EELA
European Employment Lawyers Association

EELA JOURNAL

European Employment Law Cases

Edition 2015 | 3

Belgium: ECJ asked to rule on headscarf ban

Poland: non-compete obligation does not cross to transferee

Portugal: employer cannot cancel non-compete

Denmark: employer may pay union member

Spain: employer may select 55+ employees for redundancy

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. It also includes a Commentary by the author and, in many cases, Comments on the case by lawyers 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 (the ECJ) that are relevant to practitioners of European employment law, as well as Advocates-Generals' opinions and brief summaries of questions that have been referred to the ECJ.

The full text of all editions of EELC since its launch in 2009, including an index arranged by subject matter, 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 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, several hundred attended the most recent annual conference, which was in Limassol, Cyprus. The next annual conference is to be held from 19 to 21 May 2016 in Prague, Czech Republic (see back cover). Information about the conference can be found on www.eela2016.org.
In November of each year, EELA holds a seminar in Brussels in cooperation with the Academy of European Law (ERA). The next of these ERA-EELA conferences is scheduled for 20 November 2015 (see the EELA website).

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INTRODUCTION

This issue of EELC includes 19 case reports, one article and summaries of 11 ECJ judgments, 2 A-G opinions and 11 references for a preliminary ruling. Eight of the case reports deal with discrimination, still the most popular topic. Of those, two (one German and one Belgian) concern a prohibition against wearing religious symbols at work, which in practice comes down to a ban on headscarves. Two cases on headscarves (*Achbita* from Belgium and *Bougnaoui* from France) are pending in the ECJ. An English judgment raises the issue of whether the mental processes of individuals who have influenced someone else's decision are relevant to a discrimination claim.

Greek legislation and practice make it almost impossible for employers to achieve collective redundancies. The ECJ has been asked to rule on the compatibility of that fact with EU law. However, the ECJ's ruling is likely to be overtaken by the dramatic developments in Greek labour law that are presently unfolding.

Employment law is in a constant state of flux. This is illustrated by the Irish Workplace Relations Act. Starting on 1 October 2015, it will bring major procedural reforms and will simplify employment litigation. Another example is The Netherlands, where dismissal law was amended radically with effect from 1 July 2015, *inter alia* making it harder to dismiss permanent employees on grounds of damaged working relations.

Poland and Portugal have contributed interesting reports on cases concerning non-compete clauses. Do they go across to a transferee? Can the employer waive its rights under such a clause unilaterally (to avoid having to compensate the former employee)?

Spain continues to be the Member State that refers most employment-law questions to the ECJ, particularly on the subject of fixed-term employment.

In the Austro-Hungarian *Martin Meat* case, the ECJ has delivered a judgment that is likely to be important for many European lawyers. The court lists various indicators to determine whether a contract is for the delivery of services (contracting out) or for manpower supply within the meaning of the Posting Directive. The author's commentary in the Dutch case report nicely highlights the relevance of this issue.

As always, readers of EELC are encouraged to report judgments and other developments in their jurisdiction that could be relevant to employment lawyers in other Member States.

This is the penultimate issue of EELC as EELA's journal. As of 2016, EELC will become an independent publication to which anyone can subscribe. The subscription price for an electronic copy is anticipated to be € 100 per year. For the first year, members of EELA will be offered an electronic and paper edition for this price for the first year.

Peter Vas Nunes
General editor

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2015/19

Successfully appealed pre-transfer dismissal revives employment contract retroactively, causing contract to transfer (UK)

CONTRIBUTOR ANNA SELLA*

Summary
An employee's successful appeal against dismissal meant that her dismissal was overturned and she was, without more, automatically reinstated with retrospective effect. The decision did not have to explicitly refer to reinstatement nor did it need to be communicated to the employee to be effective. This logic applies even where the employer's business transferred to a new employer after the dismissal but before any appeal hearing.

Background
The European Acquired Rights Directive on safeguarding employees' rights in the event of transfers of undertakings has been implemented in the UK by the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE).

Regulation 4 of TUPE provides that a relevant transfer shall not operate to terminate an employee's employment contract. In order for their employment to be protected and to transfer to the new employer, however, employees must be employed by the first employer *"immediately before the transfer"*. Employees who are dismissed prior to the transfer for a reason unconnected to it will not, therefore, become employed by the new employer, unless – as this case shows – the decision to dismiss them is overturned on appeal.

Facts
Mrs Salmon was employed by Castlebeck Care until she was dismissed for gross misconduct. She exercised her contractual right to appeal this decision. Before any appeal was held, the business undertaken by Castlebeck transferred to another company, Danshell Health.

Her appeal against dismissal was heard by employees of Danshell who had transferred from Castlebeck. The appeal panel decided that Mrs Salmon's dismissal was 'unsafe'. But there was no explicit decision to reinstate Mrs Salmon, and the outcome of the appeal was not communicated to her. Instead, Danshell intended to reach a settlement with her – but this did not happen. Mrs Salmon brought a claim against both Castlebeck and Danshell, claiming compensation for unfair dismissal.

The Tribunal decided that her only claim was against Castlebeck, as she had never been employed by Danshell. The Tribunal thought that, in order for Mrs Salmon's employment to be revived, the law required not just a successful appeal against dismissal but also a separate and explicit decision to reinstate. It also held that in order for any such decision to be effective, it had to be communicated to the employee. As neither of these things had occurred, Mrs Salmon's claim was against the original employer (Castlebeck) only; the claim against Danshell failed.

Mrs Salmon considered that her successful appeal meant that her dismissal was overturned and, without more, she was automatically reinstated with retrospective effect. This in turn meant that she was employed by Castlebeck *"immediately before the transfer"* in line with Regulation 4 of TUPE, so that her employment transferred to Danshell; although she was treating herself as dismissed (and seeking compensation) due to their subsequent conduct. She therefore appealed the Tribunal's decision.

Judgment
The Employment Appeal Tribunal (EAT) agreed with Mrs Salmon and overturned the Tribunal's findings. It found that, unless there were contractual provisions to the contrary, the effect of a successful appeal against dismissal was to revive the employment contract with retrospective effect so as to treat the employee as if they had never been dismissed. The EAT said that, in principle, there was every reason why (and no reason why not) this should be the case.

The EAT acknowledged that communication to the employee was needed to effect a dismissal, but this was not the case with a successful appeal against **dismissal**, where the revival of the contract happened automatically. If it was otherwise, the employer could simply avoid the consequences of any decision in favour of the employee by not telling the employee its decision, which was a situation that was clearly open to abuse. The EAT also held that the right to an appeal necessarily includes the right to be told the result.

Consequently, it was Danshell, not Castlebeck, who was liable to Mrs Salmon for unfair dismissal.

Commentary

This decision, applying established law, is unsurprising in principle and it accords with the spirit of TUPE in terms of the protection to be offered to employees on the transfer of a business. However, it does create an interesting situation in the context of a TUPE transfer because it means that the potential new employer may be put in the position of conducting an enquiry into the dismissal process of the first employer and, if it finds wrongdoing, it (the second employer) will be liable for that.

The case highlights that, generally, it is the new employer who will bear the liability for the old employer's failings, subject to contractual terms in which the transferor may agree to reimburse the transferee. This case acts as a reminder about the importance of conducting due diligence on the transfer of a business which includes information about recent 'leavers' from the business, so that the new employer can factor any outstanding risks into its commercial terms with the old employer.

It is also interesting to consider why the employee appealed in this case, when the only practical difference between the two court decisions appears to be who was responsible for paying her compensation. However, as it appears that Castlebeck went into administration, this made all the difference: Denshell was in a position to pay full compensation to the employee, giving her an effective remedy, while Castlebeck was not.
Had the appeal decision (to revoke the dismissal) been acted upon, Mrs Salmon would presumably have continued employment with Danshell, to whom her employment transferred, and been paid back-pay for the time going back to her original dismissal. However, on the facts of the

case, in particularly Danshell not communicating the appeal decision to Mrs Salmon and making no attempts to get her back to work, it seems she decided that the employment relationship was at an end. She therefore treated herself as dismissed and sought compensation. Although reinstatement is a possible remedy for unfair dismissal in the UK, it is rarely ordered by a court or tribunal because compelling specific performance of a personal contract such as an employment contract, particularly where the relationship has broken down, is considered undesirable and contrary to public policy. In any event, in this case it seems that Mrs Salmon did not wish to work for Danshell and so was not seeking reinstatement.

Comments from other jurisdictions

Austria (Martin Risak and Thomas Pfalz): Under Austrian law a dismissal may be contested in workplaces with more than four employees within a week in case of a summary dismissal or two weeks in case of a dismissal with notice (Section 105 et seq. of the Labour Constitution Act – Arbeitsverfassungsgesetz). It will be successful if the dismissal is to be considered "socially unjust" and was not based on reasons attributable to the employee or on the job being made redundant. The ruling of the court will – in case of a successful claim - reinstate him/her retroactively. If a transfer of an undertaking has taken place before the reinstatement, the employment contract will then be transferred retroactively to the transferee at the time of the transfer.

Croatia (Dina Vlahov Buhin): The case at hand would most probably be decided differently by competent Croatian courts mostly due to procedural differences of the two legal systems. However the underlying legal argumentation of the case could adequately be applied by the Croatian court, but under different procedural circumstances.

First of all, under Croatian law an "appeal" against a dismissal is carried out by filing a claim before the competent court. The respective court primarily decides whether the dismissal has been declared lawfully. If the respective court determines that the decision on dismissal has been rendered unlawfully, the dismissal shall be considered to be null and void and as if it has never been declared, ie employment relationship shall be restituted with retroactive effect (ex tunc). Provided the dismissal is declared unlawful, the court may, depending on the claim of the employee, either (i) reinstate the employee and order the reimbursement of due wages for the period when he/she was not working due to wrongful dismissal or (ii) terminate the employment relationship and order the payment of a compensation. In any case, the court may only render the aforementioned decisions if the latter or the former are explicitly requested in the claim by the employee (the employee may alter its requests of the claim in the course of the proceedings). Namely, according to the Croatian procedural law the court may only decide within the merits of the filed claim, hence, if not explicitly requested by the employee, the court may not decide that the respective employee is automatically reinstated at his former working post.

