Council - v - Wainwright
Court: *Employment Appeal Tribunal*
Date: 13 October 2014
Case number: UKEAT/0168/14
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2015/11

Traineeship agreement is separate from employment agreement (MA)

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Summary
The First Hall of the Civil Court of Malta held that a training contract does not fall within the ambit of any collective agreement, as it was not part of the employment contract.

Facts
In July 2006, the defendant company issued a public call for applications for trainee pilots. The plaintiffs applied for those positions. In mid-January 2007, after the candidates had been selected, a meeting was held at the airline's headquarters where the successful applicants were notified that they would have to pay approximately € 34,950 each for the training that the defendant company would be providing at its expense.

In order to make sure the training course was paid for, the airline had asked the plaintiffs to sign a public deed. This had the effect of securing all their property, present and future, against an amount of approximately € 46,600 each. Some of the applicants initially complained about some of the clauses in their training contract, but they were told that the training contract could not be altered in any way. The defendant company told the plaintiffs they were free to refuse to sign and leave their employment if they wished.

The trainee pilots eventually signed their training contracts and later signed their employment contracts and started working with the defendant company. At that point, the sum agreed upon in the training contract was deducted from their salary. The deduction was made in consideration of the € 34,950 which the plaintiffs owed the defendant company for their training. Their training commenced at the end of January of the same year.

In December 2008, the plaintiffs filed a claim against the defendant airline, arguing that Clauses 6, 9 and 10 of their training agreements were invalid. The content of these clauses is summarised as follows:

- Clause 6 said that upon successful completion of training, the cadets were bound to work with the employer for ten years and if they did not finish the training course, they would be liable to pay back all expenses incurred, the amount of this being secured on their property;
- Clause 9 said that in addition to the ten years of work with the airline, a sum would be deducted from their monthly salary and the total amount to be deduced was fixed at € 34,941;
- Clause 10 said that cadets would have to pay back all the money spent by the airline if for any reason they did not successfully complete their training, or if they did not work with the company for ten years.

The plaintiffs argued that these clauses were a restriction on free trade and the free movement of workers.

Judgment
The court first examined the training contract and found that it was merely an accessory to the employment contract and not part of it and was therefore not subject to any collective bargaining agreement. The training contract and the employment contract were considered by the court to be autonomous and independent.

The court noted that in accordance with Chapter 343 of the Laws of Malta, a trainee is a person other than an apprentice, who is not of compulsory school age and who is receiving training under an agreement made in writing in a vocation, otherwise than at a recognised educational establishment. The court established that during the training period, the plaintiffs were not considered to be employees, but trainees who in future aimed to become employees. In addition, the court established that it was reasonable for the defendant company, which had incurred expenses to train its employees, to expect a return on its investment.

The court then analysed Clauses 6 and 9 of the training contract and found that they are different in nature and produced different legal effects. The court classified Clause 6 as a "post-employment restraint". Covenants of this kind can limit the activities of employees where the employer needs to protect its commercial interests, but must not infringe the employee's right to engage in paid work. The court found that such clauses are a restriction on competition.

The court further noted that Article 982(1) of the Maltese Civil Code, which is to be found in Chapter 16 of the Laws of Malta, provides that a contract may involve one of the parties promising to refrain from engaging in a particular activity, but the court found that it was necessary to examine whether the clause was reasonable and not in the exclusive interests of one party. In addition, the court noted that the Employment and Industrial Relations Act, Chapter 452 of the Laws of Malta, gives the employee the right to terminate his or her employment without giving any reason.

On this basis, the court found that Clause 6 of the training contract was not part of the employment contract, but an *ad hoc* and autonomous clause. The court also found that the Clause was different from a non-compete clause, in which an employee is prohibited from seeking employment in the same field for a specific period of time.

The court concluded that Clause 6 was not contrary to Maltese law and did not serve to cancel the security on the amount the company said it was owed.

With respect to Clause 9, the court found this was different from Clause 6. The plaintiff's main argument with regards to Clause 9 was that, by deducting a sum from their salary, the employer was effectively imposing a penalty and this was subject to the appropriate sections of the law. The court however disagreed with this statement and held that nothing in the law suggested that this form of payment was tantamount to a penalty. Further, the law did not preclude an employer from claiming training expenses back from his employees and so Clause 9 was also valid.

The court held that since Clause 10 was, in effect, an amalgamation of Clauses 6 and 9, it too was valid. The court concluded by stating that the plaintiffs knew what they were signing and ought to have known the consequences.

Commentary
This case is very interesting because it is the first case which clearly distinguishes between a contract of employment and other agreements connected to that contract and also because it clarifies that training agreements are binding and enforceable.

In practice, what the court did was to interpret the clauses in the training contract independently of the general principles of Maltese labour law. The danger of this is that the judgment may convey the understanding that parties may contract separately with respect to matters ancillary to labour law and this will allow them to circumvent Maltese Labour law - the only restriction being that what they decide must be reasonable.

In our view, the court should have weighed up the employees' freedom to move from one job to another with the benefit for the employer of having them stay for a number of years. We think that a reduction on a sliding scale of the amount to be repaid by the employee based on length of service after becoming qualified, should have been considered.

Comments from other jurisdictions

The Netherlands (Peter Vas Nunes): There are two aspects to this case: (i) the trainees were considered not to have the status of employees, hence the laws governing employment did not apply, and (ii) the Maltese court accepted that Clauses 6, 9 and 10 were valid and enforceable.

Re (i): the Dutch courts accept that the relationship between a company and a trainee or apprentice may not be one of employment, but only if the work performed by the trainee has no or only very little commercial value to the company. The primary purpose of the work must be the professional development of the trainee. A complication is that the ratio between professional developments and commercially useful work tends to shift over time. In the first few months of a traineeship, the trainee may be of no commercial value at all, in fact costing the company more (in others' time) than the value of the work. However, after a certain initial period, the learning curve becomes less steep and the work becomes gradually more valuable.

Re (ii): where the relationship does qualify as one of employment, Dutch courts accept that the contract of employment may provide for an obligation to repay reasonable training costs made for the benefit of the employee's professional development, provided the amount to be repaid diminishes in proportion to the duration of the contract. A contract such as that at issue in the case reported above (if it had qualified as one of employment) would not be considered valid by a Dutch court, if only for this reason. My reading of that contract is that if the employee works for the defendant company for nine years following the completion of his training, he would still need to repay 100% of the € 34,941. This would not be considered acceptable. Moreover, the accumulation of the (unconditional) payment obligation and the (conditional) obligation to repay training costs would seem to be a "double penalty", which a Dutch court would not accept.

Subject: employment status
Parties: Ramon Portelli et – v – Air Malta p.l.c.
Court: *First Hall, Civil Court*
Date: 5 March 2013
Case number: 1237/2008
Hardcopy publication:
Internet publication: The case is available in the Maltese language only at the following web-portal: http://www.justiceservices.gov.mt/courtservices/Judgements/search.aspx?func =all

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2015/12

Financial difficulties cannot justify unilateral variations of salary and benefits (CY)

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Summary

Unilateral variations by the employer of basic employment terms may be construed as a breach of the employment relationship, giving the employee the right to either "stand and sue" or resign and claim constructive dismissal. If the employee does not resign, the court may decide that all employment terms and benefits should be restored. If, however, the employee resigns, the court may grant compensation for unlawful (constructive) dismissal. Note that if the employee does not resign, he or she should make a claim immediately, as a long period before claiming may be considered to show implied acceptance of the variations.

Facts

The applicant in this case was an airline pilot. He was employed by Cyprus Airways Public Ltd, formerly the national airline of Cyprus (the 'Company'). He was a member of the Pan-Cyprian Pilots' Trade Union. His terms of employment were governed by a collective agreement concluded with the union, which was renewed from time to time. In 2004, the Company unilaterally reduced the salaries and certain other benefits of its pilots, with effect from 1 January 2005. These reductions are refered to below, collectively, as the "salary reduction". The applicant protested, noting that neither he nor his union had agreed to the reductions, which were therefore unlawful and ineffective. He brought legal proceedings before the Nicosia Employment Court, claiming the balance between his earnings and the sums to which he was entitled.

The Company argued that the salary reduction was necessitated by such severe financial difficulties that the Company would not have survived without them. It treated these difficulties as a *force majeure*. Following refusal by the union and the applicant to agree to the salary reduction, the Company had discussed the situation with the Ministry of Labour, Welfare and Social Insurance and other public authorities in the context of their efforts to secure the airline's continued existence. The Ministry had taken the view that reducing the pilots' salary level, which was one of many suggested measures, would not be a unilateral amendment or a violation of the collective agreement because it was necessitated by *force majeure*.

The Company also argued that the applicant, by continuing to perform his work, rather than resigning and claiming compensation based on constructive dismissal, had implicitly agreed to the salary reduction, causing his old employment contract to be replaced by a new contract on the new terms.

Judgment

For a reason that is not relevant here[1], the court did not adjudicate the

1 The Labour Court delivered a judgment which was overturned by the Supreme Court on the ground that the court's composition was incorrect. The Supreme Court ordered a retrial.

case on its merits until 2014, nine years after the application was filed. The court issued a long and detailed decision relating to the salary reduction effected in 2005.

The court held that any variation to an employee's terms of employment must be agreed between the parties. This could be done in writing, verbally or impliedly. The employee's consent could be obtained either indirectly via the union following collective negotiations or directly. Individual consent may also be inferred from the employee's behaviour. Any variation of terms made without the employee's consent or without a provision in the contract allowing for unilateral amendment by the employer, is a violation of the contract of employment. The fact that the salary reduction in this case was necessitated by the Company's extremely negative financial situation does not alter this basic principle.

Consequently, the court awarded the applicant € 19,310 in salary arrears plus expenses, VAT and interest.

Commentary

This judgment was delivered in a period during which Cyprus was - and still is - facing a very serious financial crisis as a result of which numerous companies were (and still are) closing down daily because of their negative financial situation. However, the Employment Court's view was that neither the financial crisis in Cyprus nor the specific financial difficulties that a company may be experiencing can result in a breach of an employment contract for the sake of the company/ employer.

Less than three months after this judgment was delivered, Cyprus Airways Public Ltd announced its closure (January 2015) because of the extreme financial difficulties it was experiencing and because its bailout scheme did not bring the results necessary to rescue it.

Comments from other jurisdictions

Germany (Peter Dworski): As an instrument for companies to squeeze financial bottlenecks and to realise temporary economic relief, German law provides them with the opportunity to introduce short-time work. Short-time work stands for the temporary reduction of the employee's working time corresponding with a prorated reduction of the employee's claim to remuneration. For a certain period of time, the loss of salary is compensated through payments by the Federal Labour Office. However, the employer is not entitled to introduce short-time work unilaterally, as the introduction requires a legal basis, for example provisions of a collective or company agreement. Furthermore, the possibility to introduce short-time work can be regulated in individual employment contracts. It is important thereby that the regulation contains a term of notice (at least three weeks). Especially in view of the crisis years 2008 and 2009, many companies added short-time work-clauses as a standard to their employment contracts. All in all, the regulations regarding short-time work have proven their value as an effective means for the avoidance of dismissals based on operational reasons in times of crisis.

Another possibility for the employer to reduce the salary of an employee unilaterally is the dismissal for variation of contract. Content of this measure is the dismissal of the current employment agreement by the employer associated with a new contractual offer for the employee on amended conditions (e.g. reduced salary). Generally, dismissal for variation of contract requires a statutory ground for dismissal (i.e. grounds that are related to the person or the conduct of the employee or operating requirements) and has to meet the principle of proportionality. In this regard, the dismissal for variation of contract as a means to reduce the salary of an employee is only justified, if through the reduction of personnel costs the closure of operations or a significant reduction of the workforce can be prevented. According to German case law, this generally requires an extensive redevelopment concept by the employer that exploits all possible means that are less severe than the dismissal for variation of contract.

Furthermore, it is possible to reduce the salary of employees through a collective agreement (e.g. in connection with a reduction of the working time). According to German case law, the parties to a collective agreement have a broad margin of discretion regarding the reduction of costs and the protection of jobs. Remuneration agreements in collective agreements are subject to a very limited judicial control. This is an expression of the constitutionally guaranteed operational freedom of the parties to collective agreements.

The Netherlands (Peter Vas Nunes): The financial crisis has caused many employers to explore avenues to reduce payroll costs, not only through headcount reduction but also by cutting salaries or, more often, other benefits such as pension. The most obvious technique is to seek the cooperation of the relevant union(s), if any. Even though union membership has dropped to below 20% of the workforce, and in many sectors is close to nil, the vast majority of employment contracts in this country incorporate the contents of a collective agreement concluded between the employer (or the employers' association of which it is a member) and one or more unions. The clause in the employment contract incorporating the collective agreement is usually formulated (or interpreted as being) "dynamic", that is to say that the collective agreement's contents apply as those contents evolve over time. In theory, this means that if the unions agree to replace a collective agreement with a less generous one, the employees' terms of employment automatically drop to the new, lower level. However, there is a complication. Most collective agreements are what is known as "minimum" agreements. That is to say that employers are free to offer their staff better terms. In these cases, the existing terms of employment continue despite a new collective agreement being less favourable than the previous one. A way to get round this complication is to formulate the relevant provision in the new collective agreement as being a (minimum and) maximum term.

The United Kingdom (Bethan Carney): In the last few years many employers in the UK have also tried to vary employees' contractual terms because of unfavourable trading conditions caused by the recession. Employers have attempted various measures, including cutting salaries and other benefits or reducing hours. Unlike in the Netherlands, most UK employment contracts are not governed by collective agreements with trade unions, so if an employer wishes to change terms and conditions it must normally agree this with the employees directly. As in Cyprus, a unilateral variation by the employer would be a breach of contract permitting the employee to resign and claim constructive dismissal or to remain employed whilst bringing a breach of contract claim. However, the employer might be able to enforce changes in a different way. If the employer has a real and urgent need to make the change it could consult with the employees seeking their consent. If any refuse consent, the employer might be able to dismiss these individuals (giving them due notice of termination) and offer them a new contract of employment on the new terms. Giving the individual their contractual notice entitlement would prevent a breach of contract claim, the risk would be that employees with sufficient service (normally 2 years) could bring an unfair dismissal claim.

However, if the employer has a real business need to make the change this could be a potentially fair reason for the dismissal, meaning that employees would not succeed in an unfair dismissal claim. In addition, the new offer would go some way to mitigating any loss they might suffer and would reduce compensation if there had been an unfair dismissal. Attempting to change contractual terms in this way is a delicate matter and has to be handled carefully. One potential pitfall for employers to watch out for is that if they dismiss at least 20 employees, it could be a collective redundancy situation necessitating collective consultation with employee representatives or trade unions. This is because the definition of 'redundancy' in the legislation implementing the Collective Redundancies Directive (98/59/EC) is a dismissal for a reason not related to the individual concerned, which definition is clearly wide enough to encompass dismissals made to change terms and conditions.

Subject: Unilateral amendment of employment terms
Parties: Chrysanthos Chatzichrysanthou – v – Cyprus Airways Public Ltd
Court: *Nicosia Employment Court*
Date: 15 October 2014
Case number: 763/2005
Internet publication: not available

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2015/13

Implied choice of law in international employment contracts (AT)

CONTRIBUTOR ANNA MERTINZ*

Summary
Whether, and in favour of which jurisdiction, the parties to an employment contract with a cross-border dimension have made an implied choice of law, must be decided on a case by case basis. Essential indicators of an implied choice of law include direct references in the employment contract or related documents to concrete provisions and practices of a specific jurisdiction and the use of typical terms and clauses used by this jurisdiction.

Facts
The plaintiff in this case was an Austrian sales representative employed by a company with its seat in Germany. The plaintiff was responsible for the management and support of Austrian customers. He worked four days a week travelling in Austria and one day a week from home (on administrative work). He never worked in Germany. The company employed six sales representatives in Austria, but had no formal office or warehouse in Austria.

There was no explicit choice of law clause in the employment contract. However, it contained several clauses referring to German labour law, including a reference to a German collective bargaining agreement. It also used certain legal expressions that are more common in Germany than in Austria.