As to the fact that in the period between the announcement of the dismissal and rendering of the court's decision a transfer of undertaking occurred, the Croatian law generally prescribes that all existing employment agreements are ex lege transferred to the new employer. It is further stipulated, that the former and the new employer are jointly and severally liable for the obligations in regard to the employees which arose before the date of the transfer. It follows that de jure the employment agreement which has been terminated unlawfully should be transferred automatically to the new employer due to a legal presumption that such a dismissal never occurred at all, meaning that it existed during the time of the transfer. However, in order for the aforementioned court decisions to be enforceable in regard to the new employer and not to the former one, the fact that the transfer of undertaking occurred and that it pertains to the respective employee has to be determined and declared by the competent court. Hence, the employee has to request the court to determine that his/hers employment agreement has been ex lege transferred to the new employer and that he/she may therefore request that he/she continues working for the new employer or that the new employer is jointly and severely liable with the former for the payment of the compensation.

In summary, according to Croatian law the outcome of the commented case would mostly depend on how the relevant employee would structure his/hers claim. Namely, as mentioned, if the dismissal is declared to be unlawful the employee may request to be reinstated or judicially terminate the employment agreement and claim compensation. Further, in order to secure that above mentioned requests of the claim are enforceable in regard either to the new employer or both to the former and the new employer, the employee has to explicitly request the court to determine that the transfer of undertaking occurred, that he/she is encompassed by it or that the new employer is jointly and severally liable with the former for the payment of the compensation.

The Netherlands (Zef Even): This case indeed serves as a reminder to perform a thorough due diligence. It resembles to some extent a Dutch case that was judged by the Supreme Court (26 June 2009, JAR 2009/183, Pax/Bos). The employer, Sara Lee, sourced out its logistic services to another company, Pax. The employees assigned to the logistic services department, however, agreed to enter into service of a daughter company of Sara Lee, Detrex. These employees were subsequently hired by Pax in order to do the logistic work for the benefit of Sara Lee. According to the Supreme Court, the combination of (i) sourcing out the logistic activities to Pax and (ii) having the employees entering into service of Detrex whilst being hired by Pax and performing work for Sara Lee, constitutes a transfer of undertaking. Although the employees signed an employment contract with that daughter company, in fact they automatically entered into service of Pax. Pax was therefore the employer of these employees and had been just that as of the start, without Pax realising that.

Subject: Transfer of Undertakings; Reinstatement
Parties: Salmon v Castlebeck Care (Teesdale) Ltd and others
Court: Employment Appeal Tribunal
Date: 10 December 2014
Case number: UKEAT/0304/14/DM
Internet publication: www.bailii.org→UK&Commonwealth→UK Employment Appeals Tribunal→2014→December→see under name of parties

*Anna Sella is a Senior Associate at Lewis Silkin LLP: www.lewissilkin.com

2015/20

Non-compete obligations do not cross to transferee in transfers of undertakings (PL)

CONTRIBUTOR MARCIN WUJCZYK*

Summary
The Polish Supreme Court has recently narrowed the scope of rights and obligations transferred to a transferee in case of transfer of an undertaking.

Facts
On 1 April 2000, the plaintiff, Ms U.K., concluded a contract of employment for an indefinite duration with Company A under which she was employed as an executive assistant on a full-time basis. Clause 5 of the contract included a non-compete obligation according to which the plaintiff was required not to engage in competitive activity within one year following termination of the employment relationship. In consideration of this obligation, she was to receive a compensation amounting to PLN 11,474.52[1].The non-compete clause was to enter into force following termination by the parties of the employment relationship.

On 2 January 2008 Company A was acquired by Company B.

On 29 February 2012, the plaintiff and Company B concluded an agreement under which they terminated the contract of employment. They did not invalidate the non-compete clause.

On 28 May 2013 Company B, the defendant in this case, gave notice of cancellation of the non-compete clause[2]. The plaintiff did not accept the cancellation and filed a petition to order the defendant to pay her the contractual compensation of PLN 11,474.52 plus statutory interest for refraining from competitive activity.

The courts of the first and the second instance ruled in favour of the plaintiff and awarded her the entire amount of the requested compensation. They reasoned that although the plaintiff had concluded the non-compete agreement with Company A, as a result of the transfer of the undertaking to Company B, the latter became a party to the non-compete agreement. The courts also held that cancellation by Company B of the non-compete clause had no legal grounds and thus was ineffective.

The defendant filed a 'cassation' appeal with the Supreme Court.

Judgment
The Supreme Court, in its assessment of the effectiveness of the non-compete clause following the transfer of an undertaking to another employer, pointed out that the Labour Code provides that in the case of transfer of an undertaking or a part of an undertaking to another employer, the latter shall by law become a party to the existing employment relationships. It noted that, in accordance with the system provided by Article 3 of Council Directive 2001/23/EC, the Polish Labour Code introduced the principle of automatic assumption by the new entity of the rights and obligations of the previous employer. The employer acquiring the undertaking or part of it becomes a party to the existing employment relationships. This becomes effective upon acquisition of the undertaking by operation of law, with no need for any additional action by the parties, in particular, with no need for termination of the existing and conclusion of new employment contracts.

However, in terms of the non-compete clause in question, the Supreme Court pointed out that it was an agreement on non-competition after termination of the employment relationship. An essential feature of such agreements is that its term exceeds the period during which parties are bound by the employment relationship. The rights and obligations arising from the agreement are exercised only after termination of employment.

The Supreme Court went on to hold that an obligation not to compete after termination of an employment relationship is not an element of the employment relationship governed by the principle of "automatism", that is to say that all terms of employment existing at the time of the transfer automatically move across to the new employer. Since a non-compete agreement is separate from the contract of employment and is not subject to its terms and conditions, it does not fall within the employment relationship with the new employer under the Labour Code following the transfer.

The outcome of the case, therefore, was that Company B cannot hold the plaintiff to her non-compete obligation. The plaintiff's claim for payment of compensation under the contract was denied.

Commentary
First, it should be noted that the Supreme Court's judgment constitutes a change to the Court's previous standpoint. Until recently, the Supreme Court's usual approach was as expressed in its judgment of 11 January 2005, I PK 96/04, according to which "in the case of transfer of an undertaking or part of an undertaking to another employer, the latter shall by law become party to the existing employment relationships. Acquisition of the original employer of the plaintiffs by the defendant constituted the transfer of an undertaking (...) including also the rights and obligations under a non-compete agreement".

The Supreme Court's approach, as expressed in the current case, strikes me as incorrect. Article 3 of Council Directive 2001/23/EC provides that the transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer shall, by reason of such transfer, be transferred to the transferee. The expression "rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer" should be broadly interpreted. It covers not only matters arising directly from the contract of employment but also other rights and obligations, which, although not provided by such contract, are closely connected to the employment relationship and thus arise from it.

An agreement on non-competition after termination of employment is not simply a civil contract but a mixed agreement (even though it enters into force after employment has ended). The agreement is based on

1 Under Polish law, a requirement to pay the (former) employee compensation is mandatory.
2 Polish law provides that unilateral cancellation of a non-compete clause by the employer is invalid unless expressly agreed otherwise, which was not the case here. This aspect of the case is not crucial, the main issue being whether the non-compete clause retained its validity following the transfer of undertaking.

the Labour Code and can only be concluded when the employment is still continuing. Because of the nature and purpose of the agreement, it cannot, in my view, be completely separated from the employment relationship. Therefore, in the case of a transfer of an undertaking to another employer, the rights and obligations arising from the non-compete agreement should also transfer.

This interpretation is supported also by the need to protect employees. If an employee enters into a non-compete agreement and refrains from competitive activity following termination of the employment, the employer should reasonably be expected to have to compensate the employee for this. An employee should not be deprived of the right to compensation as a result of the acquisition of the business by another entity.

If the Supreme Court's position is accepted, this could also be open to abuse by employers, who might deliberately sell off parts of their businesses to subsidiaries so as to avoid non-compete obligations.

Comments from other jurisdictions

Belgium (Isabel Plets): The decision of the Polish Supreme Court appears to me to be incorrect and it would certainly be different if a Belgian court had ruled on it. Directive 2001/23/EC was transposed in Belgium through Collective Bargaining Agreement n° 32*bis* (CBA 32bis), concluded in the National Labour Council on 7 June 1985. This was adjusted by CBA 32*quinquies* of 13 March 2002.

All rights and duties arising from employment contracts existing on the date of transfer automatically transfer from the transferor to the transferee (Article 7 CBA 32*bis*). There is no doubt that a non-compete agreement included in an employment contract would transfer to the transferee.

In Belgium, a non-compete agreement can be concluded during the employment relationship, but also after termination of the employment relationship. The first type is governed by the specific and strict rules laid down in the Act on employment contracts. The second type is governed exclusively by civil law, not by labour law.

Denmark (Mariann Norrbom): Contrary to the ruling of the Polish Supreme Court, in Denmark a non-compete clause would be considered as arising from the employment relationship. Thus, it would be considered to be part of the "rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer", as provided under Article 3 of Directive 2001/23/EC. Consequently, a non-compete restriction will automatically transfer as part of the employment relationship, allowing the new employer to maintain the restriction vis-à-vis the employee. It seems that Danish law is more in line with the views of the author of this case report than with Polish law as such.

In my opinion, it would be inconvenient if a non-compete restriction did not automatically transfer with the employment relationship in the case of a transfer of the undertaking. Sometimes, the knowledge and expertise of key employees is the main reason why the new employer wants to take on the transferring business. If those employees are not automatically bound by their existing non-compete clause, there is a risk that the new employer will be taking on a business that is far less valuable than expected, as all key employees would be free to leave and take up employment with competitors.

Further, it is interesting to see that Polish law does not allow an employer to terminate a non-compete restriction, irrespective of whether a transfer has taken place. Under Danish law, employers can terminate a non-compete clause both during the employment and after termination. If the employer has not terminated the non-compete restriction prior to termination of the employment, the employee is entitled to compensation for the first three months in the form of a lump sum payment. After that, the employer can terminate the non-competition restriction at any time with one month's notice, to expire at the end of a month. However, if the restriction is terminated within the last six months of the employment, the employee will still be entitled to the lump sum payment for the first three months of the restricted period.

Germany (Dagmar Hellenkemper): German legal literature agrees with the Polish commentary above, that the transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer should, by reason of such transfer, be transferred to the transferee and that this would include any individuals' rights relating to the employment relationship with the transferor. Commentators point out that the scope of the non-compete obligation may be affected.

As noted in relation with the Portuguese decision on the waiver of a non-competition clause (see below: EELC 2015/29), an employer in Germany may unilaterally waive a non-compete clause but is only released from its obligation to pay the compensation one year after declaration of the waiver. If the transferee does not want to be bound by a non-compete clause it is free to issue a waiver to all employees transferring to the company. It would still be obliged to pay (part of) the compensation if an employee leaves within a year of the waiver, the amount depending on the time of termination.

United Kingdom (Bethan Carney): post-termination non-compete provisions in the contract of employment are deemed by UK courts to continue post-transfer as if made between the individual and the transferee as a result of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ('TUPE'). This is due to the operation of regulation 4 ("a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to the relevant transfer, which would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee"). Even though the relevant restrictions do not take effect until after the termination of employment they are still deemed to be terms of the contract and can transfer.

Although it is well-established by the courts that restrictive covenants are part of the terms and conditions of employment that do transfer as a result of TUPE, there are other issues which have been found to impact upon the effectiveness of such clauses post-transfer. In the case of *Morris Angel and Son Ltd - v - Hollande and anor 1993 ICR 71* the Court of Appeal found that restrictive covenants entered into pre-transfer did transfer to the benefit of the transferee who could enforce the covenant to restrain the employee from dealing with former clients of the transferred undertaking. However, the clause could not be read so as to prevent the individual from dealing with clients who had been customers of the transferee before the transfer – as this had not been contemplated by either party when the contract was agreed. It is not clear whether this decision will operate so as to effectively 'freeze' the

scope of restrictive covenants so that they only catch the customers with whom the individual was dealing in the period immediately before the transfer and do not cover customers of the transferee with whom the individual might deal post-transfer. In practice, employers usually try to deal with this by asking key employees to enter into new restrictive covenants after a transfer. This is in itself problematic because changes to employment contracts are void if the reason for the change is a TUPE transfer. In order to effect changes in these circumstances employers have to terminate employment and offer re-employment on the new terms – which is obviously a delicate and risky process.

Subjects: transfer of an undertaking
Parties: U.K. – v – A
Court: Sąd Najwyższy (Supreme Court)
Date: 11 February 2015
Case Number: I PK 123/15

*Marcin Wujczyk, Ph.D, is an associate professor at the Jagiellonian University and an attorney with Ksiazek & Bigaj Law Firm, www.ksiazeklegal.pl.

2015/21

Mental processes of those influencing the sole decision-maker not relevant to discrimination claim (UK)

CONTRIBUTOR KAYLEIGH WILLIAMS*

Summary
In a recent age discrimination case, the Court of Appeal decided there was no need for an Employment Tribunal to consider the mental processes of other people influencing the sole decision-maker, regardless of the fact that his decision was informed by their opinions.

Background
The legislation applicable to this case was contained in the Employment Equality (Age) Regulations 2006, which provided protection against direct discrimination on the grounds of age prior to the enactment of the Equality Act 2010.

Under these regulations, any discriminatory act by an employee in the course of his employment was to be treated as carried out by his employer as well as by him (Regulation 25). Further, that employee could then be personally liable (Regulation 26(2)).

Under Regulation 37, where the complainant proved facts that, in the absence of an adequate explanation by the employer, could lead the tribunal to find discrimination, the burden of proof shifted to the employer. In other words, the employer then had to prove that it did not discriminate, rather than the complainant proving that discrimination occurred.

There are now similar provisions to these in the Equality Act.

Facts
Dr Mary Reynolds provided services to CLFIS ('Canada Life') under a consultancy agreement, having been previously employed by them for 20 years. Her agreement was terminated when she was 73 years old by Mr Gilmour, the UK general manager. He made the decision to terminate following a presentation given to him by several directors which highlighted issues with Dr Reynolds' performance.
Dr Reynolds subsequently brought a claim for unfair dismissal (which was rejected on the basis that she was not an employee) and a further claim alleging direct age discrimination.
Employment Tribunal decision

The Employment Tribunal ('ET') which heard the case was mainly concerned with Mr Gilmour as the sole decision-maker and his motives in terminating the agreement. It did not concern itself with the thought processes of those who had potentially influenced his decision by delivering the presentation.

The ET found that Dr Reynolds had established facts that showed, in the absence of a reasonable explanation by Canada Life, that the decision to terminate was influenced by her age, so the burden of proof shifted to Canada Life to show a non-discriminatory explanation for its decision.

Following Canada Life's explanation, the ET concluded that, although Mr Gilmour took the issues raised by the presentation into account, there was no obvious age bias. His decision was not taken for a discriminatory reason, but because he felt Dr Reynolds was not performing adequately and was incapable of change. The ET found various reasons, unrelated to age, for Mr Gilmour's belief:

- Dr Reynolds was unable to attend the company's Bristol office due to her caring responsibilities (her sister was disabled), which meant she had limited access to training and development opportunities.
- She was completely inflexible in her methods of communication. For example, she refused to use email and required papers to be faxed or posted to her, but would not accept anything sent by recorded delivery.
- She was slow in turning round work and would not provide any advice in writing, insisting on dictating it over the phone to others instead.

Employment Appeal Tribunal decision
Dr Reynolds appealed to the Employment Appeal Tribunal ('EAT') on three grounds:

- The ET was wrong in saying it was necessary only to consider Mr Gilmour's motivation: it should not have disregarded the involvement of the other individuals in the process.
- Having decided that the burden of proof had shifted, the ET failed to take into account the fact that one of the directors had not given oral evidence and another had not been called to give evidence at all.
- The ET failed to address adequately whether Mr Gilmour's belief that she was incapable of changing the way in which she worked was itself age-related.

Allowing the appeal on the first ground, the EAT considered whether an ET is entitled to focus on the mental processes of the decision-maker alone. The EAT disagreed with the ET's decision, ruling that discrimination could be established if a prohibited ground (such as age) in the minds of those advising the decision maker had a "significant influence" on the outcome. The EAT sent the case to be reheard by a different ET.

Court of Appeal decision
Canada Life then appealed to the Court of Appeal, on three main grounds:

- The ET was right in law to focus exclusively on the mental processes of Mr Gilmour as the sole decision-maker and the EAT should not have reversed its decision on this point.
- Even if the mental processes of the others were in principle relevant, Dr Reynolds did not advance any claim in the ET of this kind and so was not entitled to complain now about the failure to consider it.
- Even if the mental processes of the others were relevant, there had been no finding of discrimination relating to them under the burden of proof provisions which would shift the burden to Canada Life to show a non-discriminatory motive.

The Court of Appeal split its reasoning into two parts. First, it observed the ET's focus on Mr Gilmour as the sole decision-maker. The Court agreed with the ET that the others had not been party to Mr Gilmour's decision, stating that, "supplying information or opinions used for the purpose of a decision does not constitute participation in this decision". The Court instead described the case as one of "tainted information", in which an act harmful to a claimant is done by an employee innocent

of discriminatory motivation but who has been influenced by the information of an employee with discriminatory views.

The Court of Appeal discussed two different approaches to dealing with such cases:

- **The "composite" approach:** This brings together the decision-maker's act with the informant's motivation. Under this approach the informant's discriminatory motivation could be treated as a ground for the claimant's dismissal, despite the fact that another was the actual decision-maker.
- **The "separate acts" approach:** Under this approach, the informant's report is treated as an isolated discriminatory act for which the employer is potentially liable. The claimant here is able to recover for losses caused by their dismissal as a consequence of the act, rather than because the dismissal itself was unlawful.

The Court favoured the separate acts approach, regarding the composite approach as unacceptable. This was because it was central to the scheme of the legislation that liability could only attach to an employer where an individual employee for whose act it is responsible has acted in a way that satisfies the definition of discrimination. Making the employer liable for a composite discriminatory dismissal by the decision-maker would also make the latter liable for discrimination (under Regulation 26(2)), even though he was innocent of any discriminatory motive. The separate acts approach prevented this potential unfairness.

The second part of the Court of Appeal's reasoning concerned Dr Reynolds' alleged inability to change. As mentioned above, Dr Reynolds had contended that the ET's reasoning was flawed when it rejected the contention that Mr Gilmour's belief that she was incapable of change was based on age-related stereotypes. The Court dismissed this argument, noting the ET's emphasis on how Mr Gilmour's belief was derived from his personal knowledge and judgment of Dr Reynolds.

Without going into any detail on the other two grounds of appeal, the Court of Appeal allowed Canada Life's appeal. The Court restored the ET's decision that it did not have to consider the mental processes of those influencing the decision-maker and held that it had been entitled to reject Dr Reynolds' claim.

Commentary

While this judgment appears to limit the scope of discrimination claims, it is important to note that it was very fact specific. The Court of Appeal pointed out that, if the decision to terminate had been made jointly, the motivation of all involved would have been relevant. Further, Dr Reynolds might perhaps have succeeded in her claim if she had made the motives of the advisers relevant by specifically pleading that the presentation to the decision maker was *itself* an act of discrimination.

On a practical level, employers should take care to ensure bias is challenged at all levels of their organisation, for example through diversity training and monitoring. This will help ensure that all aspects and stages of the decision-making process are free from bias, even where one person is ostensibly making the decision in question alone.