The employment relationship was terminated by the company by way of ordinary termination. The termination letter referred to the German term *"Kündigungsschutzklage"*. This is a term not known in Austrian law. It connotes the employee's right under the German Employment Protection Act (the 'KSchG') to file a claim against termination. The letter specified the deadline for filing this claim under German labour law, which is longer than the equivalent Austrian deadline.

The employee filed an action in the Austrian court system against his former German employer, claiming that the requirements of the German KSchG had not been met, that the dismissal was therefore ineffective and that his employment relationship therefore continued as if he had not been dismissed.

The main question in this case was whether the parties had made an implied choice of law. The plaintiff argued that there was an implied choice for applicability of German labour law. The company argued that Austrian labour law applied and that the termination was lawful under Austrian law.

Judgment
The Courts of the first and second Instance rejected the claim and reasoned that due to the lack of sufficient links to the German operation, German termination protection law did not apply (and that the relevant provision of German labour law was not a mandatory provision within the meaning of Articles 6/7 of the Rome Convention (now Articles 8/9 of the Rome I Regulation).

The Austrian Supreme Court (the 'OGH') ruled that taking all the circumstances and contractual provisions into account, the parties had made an implied choice of law clause in favour of German law. Important indicators were references in the contract to special national provisions and the use of typical German legal expressions, wording and clauses. The Supreme Court paid special attention to the fact that the contract did not merely reference specific provisions of German law ("static reference") but also referenced a German collective agreement ("dynamic reference"). Another strong argument for the choice of law in favour of German law was the fact that the termination letter made reference to a German law (the KSchG) and to the fact that the employer had consulted its (German) works council regarding the matter. Criteria such as place of work, place of conclusion of the contract, residence or seat, on the other hand, are no more than non-decisive indicative factors.

Since the German termination protection rules are more advantageous for the employee than the Austrian rules (in that there is a longer period to make a claim), the Supreme Court held that German termination protection law is applicable. It remitted the case to the Court of First Instance, which will now have to adjudicate the matter based on German law. In particular, that court will need to determine whether the plaintiff has satisfied the requirements for filing a (German) *Kündigungsschutzklage*. Given that Austria and Germany share a common language and that information on German law is readily available for Austrian judges, this should not be an insurmountable obstacle.

Commentary
The events in this case occurred before the 1980 Rome Convention was replaced by the Rome I Regulation (EC Reg. 593/2008). The Convention provided, and the Regulation provides, that the parties to an employment contract are, in principle, free to choose the applicable

law, provided that that choice of law does not have the result of depriving the employee of the protection afforded to him by the provisions of the law that would apply in the absence of a choice of law. The Rome I Regulation does not specify how a choice of law should be made, so implied choices of law are possible, especially if they result in the application of more favourable provisions for the employee. The question of applicable law is of great importance in drafting, negotiating and executing cross-border employment agreements. As this decision of the OGH illustrates, it is better to make an explicit choice of law in order to avoid long and complex discussions about which law applies.

Comments from other jurisdictions

Germany (Dagmar Hellenkemper): It is very likely that a German court would have come to the same conclusion. In the German interpretation of Article 8 Rome I, references to German collective bargaining agreements are a strong indication of a tacit choice of law. Further, the law chosen implicitly by the parties should not disfavour the employee *('Günstigkeitsprinzip')*. Because German law was the more favourable choice in this case, a similar outcome in Germany is very likely.

Note however, that if a German court had concluded that Austrian law applied, the German court would have had to apply Austrian law to the case, rather than referring the case to an Austrian court. This usually involves obtaining an expert opinion on Austrian law from a public institution.

Subject: choice of law
Parties: not known
Court: *Oberster Gerichtshof* (Austrian Supreme Court)
Date: 25 November 2014
Case number: 8 ObA 34/14d
Hardcopy publication: none
Internet-publication: https://www.ris.bka.gv.at/Jus/ → type case number in "Geschäftszahl"

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2015/14

Dismissal based on illegally collected evidence (FR)

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Summary

The use of evidence discovered through a system which allows the employer to monitor its employees' use of their professional email address as grounds for dismissal is forbidden in the absence of prior notification of the monitoring system with the French Data Protection Agency (CNIL).

Facts

French law[1] provides, inasmuch as relevant for the purpose of this case report, that an employer may not implement a personnel monitoring system unless it has given prior written notification to the employee representatives, the employees themselves and the CNIL, the French supervisory authority. This is in line with Article 18 of Directive 95/46 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (the 'Directive'), which states that "Member States shall provide that the controller or his representative, if any, must notify the supervisory authority referred to in Article 28 before carrying out any wholly or partly automatic processing operation or set of operations to serve a single purpose or several related purposes".

The defendant in this case was an employer. Early September 2009, in order to put an end to the abusive utilisation of its computers for personal purposes, it informed its employees and their representatives in writing that it was planning to implement an email monitoring system that would allow it to see the date, time, recipient, sender and topic of all emails sent and received from every individual computer. The employer announced that this system would be in place starting on 1 October 2009.

In an email dated 29 October 2009, the employer warned all staff that the abuse of its computer system was continuing and that continued abuse would lead to disciplinary measures.

In the meantime, despite these warnings and thanks to the monitoring system, the employer discovered that one of its employees, the plaintiff, an assistant in charge of financial analysis, had sent and received more than 1,200 personal emails from her professional email address from October to November 2009. She was called to a pre-dismissal meeting on 2 December and on 10 December 2009, the employer formally notified the CNIL that it had implemented the system. On 23 December 2009 she was dismissed. She challenged the dismissal before the labour court.

The labour court of Amiens held that the dismissal had a real and serious ground and therefore dismissed all the claims.

The employee appealed to the Court of Appeal in Amiens. It ruled in favour of the employer, reasoning that it had informed the employees and their representatives of the email monitoring in writing, as provided by law, and that the email monitoring system was in compliance with the CNIL's recommendations. Since the employer was not able to read the contents of the emails but only the date, hour, recipient, sender and the topic of the emails, the fact that the employer had not notified the CNIL until after the pre-dismissal meeting did not, in the court's view, deprive the dismissal of a real and serious ground.

The employee appealed to the Supreme Court.

Judgment

The Supreme Court overturned the appellate court's decisions. It held that the evidence of the plaintiff's abuse of her professional mailbox had been collected unlawfully, given that the CNIL had not yet been notified by the time the evidence was collected. Therefore, according to the French Supreme Court, the dismissal had no real and serious ground and the plaintiff was entitled to damages.

Commentary

With the development of new communication technologies, employers are now able to monitor their employees' activity and how they spend their working time, but also the conditions in which employees use their work tools. Even though, under French law, employers are

1 Law 78-17 « *Informatique et Libertés* » of 6 January 1978

entitled to do this and also to sanction their employees in cases of wrongful behaviour, this prerogative is not absolute and employers must comply with several procedures and conditions so as to guarantee the protection of employees' fundamental rights.

More particularly, French law has set two main principles that an employer must comply with respect to e-monitoring in the workplace: the principle of proportionality and the principle of transparency.

The principle of proportionality derives from article L.1121-1 of the Labour Code, which provides that *"no one may introduce restrictions to personal rights and to individual and collective liberties that are out of proportion to the objective sought"*.

In the *Nikon* case, the French Supreme Court ruled that there could be room for personal liberty and privacy in the workplace and held that an *"employee has a right to privacy, even in the workplace and during working hours; the right to privacy implies the protection of the confidentiality of communications. Therefore, an employer cannot have access to personal messages sent or received by its employees using the company's computer resources, even if the employer's policy prohibits all personal use of its computers"*.[2]

As a consequence, even if an employer specifies that computers are provided to employees for professional use only, under French law, the employer cannot completely prohibit employees from making personal use of their email system. If it is admitted that an employee can make a personal use of professional email system, it is only on condition that this use remains reasonable. Therefore, any abusive use or unlawful conduct (e.g. sending racist or anti-Semitic remarks via a professional email system[3]) may result in disciplinary sanctions, including dismissal.

Employees' right to privacy is not absolute. Employees' email communications are not considered private, except if designated as such by the sender or the recipient or if the subject line suggests that the email is private. Where an email is expressly identified as "personal" by the employee, the employer has no right to read the email because of the employee's right to privacy.

In the case at stake here, the employer respected this principle since the monitoring system did not allow the content of the dismissed employee's 1,200 personal emails to be read.

The breach concerned the second principle, i.e. the principle of transparency.

According to the French Labour Code and the French law of 6 January 1978, as amended on 6 August 2004, the principle of transparency obliges the employer to comply with the following steps before implementing a monitoring system: prior notification to employees' representatives, prior notification to employees, and prior notification to the CNIL.
In the case referred to the French Supreme Court, the employer did not comply with the last of these obligations and this invalidated both the evidence found and the subsequent dismissal.

It is particularly interesting to note that in the case at hand, the employee did not challenge the reality of the abuse but only the process followed by the employer to discover the abuse. Although the outcome may seem severe for employers, it is consistent with the obligation on employers to give prior notification to the CNIL of any monitoring system that collects personal data.

This decision confirms the position of the French Supreme Court of 6 April 2004, in which it ruled that where an employer had failed to declare an entry pass system to the CNIL, the employer could not dismiss an employee who refused to use it. But what is new in the decision of 8 October 2014 is that the French Supreme Court specified that even though the employer did not completely omit to declare the monitoring system to the CNIL, the fact that he did so late served to prevent him from using the results of the monitoring system to sanction an employee.

In terms of the damages that may be payable to the employee, under French law, employees with at least two years' service in a company with more than 11 employees, are entitled to receive damages equivalent to at least six months' pay in the case of unfair dismissal.

The Court of Appeal in Douai, to which the Supreme Court is returning this case for a retrial, will rule on damages. As the Supreme Court has held that the dismissal had no real or serious ground, the Court of Appeal will proceed as if the employee had not sent or received any personal mails in an abusive manner, because the employer did not respect all the steps it needed to take before implementing a monitoring system.

Comments from other jurisdictions

Greece (Harry Karampelis/KG Law Firm): The Hellenic Data Protection Authority (DPA) is the supervisory authority in Greece for data protection. It has issued various decisions and directives interpreting the Data Protection Law, which is the Greek transposition of Directive 95/46. The most important of these is DPA Directive 115/2001 on the processing of personal data of employees. It also applies to candidates, ex-employees and temporary employment agencies.

DPA Directive 115/2001 is rather sparing of words concerning the legality of checks by an employer on employee communications. It provides that the interception of emails (be they of a business or of a personal nature) in the working environment is permitted only if this is absolutely necessary for the organisation, for example to control the performance of the work to which the emails relate or to control turnover and expenses. The data recorded should be limited to what is absolutely necessary and suitable to achieve those purposes. On the other hand, the recording and processing of an entire batch of emails is never permitted, nor can the content of communications be collected, unless there is authorisation from a judicial authority and the processing is required for national security reasons or to investigate serious crimes (Article 19 of the Greek Constitution, Law 2225/1994).

The French Supreme Court's judgment reported above concluded that "the dismissal had no real and serious ground", suggesting that unlawfully collected evidence is excluded from use in civil proceedings.

In Greece, personal data processed according to the conditions set by Law 2472/1997, can be used in court proceedings, even (exceptionally) without the consent of the data subject, if such use is necessary for the court proceedings or for another task carried out by a public authority. According to the Greek Codes of Civil and Criminal Procedure, personal

2 French Supreme Court, labour section, 2 October 2001, no. 99-42.942
3 Cass. Soc., 2 June 2004, n°03-45.269

data collected through social media may be treated as evidence (i.e. either as a document or a confession, depending on the means and the way it is brought before the Court).

For the problem under discussion, one should mention Clause 7(2) of Law 2472/1997, which provides: *"Exceptionally, the collection and processing of personal data is allowed when [...]: c) the processing relates to data published by the subject itself or when the processing is necessary in order to acknowledge, exercise or defend a right before a court or a disciplinary process [...]"*. This applies both to non-sensitive and to sensitive data, although in the case of non-sensitive personal data, it is not necessary to obtain the DPA's permission. This provision reflects the legislator's attempt to combine the inherently conflicting right of evidence with the compelling need to protect individuals' privacy. It is worth mentioning that, even though the processing of personal data is allowed without the subject's consent in order to enable the person who collected the data to defend its right before a civil court, the processing is still subject to the limitation of 'purpose and necessity', i.e. personal data may only be used to the extent needed to fulfil the purpose of defending a right before a civil court. Any processing exceeding this limit shall be automatically considered unlawful.

Since 2001, the Greek Constitution has explicitly guaranteed the protection of personal data against collection, processing and use though electronic means, as well as through non-electronic means. At the same time it clearly forbids, before any court (civil, criminal, administrative), the use of evidence obtained by means of illegal processing of personal data or violation of the privacy of correspondence.

The legislator considered that the protection of personal data as well as the protection of the confidentiality of correspondence would be worthless if not accompanied by a corresponding procedural dimension. The protection would not be complete if the illegally obtained material could be used without hindrance before the courts. The constitutional prohibition against using illegally obtained evidence in a civil court meets the conditions for consistent practical application under the 1997 Data Protection Act. The exceptional processing of personal data of an individual without his or her consent to satisfy a legal interest of the person responsible for the processing can be done only if absolutely necessary and where the interests of the data subject are outweighed. For sensitive personal data (Article 7 of the 1997 Data Protection Act), the rules are tighter. The collection and processing of such data is forbidden and is tolerated only by authorisation of the DPA and provided that the terms of Article 7 (2) of the 1997 Data Protection Act apply.

Therefore, in the above case, the Greek courts would have ruled differently. The selective monitoring done by the employer, would have fallen within the provisions of the law, since the employee was promptly notified and the monitoring served purposes falling within the ambit of the employment relationship. The evidence would not be considered inadmissible before a court, although it would be subject to the limitation of purpose and necessity: therefore, it would be evaluated only to the extent needed to fulfil the purpose of defending the employer's rights before the court.

The Netherlands (Peter Vas Nunes):

1. It is widely expected that Directive 95/46 will be replaced later this year by a Regulation and a Directive. Once the Regulation is in force, the differences between the Member States in the way in which they protect the privacy of employees' personal communications should diminish.
2. In this case, the Court of Appeal found the monitoring system to be lawful because it did not allow the employer to read the contents of the emails, merely enabling the employer to know who sent them, when they were sent and their topic. How does this finding relate to, for example, the CtHR's ruling in *Copland – v – United Kingdom* (3 April 2007, application 62617/00)? Although *Copland* is far from the only relevant judgment on this topic (see, *inter alia*, the Italian case reported in EELC 2011, nr. 30), it is still a leading case.

Lynette Copland was a personal assistant. She was suspected of making excessive use of her employer's facilities for making and receiving personal telephone calls, sending and receiving personal emails and visiting websites unrelated to her work. Her employer monitored her use of these facilities without informing her, and there was no policy regulating the circumstances in which the employer could monitor telephone, email and internet use. For a reason not disclosed, the case came to the ECtHR.

The UK argued – as did the defendant in the French case reported above – that the monitoring in Ms Copland's case was limited in scope. The monitoring of her telephone usage consisted of analyses of telephone bills showing telephone numbers called, the dates and times of the calls and their length and cost. The monitoring of her email usage was limited to printouts detailing the date and time of the emails together with the recipients' email addresses. The monitoring of her internet usage took the form of analysing the websites visited, the times and dates of the visits. In other words, the employer made no attempt to intercept the contents of Ms Copland's personal communications and web surfings. Despite this, the ECtHR found, *inter alia*:

Telephone calls from business premises and emails sent from work are *prima facie* covered by the notions of "private life" and "correspondence" in Article 8 ECHR. Thus, if an employee is not given warning that his or her telephone calls and emails are liable to monitoring, the employee has a "reasonable expectation of privacy".

The collection and storage of personal information relating to an employee's telephone, email and internet usage, without the employee's knowledge, amounts to an interference of the right to respect of private life and correspondence, even if it is limited to date and length of telephone calls (or emails) and numbers dialled (or email addresses used).