Comments from other jurisdictions

Austria (Thomas Pfalz): Assuming that Dr Reynolds would have qualified as an employee under Austrian labour law, the termination of her contract would have been assessed on the basis of section 17 of the Equal Treatment Act *(Gleichbehandlungsgesetz)*. It provides protection, *inter alia*, against discrimination on grounds of age. Courts in Austria do not use the 'separate acts approach' as the English Court of Appeal did in the case reported above. Instead, they focus exclusively on whether the termination objectively results from an act of discrimination. The motives of the employer/decision-maker and/or any other subjective elements are therefore not taken into account. Thus, it seems possible that Dr Reynolds would have succeeded with a claim for unfair dismissal before an Austrian labour court, even though the individual who actually terminated her contract acted without discriminatory motives.

For the sake of completeness it is worth noting that section 19(3) of the Equal Treatment Act provides that there is also discrimination where one person is instructed to discriminate by another person. In the legal literature, it has been argued that the term 'instruction' covers any situation where one person can influence the behaviour of another. However, it seems this provision is only directed towards situations where superiors influence members of their staff and not vice versa, so section 19(3) would not apply in this particular case.

Subject: Direct discrimination; age
Parties: CLFIS (UK) Ltd - v - Reynolds
Court: Court of Appeal
Date: 30 May 2015
Case number: A2/2014/1837
Internet publication: www.bailii.org/ew/cases/EWCA/Civ/2015/439.html

*Kayleigh Williams is a paralegal at Lewis Silkin LLP: www.lewissilkin.com

2015/22

Job applicant may lie when asked about spouse's gender and political activity (FI)

CONTRIBUTORS KAJ SWANLJUNG AND JOHANNA ELLONEN*

Summary

The employer had no right to ask the job applicant about her spouse's political activity, nor to require the applicant to tell the truth about her spouse's gender. Consequently, the employer discriminated against the employee when it terminated the employment for serious breach of trust having discovered that the employee had lied about her spouse's political activity and had not corrected the assumption that the spouse was of the same gender.

Facts

The defendant in this case was an independent newspaper company. On 1 September 2008 it signed an employment contract with the plaintiff for the position of editor-in-chief, to commence in December 2008. On 26 September 2008, the company's managing director received an anonymous text message, stating that the new editor-in-chief's spouse was a candidate in the municipal election and that the spouse was of the same gender as the plaintiff.

The company arranged a meeting with the plaintiff on 29 September

2008. It turned out that the plaintiff had lied about her spouse's political activities in the job interview when asked about it, and that she had not corrected everybody's assumption that her spouse was a man. The plaintiff was told that the company could not continue the employment relationship due to the plaintiff's dishonest conduct. The details regarding the termination - means, timing and compensation - were left open.

In a judgment delivered by the Court of Appeal of Helsinki on 18 March 2010, the termination was held to be unjustified and the company was ordered to pay six months' salary for unjustified dismissal, salary for the notice period and € 5,000 as compensation for discrimination under the Non-Discrimination Act. The Supreme Court did not grant leave to appeal and the Court of Appeal's judgment remained final.

After the Court of Appeal had issued its judgment, the prosecutor filed criminal charges for discrimination at work[1] against the the defendant. The prosecutor claimed that the defendant had terminated the employment when it found out that the plaintiff's spouse was a woman and that the spouse was politically active, and consequently put the employee at a particular disadvantage because of her family relations and sexual orientation without justified and compelling grounds.

Contrary to the civil case, the criminal case was litigated all the way to the Supreme Court.

In its defence the company claimed that the employment was terminated due to significant lack of trust. The employee had announced the news of her appointment prematurely, had lied about her spouse's political activities, had not corrected the mistaken assumption regarding her spouse's gender and had issued a press release concerning her dismissal.

Judgment

The Supreme Court considered firstly what constitutes discrimination based on family relations under the Finnish Criminal Code. The concept of family relations is not clarified either within the wording of the provisions or the Parliamentary history of the Criminal Code. The lower courts had considered that family relations in this context referred to, for example, whether the employee is married and whether he or she has children, and that asking a candidate about her spouse's political activities is not the same as asking her about her family relations, and is therefore not discriminatory.

The Supreme Court noted that when interpreting the discrimination grounds provided in the Criminal Code, guidance can be drawn from how the principle has been interpreted elsewhere in the legislation. However, it follows from the principle of legality that the provision may not be interpreted in a manner that would be contrary to its purpose or lead to unexpected results.

The Supreme Court evaluated the concept of family relations further by referring to the ECJ's judgment in *Coleman* (C-303/06), which introduced the concept of associative discrimination (i.e. in connection with less favourable treatment of a non-disabled person by the employer, on grounds of her association with a disabled person). The Supreme Court held that the prinicple of legality does not preclude an interpretation according to which discrimination based on family relations can be held to occur in situations where a family member has a charasteric that is listed in the Criminal Code, or where a family member's activities or opinions are the basis for discrimination.

The Supreme Court found that the employee's spouse's political activities had evidently contributed to the grounds for termination of employment. The Supreme Court further held that the employee's candidacy for a position as editor-in-chief of an independent newspaper did not justify asking questions regarding her spouse's political activity. Consequently, the company had placed the plaintiff at a particular disadvantage based on family relations when it terminated her employment after finding out about her spouse's political acitivities.

Secondly, the Supreme Court assessed whether the plaintiff had been placed at disadvantage because of her sexual orientation without justified and compelling grounds. The Supreme Court considered that there was no doubt that the employee's spouse's gender had affected the termination of employment. The Supreme Court also found that information regarding the employee's spouse's gender was information that the employer did not have a right to or need to know. If the employee had disclosed her spouse's gender, she would also have disclosed information about her sexual orientation, which she had no obligation to do. The Supreme Court concluded that there was no justified and compelling reason for the employer to demand such information. Contrary to the Court of Appeal, the Supreme Court considered that this was a case of direct discrimination, rather than indirect discrimination.

The Supreme Court raised the fines imposed on the defendant from 15 'daily fines' to 40, which in Euros meant an increase from € 6,750 to € 18,040.

Commentary

This is the first time that the Supreme Court has ruled on an employee's dishonest conduct in a situation where the employer had asked unnecessary questions in a job interview. The Parliamentary history states that in such cases the employee is entitled to give ,'insufficient' answers, and legal scholars have different interpretations as to what this means. This case confirms that employees may even lie if employers require unnecessary information from them.

This is also the first time that the Supreme Court has addressed the issue of what constitutes discrimination based on family relations. The Supreme Court followed the principle of associative discrimination established in *Coleman* and related it to discrimination based on family relations.

Comments from other jurisdictions

Austria (Daniela Krömer): The general notion under Austrian dismissal law is that concealing facts that have no implications for the

1 Chapter 47, section 3 of the Finnish Criminal Code (1889/39) provides as follows:
"An employer, or a representative thereof, who when advertising for a vacancy or selecting an employee, or during employment without compelling and justifiable reason puts an applicant for a job or an employee at disadvantage:
(1) because of race, national or ethnic origin, nationality, colour, language, sex, age, family relations, sexual orientation, inheritance, disability or state of health, or
(2) because of religion, political opinion, political or industrial activity or a comparable circumstance
shall be sentenced to a fine or to imprisonment for work discrimination for a maximum of six months."

employment relationship does not constitute grounds for immediate dismissal. This concerns information about previous employers, criminal records and pregnancies. Even information about disability – which the employee is generally required to give so that the employer can accommodate his or her needs – can be withheld if the disability does not impact on the employment relationship (Austrian Supreme Court 9 ObA 240/02p). The general consensus is that summary dismissal on grounds that information regarding sexual orientation or a person's spouse has been withheld, is unlawful. This would entitle the employee to compensation for failure to give notice and may be a basis for a claim for reinstatement.

Belgium (Isabel Plets): Belgian case law accepts that an employee:

- has the *right to lie* when an employer or recruitment agency asks private questions, but
- has an *obligation to speak* if the questions are relevant to the job applied for.

The latter is rare, but could occur, for example, if an employer recruiting window cleaners for skyscrapers asks a candidate if he or she suffers from epilepsy. Not revealing this could be a reason to nullify the employment agreement or to dismiss the employee for serious cause.

Germany (Dagmar Hellenkemper): The same applies in Germany. It is unlawful to ask questions about pregnancies, sexual or political orientation unless the employer has a legitimate interest in asking those questions (e.g. when recruiting people to work in a laboratory in which pregant women should should not work for health reasons). Even so, employers often pose irrelevant questions in job interviews, sometimes simply to see how a candidate will react. The difficulty for candidates is that if they say "you are not supposed to ask me that", it can look as though they have something to hide. German jurisprudence therefore allows apllicants to lie. Terminations based on lies of this kind in job interviews are deemed invalid.

The Netherlands (Peter Vas Nunes):

1. As I read this judgment, the employee was dismissed for two reasons:

    - she lied about her spouse's political activity;
    - she misrepresented her spouse's gender.

This led to prosecution for discrimination on the ground of family relations. If I had been the prosecuter I would have considered three types of dircrimination:

a. family relations: by asking about the candidate's spouse's activities, the employer effectively asked whether the candidate was married;
b. political opinion: applying the docrine of associative discrimination (Coleman), one could argue that the employee was effectivly dismissed on this ground;
c. sexual orientation: requiring a candidate to disclose his or her spouse's gender is relatively more detrimental for a gay person than for a straight person and, therefore, indirectly discriminatory and this may be how the lower courts reasoned in this Finnish case, whereas the Supreme Court seems to have found direct discrimination, perhaps reasoning that the candidate was effectively dismissed for being a lesbian.

2. An employer may not ask a job applicant unlawful questions, such as, "Are you married?" or "Do you have a disability?" Easier said than done. What happens if the employer poses such questions anyway? Of course the candidate may reply, "I need not answer" or, "You should not be asking me these questions". However, such a reply is not likely to be helpful from the applicant's perspective, given that the prospective employer may be tempted to turn down the application, either (if it is careless) on a ground related to the unlawful question, or on a fabricated "neutral" ground, or without giving a reason. The only effective way for a job applicant to counter an unlawful question is to lie. Dutch case-law accepts this remedy.