3. An interesting aspect of the author's commentary on this French judgment is that, *because* ("as a consequence") the employer may not access employees' personal messages, it *cannot* (= may not?) completely prohibit employees from making personal use of their email system, provided this use remains reasonable. I do not see why a prohibition to intercept email messages should necessary lead to a right to use employer facilities for private purposes.
4. To me, the most interesting aspect of the Supreme Court's judgment lies in the court's conclusion that "the dismissal had no real and serious ground". This seems to suggest that unlawfully collected evidence is excluded from use in civil proceedings. In other words that, in this case, the employer is deemed not to have abused her employer's email system even though it was established that she had done just that. The Dutch Supreme Court

has consistently refused to draw this conclusion. In the absence of "additional circumstances", unlawfully collected evidence can be used in court. Another matter is that the employer may have to compensate the employee for the harm done to his or her privacy.

United Kingdom (Bethan Carney): The data collected by the employer in *Copland* was not used by the employer in disciplinary or other proceedings; it was a case brought by the employee for compensation for the violation of her rights under Article 8 of the European Convention on Human Rights. The UK courts, like, it seems, the Dutch courts, often refuse to exclude unlawfully collected evidence from use in employment proceedings if it is relevant. For example, in the Employment Appeal Tribunal ('EAT') case of *Avocet Hardware plc - v - Morrison* the EAT allowed the employer to adduce evidence gained from recordings of the employee (a telesales worker's) telephone calls. The recording was in breach of the Regulation of Investigatory Powers Act 2000 because the employer had not made sufficient efforts to tell employees that their calls could be intercepted. The EAT held that, if there was a breach of the employee's Article 8 rights, it was justified by Article 8(2) (which permits interference with the right to respect for private and family life 'in accordance with the law and as necessary in a democratic society in the interests of national security, [...] for the prevention of disorder or crime, [...] or for the protection of the rights and freedoms of others'). A refusal to admit the evidence would breach the employer's Article 6 rights to a fair trial. The UK courts have therefore sought to find a balance between Article 6 and Article 8 rights and are prepared to admit evidence gathered in breach of Article 8 where the evidence is so important to a fair hearing that it outweighs the right to privacy.

Subject: dismissal for misconduct – monitoring system of the professional mailbox
Parties: one employee – v – Crédits Finance Conseils which became Finapole
Court: *Cour de cassation* (French Supreme Court), social chamber
Date: 8 October 2014
Case number: 13-14.991
Internet publication:
http://legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000029565250&fastReqId=826899091&fastPos=1

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2015/15

"Secret" Facebook posting justified dismissal (PT)

CONTRIBUTOR RUI VAZ PEREIRA*

Summary
The employee in this case was one of the administrators of a "secret" Facebook group consisting of 140 employees and former employees. The group discussed matters relating to the employer. Some of the employee's posts were offensive towards the company, his superiors and his colleagues. The court agreed with the employer that this constituted a breach of the employee's duties and justified dismissal for cause. It reasoned that there was no expectation that the circle established by the "secret" group would be private and closed and that the employee was aware that his posts - which could have professional repercussions – could inevitably become public, thus preventing the employee from claiming the group was private and the content of the posts personal.

Facts
This case concerns an employee of a company engaged in security services, in particular, the surveillance of individuals and goods. The employee was a designated trade union delegate within the company.

The employee created a "secret" Facebook group (named "Employees of [X company]"). The group consisted of 140 members, all employees and former employees of the company. The employee was one of the administrators of the group, meaning that any member who wanted access to the Facebook account had to direct a request to him. The aim of the group was to discuss the company's activities and working conditions. Discussions were, however, conducted in an improper way, because the employee made several posts about procedures and working conditions, strikes and other matters that were offensive and insulting to the company, the employee's immediate superiors and his colleagues. The judgment does not reveal whether the employee used company equipment to make his posts, or whether the company had a policy regarding the use of its computer equipment and/or the use of Facebook in relation to company information.

The employer found out about the existence of the group and the postings. How it found out is not known. It initiated disciplinary proceedings against the employee and these eventually led to his dismissal.

The employee brought a case before the court, seeking reinstatement and payment of salary from the date of dismissal until the final judgment. He based his defence on (i) the right to privacy as part of his 'personality rights' and (ii) his statutory protection as a trade union representative. This case report does not go into the latter aspect, as this is not what makes this case noteworthy[1].

Judgment
Requested to rule on the matter, the Court of Appeal of Porto analysed the protection given by the Portuguese legal system to an individual's personality rights within an employment relationship and concluded that employees cannot prevent employees from, for example, being members of a social network. Nor can it decide that a particular type of group is not acceptable, for example, based on its level of privacy? So, employers can't ban membership of a group on principle.

The court performed its analysis solely on the basis of Portuguese law, without making reference to the European Convention on Human Rights and Fundamental Freedoms, the EU data protection rules or any other international instrument.

1 The Portuguese Labour Code provides that the dismissal of a trade union representative is presumed to be without just cause unless the employer proves otherwise. Jeopardising the regular functioning of the company by abusing his rights may be considered a serious breach of a trade union representative's duties and thus may (but need not in all cases) constitute just cause. In this case, the court held that some of the employee's Facebook posts far exceeded the boundaries of his right to freedom of expression.

The Court considered that the "secret" character of the group created on Facebook was substantially compromised by the fact that the social network included a large number of members (140). Moreover, the members, despite being described as "friends", were not necessarily so and might easily decide to disclose the content of the "secret" group to third parties. There was no close relationship of trust amongst the group members to justify any expectation that the secrecy of the group would not be breached.

The Court of Appeal considered that it was not acceptable that the group did not place any limits on its own freedom of expression, given that the posts were about the organisation and internal life of a company. In other words, the Court would have expected the members of the group to self-regulate their form of expression to some extent.

The Court considered that there could be *"no expectation that the circle established by the "Employees of [X company]" would be private and closed, there being no indication that the relationship established between its members was based on a minimum of trust, such that it could be expected that its privacy would not be breached by members' disclosing what was posted within the group"* and that therefore the content displayed on Facebook was subject to the disciplinary power of the employer, which was within the normal operation of the company.

With regard to the employee's dismissal, the Court considered that the falsehoods in the posts and their insulting nature could have created division and negativity amongst the employees as a whole and could have harmed the company's reputation. It concluded that there had been a serious breach of the employment duties and this gave rise to justifiable doubts about the future of the employment relationship.

Commentary

Under Portuguese law, the employer and the employee should respect each other's personality rights, which include the right to privacy and protection against access to and disclosure of details of their personal life, family life, emotional and sexual life, state of health and political and religious beliefs.

Also, by Portuguese law, the confidentiality of contents of an employee's personal messages should not be breached, despite the employer's right to have a policy on the use of the company's electronic resources (e.g. email).The law is generally interpreted strictly, notably by the Portuguese Personal Data Protection Authority.

This decision may therefore be something of a milestone in Portuguese jurisprudence, because for the first time a higher Court has found that the employee has waived his right to privacy on Facebook by publishing within a group of 140 members, most of whom the employee did not know well enough to trust.

A few days later (on 24 September 2014) the Court of Appeal of Lisbon delivered a judgment about a very similar issue. The Court was requested to rule on the case of an employee (a trade union delegate) who posted a text on his personal Facebook profile that was offensive to the reputation of his employer. He expressly asked all his Facebook 'friends' to share it on their pages and with their 'friends'. Disciplinary action was taken against him and this led to his dismissal for cause. In this case also, the Court considered that the content posted exceeded the employee's private domain and was therefore not protected by law. It felt that the comments posted were sufficiently offensive and serious to amount to the disciplinary offence of breach of the duty of courtesy and respect and that this had jeopardised the tranquillity of the work environment and the balance of the organisation to such an extent that it justified the dismissal for cause.

Bearing in mind that there is no specific legislation restricting use of or access to social media within the employment context (although Portuguese law and jurisprudence does allow for this to be restricted by company policies, provided these do not interfere with freedom of expression and conscience and the right to privacy), it is expected that Portuguese case law will have an important role to play in consolidating the rules concerning the use of social media by employees. The national courts are certainly now coming across instances of conflict between freedom of expression and the right to privacy, particularly in relation to the use of social media.

Comments from other jurisdictions

Poland (Marcin Wujczyk)There are no provisions in legislation regulating principals of using social media by employees. However, the Supreme Court repeatedly expressed the view on employee's duties of acting in the best interest of the employer It claimed that, i.a. "It raises no doubts, that remaining in employment relationship imposes on employee duties determined in the Art. 100 § 2 of the Polish Labour Code. Such duties include i.a. acting in the best interest of the employer and principles of social coexistence. If the employee exceeds the limits of allowed criticism towards the supervisor or bodies of the employer, then it is a clear example of a lack of loyalty, and regardless of duties assigned to the position occupied by the employee, it may be the reason for justified termination of an employment contract or termination of an employment contract without notice by fault of the employee. (...) even justified criticism towards the relations in a workplace shall remain within the law and characterized be a proper form of statement (...)" (judgement of the Supreme Court of 16 November 2006, I PK 76/06, issued OSNP 2007, No. 21-22, item 312). Additionally, in the judgement of 1 October 1997 (I PKN 237/97, issued OSNAPiUS 1998, No. 14, item 420) the Supreme Court claimed that "One of the conditions for allowed criticism is to maintain a proper form of statement. Actions of a plaintiff, consisted of posting on an announcement wall some offending texts towards the bodies of a co-operative glaringly breached work as well as member duties, and principals of social coexistence adopted in our society".

Exceeding the limits of allowed criticism can be the reason of justified termination of an employment contract without notice by fault of the employee. As a justified reason for dismissal the Supreme Court considered in particular insulting a member of employee's body by the employee, presenting unfounded charges of committing a crime, disparaging and arrogant statements towards the representative of the employer, questioning the employer's competences and unfounded accusations of fraud in withholding payment advances and moving money across borders without application of bank system (judgement of 11 June 1997, I PKN 202/97, OSNAPiUS 1998, No. 10, item 297).

Under the Polish law criticism expressed towards 140 people (as it occurred in the Portuguese case), which contains insulting statements shall be understood as an improper form of statement. It is difficult to consider such statement as private domain, in particular if there is possibility of passing the information to other people. The employee should direct the critical statements to supervisors or adequate supervision bodies (e.g. work inspection or trade unions), but without making such statements a public (even if restricted to the large group)

matter. Under no circumstances should criticism have insulting or accusing character. Therefore the Portuguese court rightly interpreted employee's duties concerning rights of worker to express critical statements towards employer actions.

Subject: Employee's use of social media – Fair dismissal
Parties: Unknown
Court: *Court of Appeal of Porto*
Date: 8 September 2014
Case Number: 101/13.5TTMTS.P1
Internet publication:
http://www.dgsi.pt/jtrp.nsf/56a6e7121657f91e80257cda00381fdf/917c9c56c1c2c9ae80257d5500543c59?OpenDocument

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2015/16

Deduction of expenses from posted workers' minimum wage allowed – but new legislation coming (NL)

CONTRIBUTOR ZEF EVEN*

Summary
The rule confirmed for now: an employer is entitled to deduct expenses for housing costs and health insurance premiums from the minimum wage payable to Polish posted workers, even if such deductions go beyond the deduction limits set in the enforcement policy of the Inspection of Social Affairs. Legislation proposed in order to put a stop to this.

Facts
The facts of this case were set out in EELC 2014/11. A brief summary is as follows.

A Dutch temporary agency deducts from the minimum wage payable to two of its Polish posted employees more than was allowed under the policy described below.

The minimum wage in the Netherlands is based on the Minimum Wage Act. A transnational service provider, as referred to in the Posted Workers Directive (Directive 96/71/EC), must apply the minimum wage to posted workers.

However, in practice, some service providers deduct certain costs from the wages paid to the posted workers, by setting these costs off against wages. In this case, housing costs and health insurance premiums were set off against the minimum wage. Pursuant to an enforcement policy of the Minister of Social Affairs, such a deduction is permissible, *provided* that that it is limited to a maximum of (i) 20% of the gross minimum wage for housing costs and (ii) 10% of the gross minimum wage for health insurance premiums. In this case, the costs deducted exceeded these maximum figures. In consequence, the Inspectorate fined the employer for this breach. According to the Inspectorate, the employer did not pay the full minimum wage because it set off various costs against the wages and it was therefore in violation of the Minimum Wage Act. The employer disagreed and argued that Dutch law allows these set-offs from wages. The enforcement policy therefore had no legal basis.

The District Court subscribed to the employer's point of view, holding that the Minimum Wage Act makes no reference to set-offs. In consequence, the general rules for set-offs should be applied. Set-off is a method by which an obligation to pay money is satisfied other than by payment. The Minimum Wage Act refers to an *entitlement* to a certain minimum wage, not to the actual *payment* of that minimum wage. An entitlement logically precedes set-off. Because of the entitlement there is an obligation on the employer to pay but this can be satisfied by the set-off. The Minimum Wage Act does not preclude set-off and therefore the employer did not violate any rule of public law by this means. Consequently, there was no justification for the Inspectorate to impose a fine. The Minister of Social Affairs disagreed with this ruling. He announced that the Inspectorate would lodge an appeal, without explaining the legal grounds of such an appeal. He simply stated that he still believed that set-offs against the minimum wage are not permitted, with the exceptions laid down in the enforcement policy.

Judgment
The Council of State confirmed the decision of the District Court (except for a procedural technicality): i.e. employees do not have the right to actual *payment* of the minimum wage, but merely an *entitlement* to a certain minimum wage. Set-offs against these entitlements are allowed. There is therefore no justification for the Inspectorate to impose a fine.

Commentary
Although the Minister of Social Affairs has lost this battle – and it is quite likely that the enforcement policy has come to an end – the 'war' against migrant workers working under the minimum wage is not over yet. About a month after the ruling of the Council of State, a legislative proposal for an 'Act Countering Bogus Constructions' was introduced, which has since been passed by the Lower House. It is based on Directive 2014/67/EU on the enforcement of Directive 96/71/EC. It is designed to bring about changes in several Acts, including the Dutch Civil Code and the Minimum Wage Act. It intends to prevent the abuse caused by employees of other Member States being willing to work in the Netherlands below the Dutch minimum wage. According to the Dutch legislator, there should be a level playing field in place in the Netherlands as concerns employment conditions and this should prevent unfair competition.

The proposed Act Countering Bogus Constructions introduces various means of reaching the aforementioned goals. For example, it requires the employer to specify salary slips, in more detail in order to clarify exactly which components of the amount paid are regarded as wages and which are reimbursements for expenses incurred. The minimum wage may also not be paid out in cash, but must be wired into the employee's bank account. The employer may no longer set off any amounts against the statutory minimum wage. Set-offs and deductions from the salary of posted workers are, however, allowed on salary over and above the minimum wage or in relation to (mandatory) holiday allowances. The legislator has also announced that specific exceptions to prohibit set-offs against and deductions from the minimum wage might be introduced by order of Council.

The only type of set-off that will still be admissible relates to advance

payments. These may be set-off against the actual payment of the statutory minimum wage. The proposed acts further introduce a detailed 'chain liability system', ensuring that in subcontracting chains, posted workers can hold the contractor of which the employer is a direct subcontractor liable for wages due. The Inspectorate may publish its findings on companies that use posted workers in the Netherlands. It may even inform the social partners if it suspects that a company does not satisfy the minimum mandatory requirements of a universally applicable collective labour agreement, in order to enable them to take measures against that company.

The legislative proposal drastically changes the way the Posted Workers Directive is enforced in the Netherlands. There will be many new rules to assist posted workers and to make enforcement of the rules easier and more effective. More civil servants will also be appointed to oversee compliance. Had the present case been tried based on the proposed rules, the outcome would have been very different.

Comments from other jurisdictions

Austria (Daniela Krömer): The enforcement of the Posted Workers Directive remains a challenge. While there are no comparable legal issues regarding the definition of minimum wage (e.g. housing costs cannot legally be deducted from the minimum wage of posted workers, or any worker, thus the legal status quo is in line with the ECJ's recent judgment in C-396/13, Sähköalojen ammattiliitto ry gegen Elektrobudowa Spółka Akcyjna). The legislator has introduced an Act Against Wage Dumping and Social Dumping in 2011 (§§ 7b to 7m AVRAG), and has since amended it in parts. The Act requires the employer to keep records of the remuneration of the posted employees as well as records regarding their social security status in German available at the work site. The Austrian Financial Police has been awarded competences to enter any premises unannounced and check these documents. Administrative fines are awarded if the documents are not available, not complete or if the employees are not being paid according to the applicable minimum standard; as a final sanction the enterprise is banned from posting workers to Austria for a certain amount of time. Also, a "chain liability system" like the one described in the Dutch proposal has been introduced.
While the administrative fines imposed are heavy, and the competences of the financial police wide, these enforcement mechanisms cannot prevent "informal" agreements between employers and employees regarding the actual pay, or the "pay-back" of already received remuneration in cash by the employee.

Subject: Posted Workers
Parties: Employer (temporary employment agency) – Social Affairs Inspectorate
Court: *Raad van State* (Council of State)
Date: 12 November 2014
Case number: 201400573/1/A3
Hardcopy publication: JAR 2015/11
Internet publication: www.rechtspraak.nl→ zoeken in uitspraken→ ECLI:NL:RVS: 2014:4062

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2015/17

Employee may not be dismissed on the day after returning from parental leave (LV)

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Summary
Latvian Labour Law does not prohibit the employer from making the employee's position redundant while the employee is on parental leave. However, if it does this the employer must remember that it is still obliged to offer the employee similar or equivalent work on no less favourable conditions and terms of employment. Labour law does not make this obligation conditional on what the employer is able to achieve.

Facts
The plaintiff in this case was an employee who claimed that her employer, the Ministry of Education and Science (the Ministry), had terminated her contract unlawfully on the grounds of a reduction in the number of employees. The employee, as is typical in such cases, requested the court to reinstate her in her previous job and to pay her compensation for the period of forced absence from work.

Under Latvian Labour Law a "reduction in the number of employees" is the termination of an employment contract for reasons not related to the conduct of an employee or his or her abilities, but is based on the performance of urgent economic, organisational, technological or similar measures within the business.

The employee was granted maternity and parental leave, first from 13 November 2010 to 12 June 2012, and then from 7 December 2011 to 6 June 2013. On the very first day the employee returned from leave, i.e. on 7 June 2013, she was served with an employment termination notice based on a reduction in the number of employees. The employment actually terminated on 8 July 2013, i.e. after the expiry of one month's notice.

The termination notice explained that the employee's position had been liquidated by the Ministry on 18 June 2012, i.e. while the employee was on leave, as a result of various structural and organisational changes. Further, it stated that the employer was unable to offer the employee any other job that corresponded with her qualifications and skills. Both the court of first instance and the court of appeal rejected the employee's claim.
The employee appealed to the Latvian Supreme Court. One of her arguments was that the lower court had failed to assess whether the Ministry had complied with the requirements of Section 156 (4) of the Labour Law, which states that: a) an employee who returns from parental leave is entitled to his or her previous job or b), if this is not possible, the employer must offer the employee similar or equivalent work on no less favourable terms and conditions. The employee stressed that the employer must comply with this provision of the Labour Law in all circumstances. Compliance is not optional.

Judgment
The issue before the Supreme Court was whether the employer's duty to ensure an employee who returns from the parental leave is given

the same or equivalent work is absolute or depends on the employer's ability to do it.

The Supreme Court supported the employee's view. It ruled that the Labour Law does not prohibit the employer from making an employee's position redundant while he or she is on parental leave but if it does, the employer is still obliged to find the employee similar or equivalent work on no less favourable conditions than before. The court concluded that the Labour Law does not make this obligation conditional on the employer's ability to comply.

On the basis of this line of reasoning, the Supreme Court cancelled the judgment of the court of appeal and ordered it to retry the case.

Commentary

The court of appeal heard the case a second time and by its judgment of 25 February 2015 satisfied the employee's claim. It remains to be seen whether the Ministry will again appeal the judgment of the court of appeal.

In any event this judgment is likely to change current practice, which allows employers to terminate employment contracts with employees who return from parental leave if they have no job for them. The existing approach is based on the assumption that the prohibitions on the employer against terminating the employment contract of certain categories of employees are set out exhaustively in just one Section of the Labour Law (Section 109), and employees who return from parental leave generally do not fall into any of these categories.

There are also other issues raised by this judgment, for example, for how long must the employer retain an employee who has returned from parental leave and when would it be appropriate for the employer to terminate the employment contract with such employee based on a reduction in the number of employees? And what happens in situations where both the employer and employee are aware from the very beginning that the employer is not able to ensure any further work for the employee?

Comments from other jurisdictions

Austria (Daniela Krömer): Austrian laws – the Mothers Protection Act (MSchG) and the Fathers Parental Leave Act (VKG) – stipulate a somewhat "graded" protection against termination of an employment contract while on parental leave (§ 10 (3) to (7) MSchG). In any case, labour law courts have to agree to the termination, and they can only do so if the legal requirements are met. Before the child has turned one year old, a termination is only possible if the establishment the employee has worked in is shut down or significantly reduced; between first and second birthday of the child, a termination is possible if the employee has been made redundant for economical or organisational reasons, and no other less protected employee's contract could have been terminated instead. If the employee choses parental part time, the same level of protection against termination continues to exists until the child has turned four. Hence, an absolute prerogative of the employee's interest over the employer's possibilities does not exist. However, in practice the hurdle of winning the court's approval by proving the above mentioned conditions turns out to be a very high one.

Croatia (Dina Vlahov): In the case at hand, the Croatian courts would most probably have come to the same conclusion as the Latvian Supreme Court. Pursuant to the Croatian Labour Act, the employer is not allowed to dismiss an employee, for example, during pregnancy, parental leave, work in half-time working hours or within 15 days following one of these periods. The absolute prohibition of the dismissal in these situations exists regardless of the type of the dismissal (i.e. ordinary or extraordinary). If the employer knows of the employee's rights at the time of the dismissal but goes ahead and serves a termination notice, the dismissal will be void *(Vrhovni sud Revr-140/02-2, 2 October 2002)*.

The employee has the right to return to his or her previous job upon return from maternity or parental leave. The employee must give the employer one month's notice of return. If there is no longer any need for the employee's previous job, the employer must offer the employee another appropriate job with no less favourable working conditions, regardless of any structural or organisational changes at the employer. Only if the employee does not accept a new job may the employer dismiss the employee for economic, technological or organisational reasons.

Further, an employee who has exercised his or her right to return to the old job or an equivalent job is entitled to additional training if any changes have occurred in technology or working methods during his or her absence, as well as to any other benefits arising from improvements to working conditions.

Czech Republic (Nataša Randlová): As in Latvia, Czech employers are not prohibited from making an employee's position redundant while he or she is on parental leave. However, the employer must give a returning employee work in accordance with the terms and conditions agreed in the employment contract, especially terms relating to the type of work and place of work. In contrast to the decision reported above, if the employer does not have any work for the returning employee, it may terminate the employment by notice for organisational reasons.

In my view, it is important that employees on parental leave should be protected, but this protection should not interfere with the rights of employers to decide on the number and type of employees they need, especially if the parental leave lasts several years for example, as is not unusual in the Czech Republic. This ruling therefore seems harsh for employers. If the employer does not have a suitable position for an employee returning from parental leave, in my view, it should not be forced to create one artificially.

Denmark (Mariann Norrbom): Similar to Latvian law, the Danish act implementing the Maternity Directive (the Danish Act on Equal Treatment of Men and Women) includes a right for women on maternity leave to return to similar or equivalent work without less favourable conditions than before going on maternity leave. However, this right is not unconditional, as it is not prohibited to dismiss pregnant employees or employees on maternity leave on grounds of redundancy. The main requirement is that the employer can justify that the employee is not dismissed on grounds of pregnancy.

It appears that the ruling of the Latvian Supreme Court in this case means that it is not possible to dismiss a pregnant employee or an employee on maternity leave on grounds on redundancy. Thus, Latvian law warrants wider protection for employees on maternity leave than required under the Directive compared to the Danish interpretation of the Directive.

Poland (Marcin Wujczyk): Similar problem, as in a commented ruling of the Latvian Supreme Court, appeared pursuant to provisions of the

Polish Labour Law. Under the Art. 1864 of the Polish Labour Code an employee, who returns from a parental leave, shall be ensured by an employee with a current position. If it is impossible, the employer shall reinstate the employee to an equivalent position or to a position corresponding to the employee's professional qualifications. The employee is entitled to remuneration which is not lower than the remuneration received before the beginning of the parental leave. Initially the jurisprudence claimed, that the employer is obliged to provide the employee returning from maternity leave with work, regardless of whether there is a position adequate for the employee. Over time, such approach has undergone some alterations. Recently, it has been indicated more frequently that if the employee is pregnant at the time of returning to work, the employer may be entitled to terminate employment relationship when it is not possible for him to provide employee with work. Such approach seems to be rational. It eliminates situations when the employee is allowed to perform work just to terminate the employment contract afterwards. In such cases the employer's interest shall be also taken into account. If there is objectively no possibility to continue employing the employee, it is difficult to hold the employer responsible for creating a new workplace for such employee. Although the issue of employee's rights, who returns from the parental leave is not fully clarified, the recent view of lawyers indicates that the Polish courts would adopt a position different from a position expressed by the Latvian Supreme Court.

Romania (Andreea Suciu, Andreea Tortov): Romanian law, by Government Ordinance No. 111/2010 regarding parental leave, expressly prohibits the employer from terminating an employment agreement during parental leave and for six months after returning to work even in cases of urgent economic, organisational, technological or similar issues. The law provides one exception: where the dismissal is due to insolvency or judicial restructuring.

This has also been confirmed in case law. The Bucharest Court of Appeal ruled in Decision No. 644/R of 4 February 2014 that the employer was not allowed to dismiss the employee for six months after returning from parental leave, even as a disciplinary sanction. In this case, an employer dismissed an employee for disciplinary reasons 20 days after returning from parental leave. The Court mentioned that the prohibition does not mean that employees have no disciplinary responsibility, but it *"limits the employer's ability to consider that misconduct is serious enough to justify dismissal, so the appropriate sanction should be chosen from the other disciplinary sanctions available"*. Moreover, the Court mentioned that *"even if the employee has intentionally breached the disciplinary rules, disciplinary dismissal cannot be applied"*. The Court considered that since the dismissal breached the prohibition, it was not necessary to go on to analyse whether it was sound.

In our view, such an interpretation of the law is excessive, as it limits the employer's right to choose the proper disciplinary sanction without justification. The employer should be allowed to dismiss its employees for misconduct, as this does not relate to the to the fact that the employee has been on parental leave. In addition, this interpretation of the law might lead to discrimination against other employees who have been dismissed for the same misconduct.

Considering the fact that the Romanian courts tend to be employee-friendly and keeping in mind the decision described above, we think it is likely that a dismissal within six months of return from parental leave would be considered void in any situation other than bankruptcy or judicial restructuring.

Slovak Republic (Beáta Kartíková): The Slovak Labour Code prohibits employers from terminating employment during maternity or parental leave (i.e. protected periods) except where this is by agreement. The prohibition against terminating the employment applies only to employment during maternity or parental leave and so there is nothing in Slovak law to prevent an employer terminating an employee after his or her return to work if there are reasons for termination under the Labour Code. This could, for example, include a decision by the employer to reduce the number of employees.

If an employee returns to work after the end of his or her maternity or parental leave, the employer must give the employee his or her original type of work and workplace. If this is not possible the employer must provide other work, based on the employment contract. The employer must not give the employee less favourable conditions than he or she enjoyed at the time the maternity or parental leave began. The employee is entitled to any benefits arising from improvements to the working conditions that he or she would have received if he or she had not taken leave. However, note that if the employee refuses to accept work offered, this will be considered as a legitimate reason to terminate the employment.

Subject: Parental leave
Parties: Employee – v – Ministry of Education and Science of the Republic of Latvia
Court: *Latvijas Republikas Augstākās tiesas Civillietu departaments* (Supreme Court of the Republic of Latvia (civil section))
Date: 12 November 2014
Case number: Civil Matter No. C28374713, SKC-2608/2014
Hard Copy publication: Not available
Internet publication: http://www.tiesas.lv/nolemumi/pdf/191439.pdf

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2015/18

The "Jobs Act": changes to rules for termination, executives and mandatory severance pay

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Changes are being made in relation to a number of aspects of Italian employment law, based on Prime Minister Renzi's umbrella term for them: the 'Jobs Act'. This includes various employment law enactments, beginning with a law regulating fixed term contracts brought in last year and amendments to existing law, along with at least two more changes that have not yet been completed.

The main rules (so far) are as follows:

1. *Termination*

By Legislative Decree no. 23 of 4 March 2015, instances of reinstatement of employees in their previous positions will significantly reduce and will be substituted by an indemnity based on length of service. This rule will apply to those hired after 7 March 2015 and this will mean that for

some time, existing employees will enjoy a greater degree of protection in cases of unlawful termination than new employees.

Although the change might not appear significant in other EU countries, where monetary sanctions rather than reinstatement have been normal practice, this change is a major shift in Italian employment law, which has relied on reinstatement ever since the Workers' Statute *('Statuto dei lavoratori')* of 1970. Even after 2012, when Minister Fornero of the Monti Government introduced some very controversial changes to the rules on termination and pensions, reinstatement continued to be the principal sanction for unlawful dismissal in organisations with over 15 employees. But now it is the Renzi Government's intention to make it easier to terminate newly hired staff and to this end, it is starting to move in a distinctly employer-friendly direction.

With the exception of executives (who can be reinstated only in very limited circumstances), cases of discrimination and some other specific cases, reinstatement has always been the sanction of choice for unlawful dismissal in organisations with over 15 employees, while a mere indemnity, ranging from between two and a half and six months was imposed on organisations below that threshold.

Now reinstatement is no longer an option in relation to any employer: if a termination, whether for redundancy or for reasons to do with the individual, is not lawful, the sanction will in almost all cases be an indemnity equal to two months' remuneration for each year of employment. A minimum of four months and a maximum of 24 is provided, either for very short or very long employment relationships.

Unlike in Spain, which has had a similar system to Italy for many years, the indemnity is not payable in every case of termination, but is only owed if the termination was unlawful. A lawful termination attracts no indemnity at all. But similarly to Spain, the Italian Government has now given some financial backing to indemnities, by providing that if an offer of one month's remuneration per year of service is made and accepted before a Commission appointed under section 2113 of the Civil Code, the indemnity will be tax free, while any additional amount will be subject to the ordinary tax rules. (Note that if the employer does this it may only offer an extra month's pay per year of service, capped at 18 months' pay, and it may only do so before terminating the contract and where the termination is not subject to court proceedings).

An indemnity is also provided where employees are terminated without written reasons and where the allegation is of negligence by the employee but no disciplinary procedure was conducted before the dismissal took place. In these cases, the indemnities are reduced to one month per year, with a minimum of two months and a maximum of 12, unless the court deems higher indemnities should apply.

Reinstatement is therefore now possible only in the following scenarios:

- discrimination;
- retaliation;
- termination during maternity;
- oral termination;
- disciplinary terminations (where there is evidence that the employee was dismissed based on facts that never happened)

Reinstatement will apply to collective dismissals only where the terminations were not communicated in writing. By contrast, for breaches of the mandatory information and consultation requirements with the trade unions and where the selection criteria have not been respected, the usual rule of two months' pay per year of service will apply.

Note that the trade unions will retain the special remedy that applies in cases where a collective redundancy is found to have an anti-union aim. This is known as "section 28 proceedings" (based on s28 of the Workers Statute) and the remedy is reinstatement.

2. *Changes for executives*

Further to the ECJ decision in case C-596/12 where the Court remarked that Italy had not provided any legal protection for executives in cases of mass redundancy, the Italian State decided to extend the duties of information and consultation to the executives' trade unions. These are different from the unions that represent non-executive staff. For breach of any of these rules, executives could be awarded an indemnity ranging from between 12 and 24 months' pay. The selection criteria rules have also been changed and breaches are subject to the same sanctions.

In addition, the law allows collective agreements for executives to provide for different indemnities. Note that in 1995, executives in the manufacturing sector were granted (by means of a specific agreement) an indemnity equal to and in addition to their notice period, plus an age-related increase to this in the case of restructuring, reorganisation or collective dismissal.

Shortly before the new law came in, however, the agreement granting these rights, together with the collective agreement for executives in the manufacturing sector was terminated and the new one provides only for indemnities for individual terminations – and these have been reduced significantly, as have notice periods.

No other executive CBA currently provides rules for collective dismissals and it is likely that the services sector CBA will also reduce its indemnities on next renewal.