Subject: discriminination – family status, political and sexual orrientation
Parties: Alma Media Oyj – Johanna Korhonen
Court: *Korkein oikeus* (Supreme Court)
Date: 10 June 2015
Case number: KKO:2015:41
Publication: http://korkeinoikeus.fi/fi/index/ennakkopaatokset/precedent/1433846010211.html

*Kaj Swanljung and Johanna Ellonen are, respectively, Senior Counsel and Senior Associate, with Roschier in Helsinki, www.roschier.com

2015/23

Negative freedom of association does not preclude employer from paying union members more (DK)

CONTRIBUTOR MARIANN NORRBOM*

Summary
In Denmark, there is freedom of association in the labour market. This principle is laid down in the Danish Freedom of Association Act and in Article 11 of the European Convention on Human Rights. Freedom of association means, among other things, that employers are prevented from deciding not to hire or to dismiss an employee because the employee is, or is not, a member of a trade union. During employment, however, the Danish Freedom of Association Act does not prohibit benefits from being awarded exclusively to members of a trade union that is a party to the applicable collective agreement.

Facts
Generally, all Danish employees are entitled to statutory sickness benefits from the municipality provided that they fulfil certain conditions. These benefits do not necessarily cover the employees' entire pay. They are calculated on an hourly basis taking into account the employees' hourly wage after deduction of social security contributions. However, there is a cap on the rate of sickness benefits and the maximum amount is often lower than the employees' normal pay.

The majority of Danish employees are entitled to full pay during sickness absence, for example because they are covered by certain collective agreements. In such cases, the employer pays the difference between the statutory sickness benefits and the employee's normal

pay. Approximately 70% of Danish employees are member of a union. They pay the membership fees themselves.
This case concerned two employees working at a packaging company. Both of them had had periods of sickness absence in 2011 and 2012. The first time around, the two employees received full pay during their sickness absence, but when the employer found out that they were not members of one of the trade unions that had concluded the applicable collective agreement, their sick pay was reduced to the rate of the statutory sickness benefits. Had they been members, they would have been entitled to full pay during their sickness absence.

The two employees claimed that they had been discriminated against because the employer, when reducing their pay during their sickness absence, had referred directly to the fact that they were not members of the relevant trade union. According to them, this was de facto a 'closed shop', i.e. the employees were effectively forced to join a specific trade union.

Decision
Like the High Court, the Supreme Court stated that, based on the wording of the Danish Freedom of Association Act and its explanatory notes, the aim of the legislation is to protect freedom of association in recruitment and dismissal. The Act does not prohibit differential treatment in employment.

The Supreme Court made reference to Article 11 of the European Convention on Human Rights, which provides that "Everyone has the right to [...] freedom of association with others, including the right to form and to join trade unions [...]. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society [...]." The Court noted that the case law of the European Court of Human Rights shows that it is not contrary to Article 11 per se to make an employee suffer adverse effects of non-membership of a trade union other than not being recruited or being dismissed. However, it may constitute discrimination within the meaning of the Convention if the effects of non-membership effectively force an employee to join a trade union – especially if the differential treatment threatens the employee's means of existence or is similarly invasive in nature.

The Supreme Court dismissed the claim that the differential treatment of the two employees had forced them to join one of the trade unions with an applicable collective agreement, as the differential treatment had only meant that they were not entitled to a supplementary payment during their sickness absence. The two employees had not joined one of those trade unions. Accordingly, there was no discrimination, either under the Danish Freedom of Association Act or under Article 11.

Commentary
This judgment establishes that, as a general rule, the Danish Freedom of Association Act and Article 11 of the European Convention on Human Rights – as currently understood in Denmark - only protect against discrimination in recruitment and dismissal.

Accordingly, it is not contrary to the principle of freedom of association for non-membership of a trade union to have certain adverse effects on the employee in employment, as long as it does not effectively force the employee to join the trade union.

This outcome is in line with the legislature's intentions behind the most recent amendment of the Danish Freedom of Association Act. This emphasises that collective agreements exclusively covering members of the trade union that has concluded the collective agreement are still allowed.

This is the first case concerning the scope of the Danish Freedom of Association Act in terms of differential treatment between union members and non-members. Therefore, it is still unknown how far differential treatment can be taken before being considered to force an employee to join a union, thereby rendering it unlawful.

If the employees had joined one of the trade unions that had concluded the applicable collective agreement in order to obtain the right to full pay during sickness absence, there is a possibility that the Danish Supreme Court might have ruled differently, but we think this is unlikely, as a reading of the rest of the court's opinion would suggest otherwise.

Comments from other jurisdictions

United Kingdom (Bethan Carney): It is unlawful in the UK for an employer to subject a worker to a detriment for the 'sole or main purpose' of preventing or deterring them from joining a trade union or of compelling them to become a member of a trade union. There are similar provisions regarding the dismissal of a worker for these purposes and they also make it unlawful to make an offer to a worker for the sole or main purpose of inducing them to enter or leave trade union membership. The focus in all these provisions is on the employer's purpose in treating the worker in a particular way. Like Denmark, the UK does not outlaw different treatment on grounds of trade union membership. The burden of proof in a tribunal claim is on the employer to show its purpose, however, the individual has to make out a *prima facie* case before the burden shifts to the employer.

Subject: Freedom of association
Parties: Trade Union Denmark representing A and B - v - Confederation of Danish Industry representing DS Smith Packaging Denmark A/S
Court: *Højesteret* (Danish Supreme Court)
Date: 4 June 2015
Case number: 69/2014
Internet publication: available from info@norrbomvinding.com

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

2015/24

Protestant hospital may ban headscarf at work (GE)

CONTRIBUTORS PAUL SCHREINER, DAGMAR HELLENKEMPER*

Summary
It is permissible for an employer who is part of a religious community, in this case the Protestant Church, to ask its employees to behave neutrally during working hours. This duty of neutrality can justify a prohibition on wearing Islamic headscarves.

Facts

The plaintiff, a nurse, had been employed by the defendant, a Protestant hospital, since 1996. The employment contract referred to a document setting out the terms and conditions of employment in the Protestant Church, including a dress code. The dress code prohibited headscarves and any other "private clothes" at work unless expressly permitted.

The plaintiff was on parental leave from March 2006 to January 2009[1] and subsequently ill until at least April 2010[2]. She had not worn a headscarf prior to her parental leave. In April 2010 she offered to return to work. It is disputed between the parties whether the plaintiff offered to return to work fully and without limitation or only gradually and under medical supervision. The latter is a kind of reintegration after a long illness *("Wiedereingliederung")* and work done during reintegration is not considered to be job performance because, during this time, the employee is still deemed to be sick. The employee will not receive salary but continue to receive sickness pay under the health insurance scheme.

The letter in which the plaintiff offered to return to work contained a request to be allowed to wear a headscarf for religious reasons. In effect, her offer to return to work was conditional on being allowed to wear a headscarf. The defendant refused to accept the offer to return to work, with reference to the dress code, which, for reasons of hygiene, did not only prohibit the wearing of head-scarves but the wearing of any private clothes that are not part of a nurse's uniform. The defendant claimed that it could not accept the plaintiff's service in these circumstances and decided not to pay her salary until she returned to work without the headscarf[3]. The plaintiff, on the other hand, felt that her freedom of religion had been infringed as well as her general right of personality. She sued for payment of salary from April 2010, as in her opinion, the defendant was not entitled to decline her offer of work.

The Labour Court decided in favour of the plaintiff. The Regional Labour Court then overturned the judgment and dismissed the claim. The plaintiff appealed.

Judgment

The Federal Labour Court (BAG) allowed the appeal in part but referred the case back to the Regional Labour Court for some further clarification. The BAG had not been able to determine whether the outstanding salary should be paid to the plaintiff, as it cannot hear new facts. It was unclear whether salary was owed, bearing in mind that the plaintiff had offered to return to work as part of the reintegration – which is not considered as job performance. Up until this point, she had not explained how she would have fulfilled her work duties during the reintegration.

With regard to the plaintiff's request to be allowed to wear a headscarf, the BAG, applying a balance of interests test, ruled that a religious institution may, as a general rule, ban employees from wearing head scarfs.

According to the BAG, the head scarf is considered as a symbol of the Islamic faith. The display of a dissenting religious symbol is not compatible with the special duty of loyalty of an employee in a religious institution to behave in a neutral manner with regard to religion. The employee, buy signing her employment contract, had accepted to follow the church's mission and to fulfill her tasks within the mission of the church. The employer may request employees to dress in a certain way to fulfill their work duties, especially if a need for good hygiene is involved. In a similar way, the employer may prohibit employees from dressing in a certain way. The obligation to refrain from wearing the headscarf followed directly from the dress code, which was an integral part of the employment relationship.

The German Constitution incorporates certain articles from the Weimar Reich Constitution of 1919. The Constitution of 1919 had provided that religious communities were public law bodies and this had lasted up until World War II. They were then given the right to remain that way if they could demonstrate their 'durability'. This would be determined by what it said in their constitution and the number of members they had.

In Germany, the church is autonomous in organisation and administration. This autonomy is not limited to the internal organisation of the churches but encompasses all institutions related to the church, although they may be independent in their legal form. The only precondition is an internal relationship with the religious mission of the church. This right to self-determination of the Protestant Church is to be weighed against the freedom of faith and conscience also granted by the Constitution. On balance, the Church does not have to tolerate any display of religion that is not its own. This extends to all institutions of the church.

Where it seems that the BAG should have ruled in favour of the defendant, it remained unclear whether the defendant (the hospital) was in fact related to the Protestant Church and was therefore entitled to claim the right to self-determination.

The BAG also determined that the employee had probably not been discriminated against because of her faith. The prohibition on wearing a headscarf was justified by the obligation of neutral behaviour provided by § 9(2) General Equal Treatment Act *(Allgemeines Gleichbehandlungsgesetz, 'AGG')*, which transposes Article 4(2) of Directive 2000/78/EC). This deals with: "churches and oth-er public or private organisations, the ethos of which is based on religion or belief. In the case of occupational activities for such organisations:

(i) "a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitutes a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos"; and
(ii) those organisations may "require individuals working for them to act in good faith and with loyalty to the organisation's ethos".