3. *Mandatory severance ('TFR')*

A change to mandatory severance (*trattamento di fine rapporto*, or 'TFR') pursuant to Law no. 190 of 23 December 2014 and effective from 1 January 2015 seems at first sight to be favourable to employees.

TFR is paid in any case of termination (just cause included) and to any employee, including executives, and is roughly equal to 7.5% of salary and bonuses. Thus, every year, the employer pays approximately 7.5% of annual salary into a separate fund. This was only payable to employees before the end of the employment in cases specified in law, and was limited to a certain percentage of employees belonging to the same company.

The cases specified by law included, for example, where the employee bought his or her first house or underwent serious and expensive surgery. The fact that the exceptions were limited helped to guarantee the stability of the fund for other employees in the organisation.

About 15 years ago, employees were also given the chance to pay their TFR accruals into additional pension funds, which were favourable for tax. In addition, on final payment at end of employment, TFR was taxed separately, since it had been accrued over a number of years and might otherwise serve to increase the tax payable in the year it was taken.

Under the new law it is now possible for employees to opt to receive accrued TFR in addition to their monthly salary. (Note that this covers amounts newly accrued each month, but not pre-existing accruals). But what might seem to be as advantageous because employees are no longer obliged to save in a particular way, is in reality favourable only for employees on the lowest tax rate. All other employees will be now subject to normal taxation and will therefore be fully taxed if they decide to take immediate payments. And the same law has also introduced an increase in tax for payments to TFR that go directly into pension funds - even though in the past the law had encouraged saving of this kind by making it favourable to tax.

The TFR changes may appear on the face of it to be advantageous to employees, but, for example, although families on very low incomes might receive a temporary increase to their monthly salary, they will lose the larger payment that they would have received upon termination for enforced saving. If they had previously decided to pay their TFR into additional pension funds, they will also now incur higher tax.

Commentary

The changes to the termination rules have been well received both by the European Commission and by a number of EU Member States, though from an Italian perspective, they increase job-insecurity compared to the old rules and are likely to produce some unbalanced outcomes for some time. For example, in a collective dismissal in which the employer breaches the selection criteria, those already employed on 7 March 2015 will be reinstated, whereas those employed afterwards will only receive an indemnity.

Similarly, although at first sight, the rules for executives increase their protection, this is coupled with a downward trend in financial compensation on termination and so the picture is mixed.

The stated political aim of the changes as a whole is to find ways to reduce the high rate of unemployment in Italy, yet it is hard to predict whether they will have that effect in practice. It may turn out that other obstacles, including the economic crisis, corruption and inefficiency conspire to keep unemployment rates as high as before.

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ECJ COURT WATCH

SUMMARIES BY PETER VAS NUNES

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RULINGS

ECJ 28 January 2015, case C-417/13 *(ÖBB Personenverkehr AG – v – Gotthard Starjakob)* **("Starjakob")**, Austrian case (AGE DISCRIMINATION)

Under the Austrian legislation that applied until 2012, service completed before the age of 18 was not taken into account for the purpose of calculating the reference date for advancement to higher steps on the salary scale. In a judgment delivered on 18 June 2009 in the *Hütter* case (C-88/08), the ECJ held that Directive 2000/78 precludes "national legislation which, in order not to treat general education less favourably than vocational education and to promote the integration of young apprentices into the labour market, excludes periods of employment completed before the age of 18 from being taken into account for the purpose of determining the incremental step at which contractual public servants of a Member State are graded". To comply with this judgment, Austria amended its legislation in 2011. Employees hired before 2005 were given the option to have their reference date recalculated in such a way that their pre-18 service counted towards determining that date. However, employees wishing to exercise this option (i) had to complete and submit a form including evidence of their pre-18 service and (ii) had to accept that every period required for advancement in each of the first three steps on the salary scale was extended by one year, thereby effectively undoing all or most of the advantage of the statutory amendment. Employees failing to submit such a form retained their old reference date.

Mr Starjakob worked for ÖBB, starting before the age of 18. In 2012, on the basis of the ECJ's judgment in *Hütter*, he commenced proceedings against ÖBB, claiming payment of the difference between what he was paid from 2007 to 2012 and what he would have been paid had his pre-18 service been taken into account. He did not submit the form required for this purpose.

The facts of the case and some of the legal issues closely resemble those on which the ECJ ruled on 11 November 2014, in the *Schmitzer* case (C-530/13), summarised in the previous issue of EELC.

National proceedings

The *Landesgericht* turned down Mr Starjakob's claim, but on appeal the *Oberlandesgericht* found in his favour. ÖBB appealed to the *Oberster Gerichtshof* (Supreme Court), which referred seven (groups of) questions to the ECJ. Questions 1b and 4 were whether Articles 2 and 6(1) of Directive 2000/78 preclude national legislation which, to end age discrimination, takes account of pre-18 service periods but simultaneously extends the period required for advancement in each of the three first salary steps. Question 1a was whether such legislation must allow an employee whose pre-18 service was not taken into account to obtain financial compensation which corresponds to payment of the difference between the remuneration he actually received and that which he should have received. Question 5 was whether legislation such as that at issue may require such an employee to provide evidence of his pre-18 service on pain of remaining in the old salary system. Questions 6 and 7 related to the limitation period for submitting claims.

ECJ's findings

1. The ECJ essentially repeated its findings in *Schmitzer*. Following the amendment of the law in 2011, the reference date is determined without discrimination based on age. However, the legislature neutralised the advantage resulting form this amendment by extending the period required for advancing to the next step on the salary scale in the first three steps, a measure that is likely to apply only to employees with pre-18 service. Consequently, Austrian law continues to apply differing treatment to the two categories of employee concerned. This difference of treatment is not objectively justified (§ 23 – 40).

2. National legislation which seeks to end discrimination based on

age does not necessarily have to allow an employee whose pre-18 service has not been taken into account in the calculation of his advancement to obtain financial compensation corresponding to payment of the difference between the remuneration he would have received in the absence of such discrimination and that which he actually received. That being said, according to settled case law, where discrimination contrary to EU law has been established, as long as measures reinstating equal treatment have not been adopted, observance of the principle of equality can be ensured only by granting to persons within the disadvantaged category the same advantages as those enjoyed by persons within the favoured category, the latter arrangements, for want of the correct application of EU law, being the only valid point of reference remaining (§ 42-47).

3. Directive 2000/78 is still not being correctly applied since the adoption of the national legislation at issue. The system applicable to the employees favoured by the previous system therefore remains the only valid point of reference. Therefore re-establishing equal treatment, in a case such as that at issue in the main proceedings, involves granting employees disadvantaged by the previous system the same benefits as those enjoyed by the employees favoured by that system, both as regards the recognition of periods of service completed before the age of 18 and advancement in the pay scale (§ 48).

4. Directive 2000/78 does not preclude providing for an obligation of cooperation under which the employee must give his employer evidence relating to the periods of service prior to the age of 18 so that they can be taken into account (§ 52-54).

5. In the absence of EU rules in the field, it is for the national legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights derived by individuals from EU law, provided that such rules are not less favourable than those governing similar national actions (principle of equivalence) and that they do not render the exercise of rights conferred by EU law practically impossible or excessively difficult (principle of effectiveness) (§ 61).

6. As regards the principle of effectiveness, it is compatible with EU law to lay down reasonable time limits for bringing proceedings in the interests of legal certainty, to the extent that such time limits are not liable to make it impossible or excessively difficult in practice to exercise the rights conferred by EU law (§ 62).

7. The date of delivery of the judgment in *Hütter* does not affect the starting point of the limitation period at issue in the main proceedings and is therefore irrelevant for the purposes of determining whether, in those proceedings, the principle of effectiveness has been respected. The limitation period begins to run, in the case at issue, from the day that the employee was placed in grade by the employer, that is the date on which the employment relationship began. It cannot be disputed that such a time limit constitutes a reasonable time limit for bringing proceedings in the interests of legal certainty. Moreover, in the case in the main proceedings, Mr Starjakob's right to request a re-evaluation of the reference date is not time-barred (§ 65-68).

8. The principle of equivalence requires that all the rules applicable to actions apply without distinction to actions of infringement of EU law and to similar actions alleging infringement of national law. An action seeking to enforce salary claims, such as that at issue in the main proceedings, is subject to a three-year limitation period. However, employees who have cooperated benefit from a suspension of the limitation. The provision at issue is a procedural provision governing actions based on infringements not of national law but of EU law, insofar as it was adopted to reflect the guidance from the judgment in *Hütter*, and the suspension of the limitation period also covers the period between delivery of the judgment and publication of the 2011 law. It follows that, since observance of the principle of equivalence requires the application without distinction of a national rule to actions based on infringements of both EU and national law, that principle is not relevant to a situation such as that at issue in the main proceedings, which concerns two types of actions, both based on an infringement of EU law (§ 71-74).

Ruling (judgment)

1. EU law, in particular, Articles 2 and 6(1) of Council Directive 2000/78 [...] must be interpreted as precluding national legislation such as that at issue in the main proceedings, which, to end discrimination based on age, takes account of periods of service prior to the age of 18, but which, simultaneously, includes a rule, (applicable in reality only to employees who are subject to that discrimination) extending by one year the period required for advancement in each of the three first salary steps and in so doing, permanently maintaining a difference in treatment based on age.

2. EU law, in particular Article 16 of Directive 2000/78, must be interpreted as meaning that national legislation that seeks to end discrimination based on age does not necessarily have to allow an employee whose service before 18 has not been taken into account in calculating his advancement, to obtain financial compensation of payment of the difference between the pay he would have received in the absence of that discrimination and what he actually received. Nevertheless, in a case such as that at issue in the main proceedings, as long as a system to abolish discrimination on grounds of age in conformity with the provisions of Directive 2000/78 has not been adopted, re-establishing equal treatment entails granting employees who have had at least some experience before the age of 18 the same benefits in terms of recognition of periods of service before 18 and advancement on the pay scale, as employees who have had experience of the same type and comparable duration since reaching that age.

3. EU law, in particular Article 16 of Directive 2000/78, must be interpreted as not preventing the national legislature from providing for an obligation of cooperation, in order to take into account periods of service completed before the age of 18, under which the employee must give his employer the evidence relating to those periods. Nevertheless, there is no abuse of law in (i) an employee's refusal to cooperate with this or (ii) his seeking to obtain payment intended to re-establish equal treatment with other employees who have gained experience of the same type and comparable duration after the age of 18.

4. The principle of effectiveness must be interpreted as not precluding a national limitation period for claims founded in EU

law from starting to run before the date of delivery of a judgment of a court that has clarified the legal position on the matter.

ECJ 5 February 2015, case C-117/14 *(Grima Janet Nisttahuz Poclava – v – Jose María Ariza Toledano)* **("Poclava")**, Spanish case (FIXED-TERM EMPLOYMENT)

Facts

In 2012, Spain enacted a law amending its employment legislation on account of the economic crisis. Among the measures for "fostering employment of indefinite duration and other measures to promote job creation" was a provision allowing undertakings with fewer than 50 workers, under certain conditions, to hire employees for an indefinite period with a probationary period clause with a duration of one year rather than the normal period (which varies between two and six months). Ms Poclava was hired under such a contract. She was dismissed 3½ months later.

National proceedings

Ms Poclava brought an action against her employer seeking a declaration that her dismissal was unfair and an order for reinstatement or compensation. The court referred questions to the ECJ, essentially asking whether, on a proper construction of Article 30 of the Charter and Clauses 1 and 3 of the Framework Agreement on fixed-term work annexed to Directive 1999/70, national legislation such as the Spanish law establishing and regulating employment contracts of indefinite duration to support entrepreneurs and providing for a one-year probationary period, is precluded.

ECJ's findings

1. The provisions of the Charter are addressed to Member States only when they are implementing EU law. The fundamental rights guaranteed in the EU legal order are applicable in situations governed by EU law, but not outside such situations. It is necessary, therefore, to determine whether the Spanish legislation at issue implements EU law (§ 28-30).

2. An employment contract such as that of Ms Poclava is not a fixed-term contract, and Directive 1999/70 does not regulate the duration of a probationary period. Therefore, such a contract does not fall within the scope of the Directive (§ 31-38).

3. The ECJ cannot rule on the interpretation of ILO Convention 158 or the European Social Charter (§ 43).

Ruling (judgment)

The ECJ lacks jurisdiction to answer the questions referred to it.

ECJ 5 February 2015, C-317/14 *(European Commission – v – Kingdom of Belgium)* (NATIONALITY DISCRIMINATION)

Facts

Belgian law requires candidates applying for a post in the public service to provide evidence that they have sufficient knowledge of the local language, which is French, Dutch or German, depending on where the post is situated. If the candidate has a certificate issued by the relevant Belgian authority, he or she need not sit an examination. In the absence of such a certificate, the candidate must apply, and sit, an examination to test his or her knowledge of the language in question.

Commission's action

In 2010, the European Commission sent the Belgian government a notice to the effect that the said requirement constitutes discrimination prohibited by Article 45 TFEU and Regulation 1612/68 (replaced in 2011 by Regulation 492/2011). The Belgian government did not contest the substance of the action but responded that it needed more time, given the complex structure of the country.

ECJ's findings

1. The right of a Member State to require a certain level of knowledge of a language in view of the nature of the post must not encroach upon the free movement of workers. The requirements under measures intended to implement that right must not in any circumstances be disproportionate to the aim pursued and the manner in which they are applied must not bring about discrimination against nationals of other Member States (§ 25).

2. The possession of a diploma certifying that the candidate has passed a language examination may constitute a criterion for assessing the required linguistic knowledge (§ 27).

3. However, to require that a person applying to take part in a recruitment competition provide evidence of his linguistic knowledge exclusively by means of one particular type of certificate, issued only by one particular Belgian body tasked with conducting language examinations in Belgium for that purpose, appears, in view of the requirements of the freedom of movement of workers to be disproportionate to the aim pursued. That requirement precludes any consideration of the level of knowledge which a holder of a diploma obtained in another Member State can be assumed to possess on the evidence of that diploma. Moreover, that requirement, although applicable to Belgian nationals and to those of other Member States alike, in practice puts nationals of other Member States wishing to apply for a post in a local service in Belgium at a disadvantage. It effectively forces interested persons residing in other Member States, for the most part nationals of those Member States, to travel to Belgium for the sole purpose of having their knowledge tested in a mandatory examination, in order to obtain the certificate required for their application. The additional expenses that requirement entails are liable to make it more difficult to gain access to the posts in question (§ 28-31).

Ruling (judgment)

The ECJ declares that by requiring candidates for posts in the local services established in the French-speaking or German-speaking regions, whose diplomas or certificates do not show that they were educated in the language concerned, to provide evidence of their linguistic knowledge by means of one particular type of certificate, issued only by one particular Belgian body following an examination conducted by that body in Belgium, the Kingdom of Belgium has failed to fulfil its obligations under Article 45 TFEU and Regulation (EU) No 492/2011 on freedom of movement for workers within the Union.

ECJ 12 February 2015, case C-396/13 *(Sähköalojen ammattiliitto 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 for the Finnish company ESA 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. The 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 in Finland.

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.

By questions 1-5, the referring court essentially asked whether Directive 96/71, read in conjunction with Article 47 of the Charter (regarding the right to an effective remedy) prevents a rule of the Member State of the seat of the undertaking that has posted workers (in this case, Poland) to the territory of another Member State (in this case, Finland) from prohibiting the assignment of claims arising from employment relationships and effectively barring a trade union from bringing an action before a court of the second Member State and recovering pay claims assigned to it by the posted workers.

By question 6, the referring court asks, in essence, whether Article 3 of Directive 96/71, read in the light of Articles 56 and 57 TFEU, must be interpreted as meaning that it precludes the exclusion of certain elements of pay from the minimum wage.

ECJ's findings

1. Re questions 1-5: there is nothing in the present case that gives any grounds for calling into question the action the plaintiff union has brought before the Finnish courts (§ 20-26).

2. Re question 6: the first subparagraph of Article 3(1) of Directive 96/71 pursues a dual objective. First, it seeks to ensure a climate of fair competition between national undertakings and undertakings that provide services transnationally, inasmuch as it requires the latter to afford their workers the terms and conditions of employment laid down in the host Member State (as regards a limited list of matters). Secondly, the provision aims to ensure that posted workers will have the rules of the host Member State for minimum protection as regards the terms and conditions of employment that apply to them while they work on a temporary basis in the territory of that Member State (§ 30).