Article 4(2) of Directive 2000/78/EC allows Member States to maintain national legislation incorporating national practices pursuant to which (in the case of occupational activities within churches and other public or private organisations), differences in treatment based on a person's religion or belief shall not constitute discrimination, provided a person's religion or belief constitutes a genuine, legitimate and justified occupational requirement having regard to the nature of the activities, the context in which they are carried out and the organisation's ethos.

1 An employee on parental leave is eligible for 67% of last-earned salary (with a maximum), generally for a period of 12 months per child.
2 Most likely her employer paid her 100% of her last-earned salary for six weeks, following which she re-ceived sick pay at the rate of 70%.
3 It is not known whether the plaintiff received sick pay from April 2010.

Section 9(2) of the AGG is national legislation of this kind and it takes into account the requirements of the German Constitution and its incorporation of Article 137 of the Weimar Reich Constitution of 1919. It provides that the prohibition against differential treatment on grounds of religion or belief does not prevent religious organisations, the facilities assigned to them and any organisations that have undertaken to practice a religion or belief with them (regardless of their legal form), from requiring individuals working for them to act in good faith and with loyalty to the ethos of the religious organisation.

Therefore, the only way of proving that the plaintiff had been discriminated against because of her beliefs would have been for her to show that other employees had been allowed to wear a headscarf, whereas she had not.

It remained unclear whether the hospital was in fact a charitable organisation associated with the Protestant Church and could thus legitimately impose such a duty of neutrality, and also whether the plaintiff was capable of working, given that she was still sick at the time. Thus, as mentioned, the BAG referred the case back to the Regional Labour Court for reconsideration. If the Regional Labour Court finds that the defendant is indeed associated with the Protestant Church, the ban on wearing a headscarf will have been lawful.

Commentary

This was not the first time that the BAG had had to address the issue of headscarves. In fact, the BAG has ruled on bans on headscarves in both private and public institutions. For example, a public school was allowed to enforce a ban on headscarves for teachers, as the school, being a public institution, had to remain neutral with regard to religion. However, in private companies in Germany, employees cannot be prohibited from wearing headscarves at work. As there is no obligation on private companies to remain neutral towards religion, the constitutional right of freedom of faith and conviction prevail in such cases.

In the present case, the BAG has bolstered the special status the churches still have in Germany. This special status stands above any possible religious discrimination because § 9 of the AGG specifically grants religious organisations the right to apply such stipulations.

The hospital in question - a protestant organisation - did not even require its employees to be protestant. In fact, they only asked their employees to respect the institution by behaving neutrally. This might be because it would be hard to find qualified personnel of the faith the hospital was linked to.

Thus, it is the fact that the employer in this case was a religious institution that differentiates it from other cases where muslim employees have been prohibited from wearing a headscarf. For example, in a Belgian decision reported in EELC 2013-3, the employee in a private company was allowed to wear a headscarf at the beginning, was later required to wear one bearing the company's logo and was finally prohibited from wearing a headscarf at all. This allows these institutions greater freedom when it comes to imposing neutrality onto their employees.

Comments from other jurisdictions

Belgium (Emilie Morelli): Belgium has little case law on this matter in the private sector, but it is at least established that employers in the private sector can prohibit employees from wearing a headscarf and can therefore rely on principles of strict neutrality. This comes from a case with the Labour Tribunal of Antwerp of 27 April 2010 and an appeal with the Labour Court of Antwerp on 23 December 2011. However, the case is now pending before the European Court of Justice (Labour Court Brussels, 15 January 2008). In another case, the tribunal has stated that because of lack of regulation (i.e. the company had no specific rules or dress code), its prohibition against wearing a headscarf was direct discrimination (Labour Tribunal, Tongeren, 2 January 2013).

In the case at hand, the question concerned the interpretation of the German transposition of Article 4(2) of Directive 2000/78/EC. Article 13 of the Belgian Anti-discrimination Law is the transposition in Belgium of Article 4(2). Article 13 states that *"in the case of occupational activities within public or private organisations the ethos of which is based on religion or belief, a direct difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitutes a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos."* The Article therefore concerns both public and private organisations whose direct and essential purpose is to promote a religion or belief (e.g. a church or a religious school). As in the German decision, in Belgium, the question would also be whether the employer could be considered as an 'ethos organisation'. If the answer is yes, the scope for prohibiting religious signs (e.g. headscarves) will be greater than for other employers in the private sector (e.g. commercial companies).

The Netherlands (Peter Vas Nunes):

1. The issue of discriminatory prerogatives of religious and other confessional organisations has been a contentious one in The Netherlands. The debate has focussed on homosexual teachers. Until 1 July 2015, the General Anti-discrimination Law contained a provision known as the 'sole reason' provision. It allowed religious organisations to set religiously discriminatory occupational requirements that are necessary with a view to the organisation's aim, provided this did not lead to discrimination **solely** on any other expressly prohibited ground. The implication, as interpreted by certain orthodox protestant groups, was that a candidate could be rejected or an employee dismissed on, for example, the ground of homosexuality in combination with another ground. The most publicised example was where a homosexual teacher was dismissed for being homosexual **and** having a relationship with a man. The provision was introduced in 1994 in order to get the Christian Democrats to vote in favour of the law. In 2008, the European Commission started in-fraction proceedings against The Netherlands. This eventually led to a change in the law, which is now in line with Directive 2000/78, on this point at least. The change came into force on 1 July 2015, i.e. very recently.
2. The Directive permits (Member States to permit) religious organisations to set genuine, legitimate and justified occupational requirements that are religiously discriminatory in two situations: (i) a person's religion is required by reason of the nature of his or her activities or (ii) a person's religion is required by the context in which he or she carries out his or her activities. The hospital in the case reported above accepted employees of all religions and I assume it accepted patients of all religions. Therefore, I cannot see that situation (i) comes into play. As for situation (ii), there is something I find strange: the hospital in this case was

a protestant hospital. The Di-rective would have permitted the hospital, for example, to hire exclusively protestant doctors and nurses. What this hospital did was require neutrality. Is this not something one might expect a public hospital to want?

3. The Directive limits the special prerogative to religious organisations that already had the relevant discriminatory policy in place on the basis of 'national practices' existing at the time the Directive was adopted, i.e. in the year 2000. I assume this is to prevent newly formed organisations that wish to discriminate from claiming to be religious.

Subject: Religious discrimination
Parties: unknown
Court: *Bundesarbeitsgericht* (Federal Labour Court)
Date: 24 September 2014
Case number: 5 AZR 611/12
Hardcopy publication: NZA-RR 2015, p. 292
Internet-publication: www.bundesarbeitsgericht.de →Entscheidungen→type case number in "Aktenzeichen"

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

2015/25

Does a ban on visible outward signs of religious belief at work constitute direct discrimination? (BE)

CONTRIBUTOR ISABEL PLETS*

Summary
The Belgian Supreme Court (Court of Cassation) has asked the European Court of Justice whether Directive 2000/78 should be interpreted in such a way that a prohibition on wearing a headscarf at work does (not) constitute direct discrimination where the employer's workplace rules prohibit all employees from wearing outward signs of political, philosophical and religious belief in the workplace.

Facts
G4S Security Solutions is a large company specialised in reception and security services. A G4S Muslim employee working as an outsourced receptionist asked at a certain moment to wear the headscarf during working hours. Until that moment she had been wearing the headscarf outside of working hours, taking it off when starting work. The employer refused her demand, claiming that wearing a headscarf was not compliant with company's principle of strict neutrality. This instruction was not in writing, but was rather an unwritten rule of the company, as confirmed by the employee's previous conduct.

The parties tried to reach an agreement, but this was unsuccessful. In the end the employer dismissed the employee with payment of the statutory severance indemnity.

Just one day after the dismissal the company applied a new version of its work rules, containing the following rule: *"Employees are prohibited to wear at work any visible sign of their political, philosophical or religious convictions and/or any ritual connected thereto"*.

The employee claimed additional payment equal to EUR 13,220.90 for unfair dismissal.

Both the judges at first instance (Labour Tribunal Antwerp, 27 April 2010) as on appeal (Labour Court Antwerp, 23 December 2011) rejected her claim.

In short, the Courts argued that there was no unfair dismissal: G4S Security Solutions were entitled to apply neutrality principles in the company by prohibiting employees to wear any visible sign at work of their political, philosophical or religious convictions. G4S therefore made an error in dismissing an employee who refused to work without a headscarf, taking into account the facts that the employee had been working for three years without a headscarf, G4S had given her numerous warnings and she had been paid the statutory severance indemnity.

According to the Labour Court there was no discrimination, either direct or indirect. There was no direct discrimination because the prohibition did not distinguish between different groups of employees and it did not use a criterion to distinguish them that treated certain groups of employees less favourably than others.

There was no indirect discrimination, because the prohibition against religious signs was considered proportionate to the legitimate aim of creating a neutral image towards customers and to facilitate peaceful co-existence within the company.

The employee, together with the Centre for Equal Opportunities and Opposition to Racism (CEOOR) decided to appeal before the Supreme Court (Court of Cassation).

Judgment
The Court of Cassation stated that the Labour Court judged that the unwritten rule that existed within G4S Security Solutions did not constitute direct discrimination because the latter is only possible when persons of a certain religion or conviction are treated less favourably than others, while the unwritten rule was meant for all visible signs of any religion or conviction without distinction. Hence, the rule aimed at all employees without distinction and in the same way.

The employee and the CEOOR argued that the Labour Court's position was not compatible with the text of Article 2.2 a) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. Article 2.2 a) says that direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1, such as religion or conviction.

Therefore, the Court of Cassation decided to refer the following question to the ECJ: *"Should Article 2(2)(a) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation be interpreted as meaning that the prohibition on wearing, as a female Muslim, a headscarf at the workplace does not constitute direct discrimination where the employer's rule prohibits all employees from wearing outward signs of political, philosophical and religious beliefs at the workplace?"*

The Court of Cassation requested the ECJ for a preliminary ruling on 3 April 2015. The case is referred to as Case C-157/15.

Commentary

Belgium has little case law on this matter in the private sector. No more than three relevant cases have been published. In all three cases, Muslim employees were dismissed or retaliated for not removing their headscarves during working hours.