3. The second subparagraph of Article 3(7) of the directive provides: *"Allowances specific to the posting shall be considered to be 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."*

   The task of defining what the constituent elements of the minimum wage are is a matter for the law of the Member State of the posting, but only insofar as the definition, (resulting from relevant national law or collective agreements or from the case law of the national courts), does not have the effect of impeding the freedom to provide services between Member States (§ 33-34).

4. According to the Court's settled case law, allowances and supplements that are not defined as constituent elements of the minimum wage by the law or practice of the Member State to whose territory the worker is posted, and which alter the relationship between the service provided by the worker and the consideration he receives in return for that service, cannot be treated as elements of that kind (§ 35-36).

5. The wording of the second subparagraph of Article 3(1) of Directive 96/71 makes quite clear that minimum rates of pay are to be defined by the national law and/or practice of the Member State to whose territory the worker is posted. It is implicit in that wording that the method of calculating those rates and the criteria used are also a matter for the host Member State. It follows, first, that the rules in force in the host Member State may determine whether the calculation of the minimum wage must be carried out on an hourly or a piecework basis. Secondly, the rules for categorising workers into pay groups (applied in the host Member State based on various criteria including the workers' qualifications, training and experience and/or the nature of the work), apply instead of the rules that are apply to the posted workers in the home Member State (§ 39-43).

6. However, if they are to be enforceable against an employer posting workers, the rules on the method of calculating the minimum wage and on the categorisation of those workers into pay groups applied in the host Member State, must also be binding and meet the requirements of transparency. This means, in particular, that they must be accessible and clear. It is for the national court to ascertain whether those conditions are met in the case before it (§ 40 and 44).

7. The relevant collective labour agreements in Finland provide for the payment of a daily allowance to posted workers. Under those agreements, the allowance takes the form of a flat-rate daily payment. The allowance is intended to ensure the social protection of the workers, making up for the disadvantages entailed by the fact that the workers are removed from their usual environment. It follows that such an allowance must be classified as an 'allowance specific to the posting' within the meaning of the second subparagraph of Article 3(7) of Directive 96/71. That provision of the directive states that such an allowance is part of the minimum wage. Accordingly, the daily allowance at issue must be paid to posted workers such as those concerned in the main proceedings to the same extent as it is paid to local workers when they are posted within Finland (§ 46-51).

8. According to the relevant provisions of the Finnish collective agreements, compensation for travelling time is paid to workers

if their daily commute to and from work is of more than one hour's duration. For the purposes of calculating the duration of that commute, it is necessary to determine the time actually spent by the posted workers in travelling between the place where they are accommodated in Finland and their place of work, which is located at the construction site in Finland. Since compensation for travelling time is not paid in reimbursement of expenditure actually incurred by the worker on account of the posting, it must be regarded as an allowance specific to the posting and thus part of the minimum wage. It must therefore be held that compensation for travelling time, such as that at issue in the main proceedings, which is paid to the workers on condition that their daily journey to and from their place of work is of more than one hour's duration, must be regarded as part of the minimum wage of the posted workers (§ 54-57).

9. As regards the question of whether Article 3 of Directive 96/71, read in the light of Articles 56 TFEU and 57 TFEU, must be interpreted as meaning that coverage of the cost of the accommodation of the workers is to be regarded as an element of their minimum wage, the ECJ finds that, on the wording of Article 3(7) of the directive, that cannot be the case (§ 58-60).

10. So far as concerns meal vouchers, the provision of those vouchers is based neither on law, regulation or administrative provision of the host Member State nor on the relevant collective agreements, but derives from the employment relationship established in Poland between the posted workers and their employer, ESA. Further, like the allowances paid to offset accommodation costs, these allowances are paid to compensate for living costs actually incurred by the workers on account of their posting. Accordingly, it is clear from the wording of paragraphs 1 and 7 of Article 3 of Directive 96/71 that the allowances concerned are not to be considered as part of the minimum wage within the meaning of Article 3 of the directive (§ 61-63).

11. Directive 2003/88 treats entitlement to annual leave and to a payment on that account as being two aspects of a single right. The purpose of requiring payment to be made in respect of that leave is to put the worker, during the leave, in a position, as regards his salary, comparable to periods of work. Thus, the pay the worker receives during leave is intrinsically linked to the pay he receives in return for his services. Accordingly, Article 3 of Directive 96/71 must be interpreted as meaning that the minimum pay that the worker must receive for minimum paid annual holidays corresponds to the minimum wage to which the worker is entitled during the reference period (§ 64 -69).

Ruling (judgment)

1. In circumstances such as those of the case before the referring court, Directive 96/71, read in the light of Article 47 of the Charter of Fundamental Rights of the European Union, prevents a rule of the Member State of the seat of the undertaking that has posted workers to the territory of another Member State — under which the assignment of claims arising from employment relationships is prohibited — from barring a trade union from bringing an action before a court of the second Member State, in which the work is performed, in order to recover for the posted workers, pay claims which relate to the minimum wage, within the meaning of Directive 96/71, and which have been assigned to it, that assignment being in conformity with the law in force in the second Member State.

2. Article 3(1) and (7) of Directive 96/71, read in the light of Articles 56 TFEU and 57 TFEU, must be interpreted as meaning that:

- it does not preclude a calculation of the minimum wage for hourly work and/or for piecework based on the categorisation of employees into pay groups, as provided for by the relevant collective agreements of the host Member State, provided that that calculation and categorisation are carried out in accordance with rules that are binding and transparent, a matter which it is for the national court to verify;
- a daily allowance such as that at issue in the main proceedings must be regarded as part of the minimum wage on the same conditions as those governing the inclusion of the allowance in the minimum wage paid to local workers when they are posted within the Member State concerned; compensation for daily travelling time, which is paid to the workers on condition that their daily journey to and from their place of work is of more than one hour's duration, must be regarded as part of the minimum wage of posted workers, provided that that condition is fulfilled, a matter which it is for the national court to verify;
- coverage of the cost of those workers' accommodation is not to be regarded as an element of their minimum wage;
- an allowance taking the form of meal vouchers provided to the posted workers is not to be regarded as part of the latter's minimum wage; and
- the pay the posted workers must receive for their minimum paid annual holidays corresponds to the minimum wage to which those workers are entitled during the reference period.

ECJ 24 February 2015 , Case C-512/13 *(Sopora – v – Staatssecretaris van Financiën)* **("Sopora")**, Dutch case (FREEDOM OF MOVEMENT-TAX)

Facts

Dutch tax law contains a facility under which 30% of wages are untaxed. This tax facility is only available to skilled workers who are recruited abroad and who come to the Netherlands for a limited period of time. Thirty percent of the amount paid by the employer to the employee is considered to constitute a reimbursement of expenses which such "incoming employees" have and which local employees do not have ("extraterritorial expenses"). The tax facility (referred to by the ECJ as the "flat-rate rule") is not available to incoming employees who at the time of recruitment lived within 150 kilometres from the Dutch border, unless and to the extent that they prove that they have extraterritorial expenses.

National proceedings

Mr Sopora was hired in Germany, within 150 km from the Dutch border. He was denied the 30% tax facility. He appealed this denial, first before the local court, then, before the Supreme Court. It asked the ECJ whether Article 45 TFEU precludes the Dutch legislation at issue.

ECJ's findings

1. Article 45 TFEU prohibits a Member State from adopting a measure favouring workers residing in its territory. The freedom of movement of workers also prohibits discrimination between non-resident workers, if such

discrimination leads to nationals of certain Member States being unduly favoured in comparison with others (§ 21-25).

2. Workers who have accepted employment in the Netherlands whilst living abroad are liable to incur additional expenses. The objective pursued by the legislation at issue is achieved by making the flat-rate rule available to those workers but not to workers who have resided for a long time in the Netherlands. This is legitimate (§ 26-35)

Ruling (judgment)

Article 45 TFEU must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, by which a Member State provides that workers who resided in another Member State prior to taking up employment in its territory are to be granted a tax advantage consisting in the flat-rate exemption of reimbursement of extraterritorial expenses in an amount of up to 30% of the taxable base, on condition that those workers resided at a distance of more than 150 kilometres from its border, unless – and this is a matter for the referring court to ascertain – those limits were set in such a way that that exemption systematically gives rise to a net overcompensation in respect of the extraterritorial expenses actually incurred.

ECJ 26 February 2015, case C-238/14 *(European Commission – v – Grand Duchy of Luxembourg)*, **("Luxembourg")** (FIXED-TERM EMPLOYMENT)

Facts

Clause 5(1) of the Framework Agreement on fixed-term work annexed to Directive 1999/70 requires the Member States to introduce one or more of the following measures:

a. objective reasons justifying the renewal of fixed-term contracts;
b. the maximum total duration of successive fixed-term contracts;
c. the number of renewals of such contracts.

Luxembourg law permits fixed-term contracts to be concluded "for the performance of a specific and non-permanent task". The law lists certain tasks as being specific and non-permanent. The list includes "employment posts in respect of which it is normal in some sectors of economic activity not to use permanent contracts owing to the nature of the activity or the temporary nature of the posts". Where a fixed-term contract is permitted, it may not be renewed more than twice and it may not exceed a total duration of 24 months. However, by way of derogation from these principles, an unlimited number of successive fixed-term contracts may concluded, without any limit in duration, with "occasional workers in the entertainment arts". The definition of "occasional worker in the entertainment arts" includes any artist or technician "who pursues his occupation primarily on behalf of an entertainment company or in connection with a cinematographic, audio-visual, theatrical or musical production", irrespective of the type of work actually carried out.

In March 2009, the Commission asked Luxembourg to clarify the compatibility of this legislation with the Framework Directive. The Commission was not satisfied with Luxembourg's reply. In May 2014, this resulted in an application to the ECJ for a declaratory judgment.

ECJ'S findings

1. It is undisputed that the national legislation at issue permits the recruitment of occasional workers in the entertainment arts on the basis of successive fixed-term employment contracts without limit in terms of number or total duration of contracts. The issue, therefore, is whether this practice can be justified by an "objective reason" within the meaning of Clause 5(1)(a) of the Framework Directive (§ 41-42).

2. The concept of "objective reason" refers to precise and concrete circumstances characterising a given activity. Those circumstances may result, in particular, from the specific nature of the tasks or from the pursuit of a legitimate social-policy objective of a Member State (§ 44-45).

3. The definition of "occasional worker in the entertainment arts" is neutral as regards whether the worker's activity is temporary. Therefore, even assuming that the workers in question participate exclusively in individual projects which are limited in time, as Luxembourg alleges, that does not explain how the law requires them to engage in their professional activities within the framework of such projects (§ 46).

4. Moreover, the assertion that every "occasional worker in the entertainment arts" is hired for projects of a temporary nature is contradicted by the fact that "by way of derogation" from the normal rules, these workers may be hired on the basis of successive fixed-term contracts without limitation. If every one of these workers always worked on temporary projects there would be no need to derogate (§ 47).

5. Luxembourg's argument that the derogation actually favours the workers in question, because it makes it more attractive for employers to hire them, is not valid. Even supposing that the legislation at issue pursues this objective, it does not prove the existence of specific and concrete circumstances characterising the activity (§ 50).

Ruling (judgment)

The ECJ declares that, by maintaining in force, with respect to occasional workers in the entertainment arts, derogations from the measures designed to prevent the abusive use of successive fixed-term contracts, the Grand Duchy of Luxembourg has failed to fulfil its obligations under Clause 5 of the Framework Agreement [...].

ECJ 26 February 2015, case C-515/13 *(Ingeniørforeningen i Danmark – v – Tekniq)* **("Landin")**, Danish case (age discrimination)

Facts

Mr Landin was employed by Enco. At his request, payment of his State retirement pension, which would normally have started at age 65, was postponed until age 67. In November 2011 he turned 67. Enco dismissed him giving six months' notice. He was not paid a severance allowance. This was in accordance with the Danish Law on salaried employees, which provides that an employee who has been continuously employed for 12, 15 or 18 years is eligible for a severance award upon termination of his employment equal to one, two or three months' salary, respectively, but which also provides (in paragraph 2a(2)) that this does not apply if the employee is entitled to a State retirement pension upon termination of his employment. Mr Landin worked during his notice period (until he was 67½ years old) and then found a new job with another company.

National proceedings

Mr Landin brought an action seeking payment of a severance allowance. He argued that the exception for retirees to entitlement to a severance allowance is contrary to EU law. The court referred a question to the ECJ.

ECJ's findings

1. The national legislation at issue provides for a difference of treatment based directly on grounds of age. It is necessary to examine whether that difference may be justified (§ 14-17).

2. The severance allowance aims to facilitate the move to new employment for older employees who have many years of service with the same employer. The restriction of the benefit of the allowance to workers who are not eligible for a State retirement pension is based on the premise that those who are eligible for a State retirement pension will generally decide to leave the labour market. This is a legitimate aim (§18-22).

3. Restricting severance allowance to only those workers who, on termination of the employment relationship, are not entitled to a State retirement pension does not appear unreasonable in the light of the objective pursued by the legislature of providing increased protection for workers for whom it is difficult to find new employment as a result of their length of service in an undertaking. Paragraph 2a(2) also makes it possible to limit the scope for abuse by preventing workers who intend to retire from claiming a severance allowance which is intended to support them while seeking new employment (§ 27-29).

4. The Danish legislature balanced the protection of workers who, because of their length of service in an undertaking, are generally among the oldest workers, against the protection of younger workers who are not entitled to severance allowance. It took account of the fact that severance allowance, as an instrument for giving greater protection to a category of workers defined in relation to their length of service, constitutes a form of difference of treatment to the detriment of younger workers. The measure thus aims to ensure, in accordance with the principle of proportionality and the need to counter abuse, that severance allowance is payable only to those for whom it is intended, namely those who intend to continue to work but, because of their age, generally encounter more difficulties in finding new employment. The provision thus prevents the severance allowance from being paid to workers who will in any event be eligible for a State retirement pension. It is apparent from the foregoing that Paragraph 2a(2) does not go beyond what is necessary to attain the objectives which it pursues insofar as it excludes from entitlement to severance allowance workers who will, on termination of the employment relationship, receive a State retirement pension. It should, however, be ascertained whether this finding is put into question by the fact that the provision treats those who will actually receive a State retirement pension in the same way as those who are eligible for such a pension (§ 30-33).

5. Paragraph 2a(2) of the Law on salaried employees excludes all workers from entitlement to the severance allowance who, upon termination of their employment relationship are eligible for a State retirement pension. It must therefore be examined whether such an exclusion does not go beyond what is necessary to achieve the objectives pursued. The exclusion is based on the idea that, generally speaking, employees leave the labour market if they are eligible for a State retirement pension. As a result of that age-based assessment, a worker who satisfies the criteria for eligibility for a State retirement pension, yet wishes to waive his pension rights temporarily and to continue in his career, will not be able to claim a severance allowance even though this is intended to protect him. Thus, in pursuing the legitimate aim of preventing the allowance from being claimed by persons who are not seeking new employment but will receive a replacement income in the form of a State retirement pension, the measure at issue deprives workers who have been made redundant and who wish to remain in the labour market of entitlement to the severance allowance merely because they could, because of their age, draw such a pension (§ 34-35).

6. The facts in this case can be distinguished from those in *Andersen* (ECJ 12 October 2010, case C-499/08). That case concerned, not Article 2a(2), but Article 2a(3) of the Law on salaried employees, which provides that no severance shall be payable, if the employee will – on termination of the employment relationship – receive an old-age pension from the employer. The ECJ held that said Article 2a(3) made it more difficult for such a worker subsequently to exercise his right to work because he was not entitled to severance allowance whilst seeking new employment. The ECJ found that there was a risk that those workers would thus be forced to accept a reduced pension entitlement, leading to a significant reduction in their income in the long term (§ 36-37).

7. Given that the pension at issue in *Andersen* was paid from the age of 60, any employee of that age would be entitled upon termination of the employment relationship to a smaller pension than that which the employee would otherwise have been entitled to, had he continued to work until the requisite age before retiring. As a consequence, such an employee would risk receiving a reduction in pension entitlement on the grounds of taking early retirement. This is not the case in the main proceedings, which concern the exclusion of severance allowance where the salaried employee is entitled to receive a State retirement pension upon termination of the employment relationship (§38-39).