In one case, the company had no specific rules or dress code: the tribunal stated that because of the lack of regulation this was a case of direct discrimination[1].

In the two other cases[2], the company had a specific rule, either written or unwritten. Employers used image and neutrality as arguments to justify their internal rules and ban on outward religious, political and philosophical symbols at work. The Courts accepted the neutrality argument in both cases: the commercial interests of the companies trumped those of an employee wishing to dress in accordance with his or her religious belief and habits.

The question as to whether a ban on wearing religious signs at work could be considered as direct or indirect discrimination based on religion is of course a crucial one.

If the ban is considered directly linked to religion, distinction would only be allowed if a person's (lack of) religion would be a genuine and determining occupational requirement. Neutrality would, in such a case, not be a good enough argument.

If the ban is considered indirectly linked to religion, distinction can still be objectively justified. In that case employers could still argue that a need for neutrality justifies the ban on headscarves and other religious symbols.

However, taking into account the ECtHR's ruling in the *Eweida* case *(Eweida and others - v - UK*, 48420/10, 59842/10, 51671/10 and 36516/10, judgment of 15 January 2013), the simple existence of a neutrality policy for dress can never be sufficient. Belgian Labour Courts should assess whether a neutrality policy or dress code can ever be a legitimate purpose for a company (e.g for image building, employer branding, and promotion of a certain brand) and whether commercial interests are more important than the interest of a Muslim employee to wear a headscarf.

Comments from other jurisdictions

Austria (Jana Eichmeyer / Anna Schmitzer): So far, there have been no decisions of the Austrian Supreme Court in labour law cases regarding headscarves, but the law concerning direct and indirect discrimination in Austria is determined as follows.

In Austria Directive 2000/78 has been implemented by the Federal Law on Equal Treatment (GlBG). According to section 17 GlBG, discrimination against anyone because of his religion, belief, age or sexual orientation is prohibited. This includes wearing headscarves, as a person's religion can be ascertained from what they wear.

Section 19(2) GlBG clarifies what is meant by indirect discrimination. It means an apparently neutral provision, criterion or practice which would result in a disadvantage for persons having a particular religion or belief. The sole exception would be a provision, criterion or practice that is objectively justified by a legitimate aim where the means of achieving the aim are appropriate and necessary.

In terms of jusitifcation, an employer could prohibit the wearing of a headscarf for the following reasons: because of the need to maintain harmony and religious and political neutrality in the workplace; for safety reasons (e.g. the need to wear a helmet or sterile headgear) or if a headscarf is not the usual clothing in the relevant business. Employers should ensure, however, that any prohibition against wearing religious symbols is not discriminatory, but neutral and proportionate.

The Netherlands (Peter Vas Nunes): Entering the Dutch word for headscarf on the website of the Human Rights Commission yields 176 rulings from 1996, including one on a similar case involving G4S Security (CGB 2013-101). Besides these and earlier rulings there are numerous judgments on headscarves by the courts (although no relevant Supreme Court rulings yet).

The issue, as I see it, is whether disfavouring an employee because he or she wears, or wishes to wear, a headscarf (hijab, burka, turban, crucifix, etc.) at work constitutes direct or indirect discrimination on the ground of religion or belief. The relevance of the distinction between direct and indirect discrimination is, obviously, that the former cannot be objectively justified, whereas the latter can. Barring the exceptions allowed by Article 4 of Directive 2000/78 (occupational requirement and religious organisations), direct discrimination on the ground of religion or belief cannot be justified and is therefore always unlawful.

The author of this case report refers to the Eweida case, which was reported and commented on in EELC 2012 nr 43 (High Court) and EELC 2013 nr 1 page 42 (ECtHR). I will limit this commentary to Directive 2000/78, which in Article 2(1) defines direct discrimination as occurring "where a person is treated less favourably than another is, has been or would be treated in a comparable situation on any of the grounds referred to in Article 1".

When is a person treated less favourably "on the ground of" religion? Does this occur when a person is discriminated against because of his or her particular religion? Or is there also religious discrimination where religion as a whole is banned? Suppose, by way of example, that a company prohibits all manifestations of religion at work. Such a policy does not disfavour Muslims, Christians or Jews, it disfavours anyone whose religion encourages him or her to manifest that religion. This issue is, as it were, the converse of the issue raised in EELC 2012 nr 22, which dealt with discrimination on the ground of marital status. Being married or unmarried may not be a ground for unequal treatment, but does this also apply to being married to a particular person?

A related question concerns the borderline between direct and indirect religious discrimination. Let me give three examples:

a. You are dismissed because you are Jewish;
b. You are dismissed because you wear a crucifix, which violates our policy of religious neutrality;
c. You, a hairdresser in our upmarket saloon, are dismissed because we want our customers to be able to see (the quality of) your hair, which is not possible when you wear a headscarf.

1 Labour Tribunal Tongeren 2 January 2013, *Ors.* 2013, afl. 3, 22 en *Or.* 2013, afl. 4, 109.

2 One is the case discussed here, the other is Labour Court 15 January 2008, *JTT* 2008, 140.

Clearly, employer a. discriminates directly and employer c. discriminates indirectly. I would place employer b. in the category of indirect discrimination. The case resembles that of the tram driver reported in EELC 2010 nr 57. The public transport company of Amsterdam had introduced a new uniform that all tram drivers had to wear and a new dress code that prohibited visibly worn jewellery (other than modest jewellery), ostensibly to project a professional image. The Court of Appeal accepted that this policy was indirectly discriminatory against an employee who felt that his religion obligated him to wear a necklace with a cross attached to it (but objectively justified).

I feel inclined to hold that employer b. discriminates directly on the ground of religion. The dismissal is directly related to religion, even though it does not disfavour any particular religion or group of employees.

In brief, the borderline seems to lie somewhere between b. and c. It is the objective of the employer's policy ("on the ground of") that determines the borderline.

United Kingdom (Bethan Carney): There is no equivalent in the UK of the principle of neutrality. It is generally accepted in this country that a ban on wearing religious symbols in the workplace would be directly discriminatory (even if it impacted equally on followers of several different religions) because the religious believers would be treated less favourably than those without religious beliefs. For example, if my employer did not allow me to wear a crucifix around my neck at work but allowed another employee to wear a necklace, my employer would be treating me less favourably than the other employee because of religion. This would be less favourable treatment even if my employer also prohibited Muslim colleagues from wearing headscarfs. In the Eweida case, the employer's dress code banned wearing visible forms of jewellery whether they were religious or not.

Subject: Religion and discrimination
Parties: Samira A. and Centre for Equality of opportunities and Opposition to Racism - v - G4S Secure Solutions
Court: *Cour de cassation* (Supreme Court)";
Date: 9 March 2015
Case number: S.12.0062.N
Publication: francais→cour de cassation→jurisprudence→ Arrêts de la Cour de cassation→Recherche Avancée→Numéro de rôle→case number

*Isabel Plets is of counsel in the Brussels firm of Lydian, www.lydian.be

2015/26

Employers may select 55+ employees for redundancy provided they are compensated adequately (SP)

CONTRIBUTOR SONIA CORTES*

Summary
The Spanish Constitutional Court has ruled that using age as one of the selection criteria for collective redundancy is not discriminatory, as long as compensatory measures are provided.

Facts
The claimants were four employees over 55 years of age. The defendant was a publicly owned company, the Instituto Valenciano de la Vivienda. The company implemented a collective redundancy procedure affecting 211 employees. The redundancy was justified by the heavy losses it was suffering as a consequence of the economic crisis and for reasons of production and organisation.

During the consultation period, the employer concluded an agreement with the works council by which four selection criteria were agreed upon. The fourth criterion was proximity to retirement age (the usual retirement age being 65 years, but early retirement starting at 61 years of age also being available). The agreement included compensatory measures for those over 55: a compulsory measure and an agreed additional measure. The compulsory measure was the continued payment of social security contributions for employees over 55 from the expiry of unemployment benefit (maximum of 24 months) until the age of 61. The additional measure was the payment of certain monthly amounts for employees over 45. In particular, employees terminated between 58 and 61 were entitled to receive a monthly payment of € 849 for eight months and those terminated between 50 and 57 were to receive this for 12 months. In addition, employees over 55 were entitled to a public benefit after expiry of unemployment benefit if their income was below a given threshold.

At the end of the redundancy dismissal procedure, all employees over 55 were terminated, whereas less than half of the younger employees were terminated.

The claimants brought a claim for age discrimination, arguing that they had been selected simply on the basis of their age and that the sacrifice imposed on employees aged 55 or more was disproportionate because of the difficulty of finding another job and because the social security contribution to sustain their retirement pension was only payable for a limited period.

The defendant argued that the age criterion was not discriminatory because employees of 55 or more suffered less as a consequence of redundancy because they were closer to retirement and most of the period until retirement was covered by the company's contribution. The effect of that contribution was to prevent their retirement pension decreasing in the event they were unable to work again before retirement. The age criterion was objective and proportionate. It was objective because older employees had fewer years of work left before retirement and proportionate because the company had put in place compensatory measures.

The company advanced two arguments in defence of its position:
(i) keeping on employees nearing retirement costs the business more (because retaining them for a few more years would mean having to terminate younger staff now and having to recruit and train new staff in a few years time) and (ii) the measure was less damaging to older employees because they had fewer years left to work and, in addition, they were entitled to compensatory measures.

Both the court of first instance (Social Court of first instance – *Juzgado de lo Social*- nº 1 of Valencia, decision dated 19 November 2012) and the

Appeal Court (Superior Court of Justice –*Tribunal Superior de Justicia* - of Valencia, decision dated 2 May 2013) ruled in favour of the company. The Appeal Court ruled that the employees had not been subject to age discrimination because the dismissals were based on economic, production-related and organisational reasons and therefore there had been no unequal treatment.

Judgment

The issue at hand was whether age is a discriminatory criterion for selecting employees for redundancy.

The Court ruled that it is the employer's prerogative to select employees for redundancy, but that this is subject to certain limits and its decisions must be applied objectively. They must also be applied proportionally to the harm caused.