8. The risk of incurring a reduction in pension entitlement on the grounds of early retirement does not, in principle, concern employees who are entitled to a State retirement pension upon termination of employment, such as Mr Landin, who was 67 years old at the time. Moreover, to the extent that the severance allowance is a lump sum payment corresponding to one, two or three months' salary, a provision such as the one at issue in the main proceedings does not appear capable of causing a significant loss of income to the departing employee in the long term. In that regard, the main proceedings may equally be distinguished from the facts arising in *Toftgaard* (C-546/11), which concerned the exclusion of those officials who were entitled to a pension at the age of 65 from entitlement to retain their current salary for three years post termination of the employment relationship. These findings are not called into question by the fact that, as is the case with Mr Landin, an employee can increase his pension entitlement by continuing to work beyond the normal age of retirement (§40-43).

Ruling (judgment)

Articles 2(1), 2(a) and 6(1) of Council Directive 2000/78 must be interpreted as meaning that they do not preclude national legislation, such as the legislation at issue in the main proceedings, from providing that an employer must, upon termination of the employment relationship of a salaried employee who has been continuously employed in the same undertaking for 12, 15 or 18 years, pay an amount equivalent to one, two or three months' salary, unless the salaried employee is entitled to receive a State retirement pension upon termination of employment to the extent that legislation is both objectively and reasonably justified by a legitimate aim relating to employment and labour market policy as well as constituting and appropriate and necessary means of achieving that aim. It is for the national court to satisfy itself that this is the case.

ECJ 17 March 2015, case C-533/13 (Auto-ja Kuljetusalan Työntekijäliitto AKT ry - v - Öljytuote ry and Shell Aviation Finland Oy) **("AKT")**, Finnish case (TEMPORARY AGENCY WORK)

Facts

Shell Aviation Finland Oy ('Shell') delivers fuel to 18 airports in Finland. It is a member of 'Ölytuote', the Finnish association of employers in the fuel industry. AKT is the trade union for the tank truck and oil products industry. It brought legal proceedings against Shell for breach of Article 8(3) of a collective agreement concluded in 1997 between the national associations of employers and employees (the '1997 collective agreement') and Clause 29(1) of the collective agreement for the tank truck and oil products industry (the 'tank truck collective agreement'). These two, similarly worded provisions provide that employers may only make use of temporary agency workers ('agency workers') in order to cope with peaks in workload or for temporary and limited tasks that cannot be performed by their own staff on account of urgent need, limited duration, specific skills, the use of special equipment or other similar reasons. Article 8(3) of the 1997 collective agreement prohibits employers from making use of external labour supply wherever agency workers are being utilized for normal work alongside company staff and under the same supervisors. AKT alleged that Shell had been employing agency workers for the same tasks as its own employees, regularly and on a large scale, since 2008. Shell responded that its use of agency workers had been mainly to replace its own staff during vacations and sick leave periods. In addition, Shell argued that Clause 29(1) of the tank truck collective agreement contains a restriction that is not compatible with Article 4(1) of Directive 2008/104 on temporary agency work, which provides that:

"Prohibitions or restrictions on the use of temporary agency work shall be justified only on grounds of general interest relating in particular to the protection of temporary agency workers, the requirement for health and safety at work or the need to ensure that the labour market functions properly and abuses are prevented."

National proceedings

AKT applied to the court seeking an order that Shell pay it a fine in accordance with the Finnish law on collective agreements. The court referred three questions to the ECJ. It observed that Clause 29(1) takes a different approach than the Directive, where it prohibits the use of agency work except in certain specific situations. The questions raise three issues: (1) the extent of the obligations placed on the Member States by the Directive, (2) the extent to which Member States may restrict the use of agency work and (3) whether Article 4(1) of the Directive can be applied in a dispute between private parties.

ECJ's findings

1. In order to ascertain the exact meaning of Article 4(1) of the directive, that provision needs to be read as a whole, taking into account its context (§ 22-27).

2. Article 4(2) and (3) of the directive provides that the Member States shall review any prohibitions or restrictions on the use of temporary agency work and inform the Commission of the results of the review by 5 December 2001. It follows that Article 4(1), read in conjunction with paragraphs 2 and 3 of that Article, is addressed solely to Member States (§ 28).

3. Depending on the result of the review, the Member States could have been obliged to amend their legislation. However, the fact remains that they are free to either remove or adapt prohibitions and restrictions to render their legislation compliant with Article 4(1) (§ 29-30).

Ruling (judgment)

Article 4(1) of Directive 2008/104/EC [....] on temporary agency work must be interpreted as meaning that:

- the provision is addressed only to the competent authorities of the Member States, imposing on them an obligation to review in order to ensure that any potential prohibitions or restrictions on the use of temporary agency work are justified; and therefore,
- the provision does not impose an obligation on national courts not to apply any rule of national law containing prohibitions or restrictions on the use of temporary agency work which are not justified on grounds of general interest within the meaning of Article 4(1).

OPINIONS

Opinion of Advocate-General Wahl of 5 February 2015 in cases C-182/13 *(Valerie Lyttle and others – v – Bluebird UK Bidco 2 Ltd)* **("Lyttle")**, **C-392/13** *(Andrés Rabal Cañas – v – Nexea Gestión Documental SA and Fondo de Garantía Salarial)* **("Cañas")** and **C-80/14** *(USDAW and B. Wilson – v – Realisation 1 Ltd in liquidation and others)* **("USDAW")** (COLLECTIVE REDUNDANCY)

Facts

All three cases concern collective dismissals. In *Lyttle*, four plaintiffs worked in four different stores belonging to one employer, each store employing fewer than 20 workers. In Cañas the employer operated two establishments, one in Madrid and one in Barcelona. Over the course of five months, the employer dismissed, individually, 14 + 2 + 1 + 1 + 3 + 13 workers. In *USDAW*, the employers Woolworths and Ethel Austin dismissed thousands of workers, some in stores employing 20 or more workers and some in smaller stores.

National proceedings

The Industrial Tribunals (Northern Ireland), the *Juzgado de lo Social*

No 3 and the Court of Appeal (England and Wales) referred questions to the ECJ on the meaning of "establishment" and "redundancy" and on how to calculate the thresholds in Article 1(1)(a) of Directive 98/59 on the approximation of the laws of the Member States relating to collective dismissals:

"(a) 'collective redundancies' means dismissals effected by an employer for one or more reasons not related to the individual workers concerned where, according to the choice of the Member States, the number of redundancies is:

(i) either, over a period of 30 days:
- *at least 10 in establishments normally employing more than 20 and less than 100 workers,*
- *at least 10% of the number of workers in establishments normally employing at least 100 but less than 300 workers,*
- *at least 30 in establishments normally employing 300 workers or more,*

(ii) or, over a period of 90 days, at least 20, whatever the number of workers normally employed in the establishments in question;

For the purpose of calculating the number of redundancies provided for in the first subparagraph of point (a), terminations of an employment contract which occur on the employer's initiative for one or more reasons not related to the individual workers concerned shall be assimilated to redundancies, provided that there are at least five redundancies."

Opinion

1. The Directive allows Member States to choose between two different methods to determine the threshold triggering the obligation to inform and consult with the workers:

- (i) a certain number of dismissals, varying between 10 and 30, over a 30-day period; or
- (ii) 20 over a 90-day period.

So far, there have been two ECJ rulings on Article 1(1)(a) of the Directive: *Rockfon* in 1995 (C-449/93) and *Athinaïki Chartopoïïa* in 2007 (C-270/05). In those judgments, the ECJ interpreted "establishment" to denote "the unit to which the workers made redundant are assigned to carry out their duties". In other words, "establishment" refers to the local employment unit, not the legal entity or the "undertaking" within the meaning of the TFEU. Both judgments were in cases where method (i) was at issue. However, it is clear that the ECJ's rulings apply equally to method (ii) situations, as it would be illogical to interpret "establishment" differently where it relates to the legislation of a Member State that has opted for method (i) and where the Member State has opted for method (ii). Consequently, even where the aggregate number of dismissals effected in a restructuring process might be high on a national scale, if the number of dismissals in a local unit is below the threshold, there is no collective dismissal within the meaning of the Directive. This is understandable, because a small number of dismissals locally may be relatively easy to reabsorb into the employment market (§ 36-49).

2. Moreover, several Directives make a distinction between "undertaking" and "establishment". Also, the interpretation sought by some, to the effect that "establishment" refers to the employer as a whole in method (ii) and not in method (i) would rob Article 5 – which permits the Member States to enact rules more favourable to workers – of all purpose (§ 50-60).

3. Spanish law limits the scope of the Directive to "termination of employment contracts based on economic, technical, organisational or production grounds" (as well as on other grounds provided there are at least five terminations). This is too narrow. The Directive's scope includes all reasons "not related to the individual workers"(§ 65-78).

Proposed reply

- The concept of "establishment" as referred to in Article 1(1)(a)(ii) of Council Directive 98/59/EC has the same meaning as under Article 1(1)(a)(i) of that directive. That concept denotes the unit to which the workers made redundant are assigned to carry out their duties, which it is for the national court to determine. That does not preclude Member States from enacting implementing rules on the basis of that concept without lowering the level of protection.
- Article 1(1) of Directive 98/59 precludes a provision of national law, such as Article 51(1) of the *Ley del Estatuto de los Trabajadores* of 29 March 1995, under which there must be at least five terminations of employment contracts without the consent of the workers concerned, on grounds other than economic, technical, organisational or production grounds, before such terminations may be taken into account for the purposes of determining whether collective redundancies have taken place.
- On a proper construction of Article 1(2)(a) of Directive 98/59, all collective redundancies effected under contracts of employment concluded for limited periods of time or for specific tasks are excluded from the scope of that directive, save where such redundancies take place prior to the date of expiry of such contracts or before their completion. It is irrelevant whether the grounds for the termination of such contracts are the same. That does not preclude Member States from enacting rules which, without lowering the level of minimum protection, are more favourable to workers.

Opinion of Advocate-General Sharpston of 5 March 2015 in case C-9/14 *(Staatssecretaris van Financiën – v – D.G. Kieback)* **("Kieback")**, Dutch case (FREEDOM OF MOVEMENT – TAX)

Facts

Mr Kieback is a German national. In the first three months of 2005 he worked in Maastricht, the Netherlands, while living across the border in Aachen, Germany. He chose to be subject to the Dutch tax regime for non-residents. As a result, he was taxed only on his Dutch income. Initially, the Dutch tax authorities did not allow him to deduct from his Dutch income tax the interest he paid on the mortgage on his house in Germany. He challenged this refusal successfully in the Dutch courts, so in the end the fact that he was a non-resident taxpayer did not, in itself, stop him from being able to deduct his German mortgage interest. However, the Dutch tax authorities came up with a new argument to justify their refusal to allow such a deduction. They appealed to the Supreme Court on the basis of the following new facts.

National proceedings

On 1 April 2005, Mr Kieback moved to the U.S. The Dutch tax authorities took the position that they were not required to grant a non-resident taxpayer advantages that are not available to resident taxpayers. Resident taxpayers may only deduct mortgage interest where they receive all or almost all of their income over the whole tax year (January – December) in the Netherlands. Given that most of Mr Kieback's income in 2005 was generated in the U.S., he did not satisfy this requirement. The Supreme Court referred two questions to the ECJ.

Opinion

1. Under the Netherlands legislation applicable at the time of the facts in the main proceedings, only taxpayers *who resided during part of a tax year in the Netherlands* were entitled to be subject consecutively to the regimes applicable to resident and non-resident taxpayers in that Member State in the course of a single tax year. That possibility clearly constituted a fiscal advantage. It enabled a taxpayer to be treated as a tax resident in the Netherlands (and therefore to deduct mortgage interest related to a personal dwelling) during part of the year, and to be taxed only on his income received in the Netherlands during the remaining part of that year. In 2005, a non-resident taxpayer like Mr Kieback could not benefit from that advantage, even if he received all or almost all his income in the Netherlands during part of that tax year. (§ 20).

2. The main issue of discrimination raised by the present reference concerns the difference in treatment between a person in the situation of Mr Kieback, on the one hand, and that of a taxpayer who resided and worked in the Netherlands during the first part of the tax year and then, like Mr Kieback, moved to another State to take up new employment for the remainder of that tax year, on the other (§ 21).

3. National rules under which a distinction is drawn on the basis of residence, in that non-residents are denied certain benefits which are – conversely - granted to persons residing within national territory, are liable to operate mainly to the detriment of nationals of other Member States, as non-residents are generally foreigners. Tax benefits granted only to residents of a Member State may thus constitute indirect discrimination on grounds of nationality and hence be caught by the prohibition laid down in Article 39(2) EC. Such discrimination can nevertheless arise only through the application of different rules to comparable situations or the application of the same rule to different situations. Answering Question 1 therefore requires examining whether Mr Kieback was in a situation comparable to that of either a taxpayer who resided and worked in the Netherlands during the first three months of 2005 and, like Mr Kieback, then moved to another State to take up new employment, or a taxpayer who resided (and worked) in the Netherlands throughout 2005 (§25-26).

4. The ECJ has consistently held, in relation to direct taxes, that residents and non-residents are in principle not comparable, since (i) income received by a non-resident in his State of employment is in most cases only part of this total income, which is concentrated at his place of residence, and (ii) a non-resident's personal ability to pay tax, determined by reference to his aggregate income and his personal and family circumstances, is easier to assess at the place where his personal and financial interests are centred - which is generally the place where he has his usual abode. That finding is supported by international tax law, in particular the Model Tax Convention on Income and on Capital of the Organisation for Economic Cooperation and Development (OECD), which recognises that in principle the overall taxation of taxpayers, taking into account their personal and family circumstances, is a matter for the State of residence (§ 27).

5. However, the position is different where the non-resident taxpayer receives no significant income in the State of his residence and obtains the major part of his taxable income from an activity performed in the State of employment, with the result that the State of residence is not in a position to grant him the benefits resulting from taking his personal and family circumstances into account. Since there is no objective difference in the State of employment between the situations of such a non-resident taxpayer and of a resident taxpayer engaged in comparable employment, the two categories of taxpayers have to be treated equally as regards taking their personal and family circumstances into account (§ 29).

6. It follows that, in principle, Article 39 EC and more particularly the non-discrimination rule contained in the second paragraph of that provision, precluded the Netherlands from denying Mr Kieback the option which it granted taxpayers who resided and worked in that Member State during the first three months of 2005 and then moved elsewhere, namely to choose to be subject consecutively to the regimes applicable to resident and non-resident taxpayers in the course of a single tax year. That denial restricted Mr Kieback's freedom of movement since it was liable to discourage him from residing in a Member State other than the Netherlands for the period during which he received all or almost all of his income in that latter Member State (§ 32).

7. It then becomes necessary to examine whether that difference in treatment can be justified. According to the Court's case law, a measure restricting one of the fundamental freedoms guaranteed by the Treaties may be accepted only if it pursues a legitimate objective which is compatible with the Treaties and is justified by overriding reasons in the public interest. That measure must be such as to ensure achievement of the aim pursued and not go beyond what is necessary for that purpose (§ 33).

8. The Netherlands Government submits in essence that enabling a taxpayer in the situation of Mr Kieback to deduct from his taxable basis mortgage interest related to a dwelling in another Member State, attributable to the part of a tax year when he received all or almost all of his income in the Netherlands, would raise important practical difficulties. Much information would be required to determine whether and to what extent the Member State of employment had to take that taxpayer's personal and family circumstances into consideration. The taxing authorities in that Member State would not normally possess that information (§ 34).

9. The Advocate-General rejects this and other arguments justifying the difference in treatment (§ 35-40).

Proposed reply

- (1) Article 39 EC (now Article 45 TFEU) precludes national legislation such as that at issue in the main proceedings, pursuant to which a non-resident taxpayer who received all or almost all of his income in a Member State during the first three months of the tax year and then moved to another State, where he took up new employment, cannot choose to be subject consecutively to the regimes applicable to resident and non-resident taxpayers in the course of that year, and therefore deduct mortgage interest related to a personal dwelling attributable to those first three months, if that option is available to a taxpayer who resides and works in that Member State during the first three months of the tax year and then he moves to another State to take up new employment for the remainder of the tax year.

- (2) The circumstance that the non-resident taxpayer has gone to live and work in a non-Member State rather than a Member State during the course of the tax year has no bearing on the answer to Question 1.

PENDING CASES

Case C-496/14 *(the Romanian State -v- Tamara Vararu and Consiliul National pentru Combaterea Discriminarii)* **("Vararu")**, reference lodged by the Romanian *Tribunalul Sibiu* on 6 November 2014 (DISCRIMINATION - OTHER GROUNDS)

Do the TEU and the Charter preclude national legislation, which provides that the second-born, third-born and so on of multiple births, the first-born of multiple births and children born as single births are to be treated differently?

Case C-509/14 *(Administrador de Infraestructuras Ferroviarios (ADIF) -v- Luis Aira Pascual and others)* **("Aira Pascual")**, reference lodged by the Spanish *Tribunal Superior de Justicia de la Communidad Autónoma del Pais Vasco* on 13 November 2014 (TRANSFER OF UNDERTAKINGS)

Does Directive 2001/23 preclude legislation to the effect that a public sector undertaking, responsible for a service central to its own activities and requiring important material resources that has been providing that service by means of a public contract, requiring the contractor to use those resources which it owns, is not subject to the obligation to take over the rights and obligations relating to employment relationships when it decides not to extend the contract but to assume direct responsibility for its performance, using its own staff and thereby excluding the staff employed by the contractor, so that the service continues to be provided without any change other than arising as a result of the replacement of the workers performing the activities and the fact that they are employed by a different employer?

Case C-515/14 (European Commission –v- Cyprus), action bought n 14 November 2014 (FREEDOM OF MOVEMENT – PENSIONS)

This case deals with an age criterion in the Cypriot law on pensions which, in the Commission's view, deters workers from leaving their State in order to take up work in another Member State, an institution of the EU or another international body and results in unequal treatment between migrant workers, including those who work in the institution of the EU or another international body, on the one hand, and State officials who have engaged in activity only in Cyprus, on the other.

Case C-538/14 (European Commission –v- Finland), action bought on 26 November 2014 (RACE DISCRIMINATION)

The Commission argues that Finland has failed to designate a body for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin and to ensure that its competences extend to questions concerning working life.

Case C-596/14 *(Ana de Diego Porras -v- Ministerio de Defensa)* **("De Diego Porras")** reference lodged by the Spanish *Tribunal Superior de Justicia de Madrid* on 22 December 2014 (TEMPORARY EMPLOYMENT)

Is the compensation due on termination of a temporary contract covered by the employment conditions to which Clause 4(1) of the framework agreement on fixed-term work (annexed to Directive 1999/70)) refers? If such compensation is covered by the employment conditions, must workers with an employment contract or relationship entered into directly between an employer and a worker where the end of the employment contract or relationship is determined by objective conditions, such as reaching a specific date, completing a specific task or service, or the occurrence of a specific event, receive, on termination of the contract, the same compensation as that to which a comparable permanent worker is entitled when his contract is terminated for objective reasons? If a temporary worker is entitled to receive the same compensation as a permanent worker on termination of the contract for objective reasons, must Article 49(1) (c) of the Estatuto de los Trabajodores (Workers' Statute) be regarded as having correctly transposed Council Directive 1999/70/EC [.....], or is it discriminatory and contrary to that directive in that it undermines its purpose and its effectiveness? If there are no objective reasons for excluding temporary replacement workers from the entitlement to receive compensation on termination of a temporary contract, is the distinction which the Worker's Statute establishes between the employment conditions of those workers discriminatory, compared not only with the conditions of permanent workers but also with those of other temporary workers?

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2009/5 (MT) contracting out cleaning is a transfer despite no assets or staff going across
2009/22 (BE) collective agreement cannot create transfer where there is none by law
2009/41 (GE) BAG follows *Klarenberg*
2009/42 (UK) EAT clarifies "service provision change" concept
2010/1 (FR) Supreme Court drops "autonomy" requirement
2010/4 (SP) Supreme Court follows *Abler*, applying assets/staff mix
2010/5 (LU) court applies *Abler* despite changes in catering system
2010/6 (IT) Supreme Court disapplies national law
2010/27 (NL) assigned staff not an economic entity
2010/40 (NO) Supreme Court applies comprehensive mix of all *Spijkers* criteria
2010/73 (CZ) Supreme Court accepts broad transfer definition
2011/34 (BU) Bulgarian law lists transfer-triggering events exhaustively
2011/37 (CY) Cypriot court applies directive
2012/14 (NO) Airline catering company capital-intensive
2012/15 (GE) No TOU unless activity pre-transfer independent entity
2012/17 (LI) Lithuanian courts follow Directive
2012/31 (AT) TOU despite *ex tunc* cancellation of contract
2013/16 (GE) only actual takeover of staff, not offer of employment, relevant
2013/50 (LU) did beauty parlour retain its identity?
2013/51 (Article) transfer of employees on re-outsourcing?
2014/1 (CZ) Czech law goes beyond the directive
2014/14 (NL) all Spijkers criteria relevant
2014/35 (UK) no SPC where underlying client not same
2014/36 (DK) plaintiffs defacto still employed
2014/37 (NL) transfer despite bankruptcy
2014/38 (CZ) Supreme Court applies "good practice" doctrine rather than transfer rules
2014/39 (SK) Constitutional Court applies transfer rules following discrimination complaint
2014/40 (HU) nature of activity determines existence of transfer
2014/54 (GR) no transfer because law says so
2015/2 (GE) economic identity of gas station

Cross-border transfer

2009/3 (NL) move from NL to BE is transfer
2011/3 (UK) TUPE applies to move from UK to Israel
2012/1 (GE) move from GE to Switzerland is transfer
2014/42 (Article) cross-border transfer, an analysis

Which employees cross over?

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

Employee who refuses to transfer

2009/20 (IR) no redundancy pay for employee refusing to transfer
2009/21 (FI) transferee liable to employee refusing to transfer on inferior terms
2009/23 (NL) agreement to remain with transferor effective
2011/18 (AT) no *Widerspruch* right except in special cases
2012/2 (CZ) employers cannot transfer staff without their consent unless there is a TOU
2012/45 (GR) employee who refuses to go across loses job
2013/1 (AT) no general *Widerspruch* right for disabled employees
2014/41 (GE) employee forfeits Widerspruch right

Termination

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

Which terms go across?

2009/4 (NL) terms closely linked to transferor's business are lost
2010/3 (P) transferee liable for fine levied against transferor
2010/25 (FI) voluntary pension scheme goes across
2010/56 (CZ) claim for invalid dismissal goes across
2010/75 (AT) not all collective terms go across
2013/35 (NL) transferee liable for pension premium arrears
2014/52 (NO) collective terms need not go across

Duty to inform

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

ETO

2012/16 (NL) ETO defence fails
2013/17 (AT) dismissal soon after transfer creates non-ETO

Age, terms of employment

Age, termination

Disability

Race, nationality

Religion, belief

Sexual orientation

Part-time, fixed-term, "temps"

Collective redundancy

Individual termination

Paid leave

Parental leave

Working time

Privacy

Information on terms of employment

RUNNING INDEX OF ECJ RULINGS SUMMARISED IN EELC

1. Transfer of undertakings

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

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

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

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

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

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

11 September 2014, C-328/13 (*Gewerkschaftsbund*): terms under a collective agreement that continues to apply despite expiry, go across (EELC 2014-3).

2. Gender discrimination, maternity

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

19 June 2014, C-53 and 80/3 (*Strojirny Prostejov*): unequal tax treatment of foreign temporary employment agency breaches Article 57 TFEU (EELC 2014-3).

17 July 2014, C-173/13 (*Leone*): French retirement scheme favouring career breaks must be justified (EELC 2014-3).

3 September 2014, C-318/13 (*X*): compensation for accident at work may not be actuarially gender-dependent; criteria for State liability (EELC 2014-3).

3. Age discrimination

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

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

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

8 July 2010, C-246/09 *(Bulicke)*: German two-month time limit for

bringing age discrimination claim probably not incompatible with principles of equivalency and effectiveness; no breach of non-regression clause (EELC 2010-4).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

11 November 2014, C-530/13 (*Schmitzer*): legislation ending discrimination may not remove the benefit indirectly (EELC 2014-4).

13 November 2014, C-416/13 (*Vital Pérez*): maximum age of 30 for entering police service not justified (EELC 2014-4).

21 January 2015, C-529/13 (*Felber*): not crediting pre-service completed before age 18 justified (EELC 2014-4).

28 January 2015, C-417/13 *(Starjakob)*: how to end discrimination that fails to take account of service prior to age 18.

26 February 2015, C-515/13 *(Landin)*: ECJ accepts exclusion of retirees from transition award.

4. Disability discrimination

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

18 December 2014, C-354/13 (*Kaltoft*): obesity can be a disability (EELC 2014-4).

5. Other forms of discrimination

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

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

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

28 June 2012, C-172/11 *(Erny)*: re differential tax treatment of pre-retirement benefits (EELC 2012-2).
6 December 2012 C-124/11 *(Dittrich)*: medical health subsidy covered by Directive 2000/78 (EELC 2013-1).

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

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

6. Fixed-term work

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

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

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

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

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

18 January 2011, C-272/10 *(Berziki)*: Greek time-limit for applying for conversion of fixed-term into permanent contract compatible with Directive (EELC 2011-1).
10 March 2011, C-109/09 *(Lufthansa)*: German law exempting workers aged 52 and over from the requirement to justify fixed-term hiring not compatible with Framework Agreement (EELC 2011-1).

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

8 September 2011, C-177/10 *(Rosado Santana)*: re difference of treatment between career civil servants and interim civil servants and re time limit for challenging decision (EELC 2011-3).
26 January 2012, C-586/10 *(Kücük)*: permanent replacement of absent staff does not preclude existence of an objective reason as provided in Clause 5(1)(a) of the Framework Agreement (EELC 2012-1).

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

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

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

7 March 2013, C-393/11 *(AEEG)*: fixed-term service time for public authority must count towards determining seniority upon becoming civil servant (EELC 2013-2).

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

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

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

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

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

26 November 2014, C-22/13 (*Mascolo*); Italian system of successive contracts in schools violates Directive 99/70 (EELC 2014-4).

5 February 2015, C-117/14 *(Poclava)*: one-year probation does not make permanent contract fixed-term (EELC 2015-1).

26 February 2015, C-238/14 *(Luxembourg)*: Luxembourg has failed to fulfil its obligations under the Framework Agreement (EELC 2015-1).

7. Temporary agency work

17 March 2015, C-533/13 *(AKT)*: Member States need not remove restrictions on agency work (EELC 2015-1).

8. Part-time work

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

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

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

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

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

15 October 2014, C-221/13 (*Mascellani*): involuntary conversion to full-time compatible with Directive (EELC 2014-4).

5 November 2014, C-476/12 (*Gewerkschaftsbund*): child allowance subject to principle of *pro rata temporis* (EELC 2014-4).

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

11 February 2010, C-405/08 *(Holst)*: Danish practice regarding dismissal protection of employee representatives not compatible with Directive 2002/14 (EELC 2010-2 and 3).
20 June 2013, C-635/11 *(Commission - v- Netherlands)*: foreign-based employees of Dutch company resulting from cross-border merger must enjoy same participation rights as their Dutch colleagues (EELC 2013-3).

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

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

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

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

24 January 2012, C-282/10 *(Dominguez)*: French law may not make

entitlement to paid leave conditional on a minimum number of days worked in a year (EELC 2012-1).

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

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

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

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

13 June 2013, C-415/12 *(Brandes)*: how to calculate leave accumulated during full-time employment following move to part-time (EELC 2013-2). 19 September 2013, C-579/12 *(Strack)*; carry-over period of 9 months insufficient, but 15 months is sufficient (EELC 2013-3).

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

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

11. Health and safety, working time

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

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

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

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

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

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

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

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

19 June 2014, C-683/13 (*Pharmacontinente*): inspectors must be able to inspect working time records (EELC 2014-4).

12. Free movement, tax

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

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

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

19 June 2014, C-53 and 80/13 (*Strojirny Prostejov*): unequal tax treatment of foreign temporary employment agency breaches Article 56 TFEU (EELC 2014-3).

24 February 2015, C-512/13 *(Sopora)*: workers residing less than 150 km from Dutch border may be favoured (EELC 2015-1).

13. Free movement, social insurance

1 October 2009, C-3/08 (*Leyman*): Belgian social insurance rules in respect of disability benefits, although in line with Regulation 1408/71, not compatible with principle of free movement (EELC 2009-2).

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

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

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

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

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

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

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

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

19 December 2012, C-577/10 (*Commission - v - Belgium*): notification requirement for foreign self-employed service providers incompatible with Article 56 TFEU (EELC 2013-1).

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

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

19 June 2014, C-507/12 (*Saint Prix*): woman who gives up work due to late stage pregnancy retains "worker" status provider she finds other work soon after childbirth (EELC 2014-3).

15 January 2015, C-179/13 (*Evans*): Member State national employed in consulate of third country need not be affiliated to host country's social security scheme (EELC 2014-4).

14. Free movement, work and residence permit

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

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

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

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

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

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

11 September 2014, C-91/13 (*Essent*): third country nationals made available by an employer in another Member State do not need work permits (EELC 2014-3).

15. Free movement, pension

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

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

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

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

23 January 2014, C-296/12 (*Belgium*): Belgian law limiting tax reduction of contributions to Belgian pension funds breaches Article 56 TFEU (EELC 2014-3).

5 November 2014, C-103/13 (*Somova*): pension may not be conditioned on discontinuing foreign social security coverage (EELC 2014-4).

16. "Social dumping"

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

12 February 2015, C-396/13 (*Elektrobudowa*): What is included in "minimum wage" under Posted Workers Directive? (EELC 2015-1)

17. Free movement (other)

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

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

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

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

18 September 2014, C-549/13 (*Bundesdruckerei*): Article 56 TFEU precludes fixing minimum wage through public procurement requirement (EELC 2014-3).

18. Maternity and parental leave

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

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

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

13 February 2014, C-412 and 513/11 (*Kultarinta and Novamo*): pregnant worker interrupting unpaid parental leave entitled to paid maternity leave (EELC 2014-1 and 3).

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

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

18 March 2014, C-363/12 (*X*): commissioning mother may be refused maternity leave; no sex or disability discrimination (EELC 2014-3)

19. Collective redundancies, insolvency

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

10 February 2011, C-30/10 (*Andersson*): Directive 2008/94 allows

exclusion of (part-)owner of business (EELC 2011-1).

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

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

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

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

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

25 April 2013, C-398/11 (*Hogan*): how far must Member State go to protect accrued pension entitlements following insolvency? (EELC 2013-2).
28 November 2013, C-309/12 (*Gomes Viana Novo*): Member State may limit guarantee institution's payment obligation in time.

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

5 November 2014, C-311/13 (*Tümer*): illegal third country national entitled to insolvency benefits (EELC 2014-4).

20. 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).

21. 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).

22. Miscellaneous

4 December 2014, C-413/13 (*FNV*): collective agreements re minimum earnings of self-employed distort competition, but "false self-employed" are covered by the "Albany exception" (EELC 2014-4).

5 February 2015, C-317/14 *(Belgium)*: candidates may be obligated to prove language proficiency exclusively by means of a Belgian certificate.

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National associations of employment lawyers

Country	Name	Website
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Belgium 2	AJPDS	http://www.ajpds.be/
Bulgaria	none	
Croatia	-	
Cyprus	none	
Czech Republic	CzELA (Czech Employment Lawyers Association)	www.czela.cz
Denmark	Ansaettelses Advokater	www.ansaettelsesadvokater.dk
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Latvia	-	
Lithuania	-	
Luxembourg	ELSA	www.elsa.lu
Malta	-	
Netherlands	Vereniging Arbeidsrecht Advocaten Nederland (VAAN)	www.vaan.nl
Northern Ireland	ELG	
Norway	Norsk Arbeidsrettslig Forening	www.arbeidsrettsligforening.no
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Portugal	Associação Portuguesa Direito do Trabalho (APODIT)	www.apodit.com
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