In the matter at hand, there were four criteria for selecting employees. The employer needed to consider: (i) whether the employees worked in the department affected by the redundancy process; (ii) their skills, expertise and versatility; (iii) their qualifications and know-how; and/or (iv) their proximity to retirement.

The Spanish Constitutional Court, basing its decision on Article 21.1 of the Charter of Fundamental Rights of the European Union, Article 5 of the ILO's Discrimination Convention, 1963 (C111), Article 15.2.d of the ILO's Termination of Employment Recommendation, 1982 (119), Article 5.a of the ILO's Termination of Employment Recommendation, 1982 (R166), ECJ case law (C-555/07 *Kücükdeveci v. Swedex GmbH*, dated 19 January 2010) and Article 14 of the Spanish Constitution, ruled as follows.

Until now, the Spanish Constitutional Court's case law had not provided any specific criteria for assessing whether there had been discrimination, but only a general approach whereby any restriction of equality should be justified, proportionate, necessary and restrictively interpreted.

The Court resolved that the first argument made by the company, based on training costs, did not justify differential treatment, given that termination left those made redundant with very little chance to find a new job.

By contrast, the second reason, based on proximity to retirement, along with the compensatory measures, could be defended objectively provided the measures were sufficient and effective in mitigating the negative impact caused to the employees.

The Court considered the measures the company put in place for older employees, including the compulsory social security contributions for employees over 55 and the additional agreed monthly payment, as well as the public benefit for unemployed individuals on low income. The Court concluded that there had been unequal treatment based on age, but that this was justified on objective grounds and the measures put in place were proportionate in mitigating the harm caused.

Commentary

The ruling of the Spanish Constitutional Court has a significant impact because collective redundancies generally have more of an impact on older employees, but despite this the Constitutional Court had not previously ruled on this particular issue.

The decision provides a rationale that helps in assessing whether a selection criterion based on age could be discriminatory and the extent to which the measures taken to mitigate the impact on affected older employees compensate for the harm caused to them. Given that the Spanish Constitutional Court is the highest court in the land, the decision cannot be further appealed in Spain.

The ruling is very interesting, as it addresses an issue that we see very often in practice, i.e. that companies, works councils and even unions are inclined to agree that there is justification for making older employees redundant first, because they have fewer years before they reach retirement and very often also, fewer family responsibilities.

However, the notion of *'effectively mitigating the negative impacts of the dismissal'* seems too vague and imprecise to be particularly useful in practice. The additional severance of € 849 for eight or 12 months (which is the only additional measure the employer committed to) is a fairly limited level of compensation for unequal treatment based on age. However, the court takes into account other measures that the employer is subject to by law and even other rights may add up to a considerable amount, i.e. around € 50,000. The public subsidy to be paid by the Treasury amounted to approximately € 480 per month, but this was recently rescinded by new legislation.

The decision – including the second instance one – were also too vague in terms of assessment. There was no clear indication as to whether or not there was unequal treatment and no assessment of, for example, the figures for terminations of older versus younger employees. The Constitutional Court's decision is clear in concluding that there was unequal treatment, but that it was justified by the compensatory measures, but it does not detail how the criteria of proportionality, necessity and reasonableness were actually met.

Finally, new legislation has changed the situation: the retirement age at the time of the redundancy plan was 65 and early retirement was available at the age of 61. Currently, however, the retirement age is 67 (subject to a transitional period) and early retirement has been increased to 63 years of age. And the retirement pension has been reduced. Therefore, it remains to be seen whether this interpretation will still apply in years to come and to what extent the new circumstances will change the scope of the assessment.

Comments from other jurisdictions

Germany (Dagmar Hellenkemper): It is unlikely that a German Court would come to the same conclusion. In the case of redundancies, companies in Germany are bound by law to choose between the employees who may remain in the company and those who will be terminated on grounds of social selection. The selection follows four criteria laid down in section 1 of the Unfair Dismissal Act: the employee's seniority, age, duties to support dependents and severe disability. Employees are awarded points in those categories that apply to them. The employees with the highest scores are deemed to be the most worthy of protection. A dismissal is deemed unjustified if an employee is being dismissed while a comparable employee with a lesser score is not dismissed. Financial compensation to the individual employee and proximity to retirement age are not taken into account. In order to avoid companies ending up with large numbers of employees close to the retirement age after a mass redundancy, case-law allows for the formation of 'age groups', a practice that has been found to be in accordance with the Equal Treatment Act. This measure allows for

the dismissal of only the least protected employees in every age group, but this measure usually in effect, exempts from termination those employees who are closest to the retirement age as well. Hence, many employers try to come to mutual agreements with the employees they wish to terminate, usually including severance payments to cover the period between the end of employment and retirement.

Subject: Age discrimination
Parties: 4 employees - v - Instituto Valenciano de la Vivienda
Court: *Tribunal Constitutional* (Constitutional Court)
Date: 13 April 2015
Case number: 66/2015
Publication: www.tribunalconstitucional.es→jurisprudencia sentencia →66/2015

*Sonia Cortes is a partner with Abdon Pedrajas & Molero in Barcelona, www.abdonpedrajas.com

2015/27 CONSTITUTIONAL COURT VALIDATES UNIFIED STATUS FOR WHITE COLLAR AND BLUE COLLAR WORKERS (BE)

CONTRIBUTOR NICOLAS SIMON*

Summary
Under Belgian law, an employer wishing to dismiss an employee has the choice of either observing a notice period (the length of which depends on years of service) or paying the employee an 'indemnity in lieu', that is to say a sum of money equal to the salary (including fringe benefits) that the employee would have earned during the notice period. In December 2013, a law was passed that altered the rules on notice periods. Some of the provisions of the 2013 law especially affect employees who are entitled to a notice period (or an indemnity in lieu) of 30 weeks or more. These '30+ week employees' must now be offered employability assistance by an external outplacement agency. Employees who are dismissed with notice receive these outplacement services during their notice period. The cost of the outplacement agency is borne by the employer. Employees who are not given notice but are paid an indemnity in lieu, on the other hand, bear the cost of the outplacement services themselves, in that their indemnity is reduced by a sum equal to four weeks of salary. A union representing executive employees *('cadres / kaderpersoneel')* and several individual workers challenged the constitutionality of the relevant provisions of the 2013 law without success.

Facts
Until 31 December 2013, Belgian employment law contained different rules for white collar and blue collar workers. In a judgment dated 7 July 2011, the Constitutional Court found this distinction to be discriminatory and therefore unconstitutional. The legislator was ordered to adopt legislation harmonising the legal status of both categories of workers by 8 July 2013. The judgment was reported in EELC 2014/23.

On 26 December 2013, Parliament enacted a law known as the Unified Status Act *(Statut unique)*, which came into force on 1 January 2014, almost seven months after the deadline set by the Constitutional Court. The Act did not merely unify the status of white and blue collar workers, it also quite radically amended Belgian dismissal law and some other aspects of employment law (such as payment during sickness). This is because the government seized the opportunity to reform employment law while complying with the Constitutional Court's order.

On 27 June 2014, a union representing executive employees and a number of individual workers applied to the Constitutional Court. They asked the court to declare three provisions of the Act, Articles 81, 88 and 92, unconstitutional and void. These provisions form the basis for the legislator's increased focus on re-employability after dismissal, which is one of the new elements in the Unified Status Act. This new approach especially impacts 30+ week workers.

The mechanism introduced by the new law differs, depending on whether the employer dismisses the employee with a notice period or with an indemnity in lieu of notice[1].

- A 30+ week worker dismissed with a notice period is entitled to 60 hours of outplacement paid by the employer, to be taken during the notice period. In Belgium, employees are entitled during their notice period to extra paid leave in order to look for a new job. It is during these days of paid leave that they will have to follow the outplacement guidance.
- A 30+ week worker dismissed with an indemnity in lieu of notice is also entitled to a 60 hour outplacement package, paid for by the employer. The value of the package must equal 1/12th of the annual salary, but may not be less than € 1,800 and is capped at € 5,500. To compensate employers for this extra cost, Article 81 stipulates that a sum equalling four weeks' salary is deducted from the indemnity. In practice this means that the exit package of such an employee is composed of an indemnity equalling 26+ weeks' salary and 60 hours of outplacement services[2].

Article 88 introduces a transition period ending on 31 December 2015. During this period, a 30+ week worker who was dismissed with an indemnity in lieu may waive the right to outplacement, in which case there is no deduction from the indemnity payment.

Article 92 provides that, starting no later than 1 January 2019, the social partners must negotiate collective bargaining agreements at sector level in order to replace one third of the current exit package of 30+ week workers by employability-enhancing measures. For these workers a minimum notice period (or indemnity in lieu) of at least 26 weeks is, however, guaranteed.

In brief, what these provisions do is to shift the focus of dismissal protection from monetary compensation to assistance on re-entering the labour market through outplacement. The snag is that workers pay for this assistance themselves. The claimants argued that this

1 A combination of notice period and indemnity is possible.
2 The purpose of the legislator was to foresee an outplacement valued to 1/12th of the annual salary which approximately corresponds to four weeks. Further, in order to ensure uniformity and quality in the outplacement services, the legislator stipulated that the price range must be between € 1,800 and € 5,500 and that there must be 60 hours of training. The 60 hours are therefore a kind of guarantee of the quality of the outplacement, but are not related to the value of the services. This calculation nevertheless means that it is better for high wage employees to waive their entitlement to outplacement and ask for four weeks' wages. They still have the possibility to use the outplacement services on an individual basis at a lower cost.

involuntary contribution to the cost of their outplacement infringed (i) their right to property, (ii) their right to equal treatment and (iii) their right to protection of acquired rights ('standstill rights').

Judgment

Right of property

The *Statut unique* will cause redundant employees to lose a portion of their indemnity in lieu of notice in exchange for employability assistance. The plaintiffs claimed that this involuntary exchange infringes their right of property as guaranteed by Article 16 of the Belgian Constitution and Article 1 of the First Additional Protocol to the European Convention on Human Rights.

The Court held that the challenged provision does not change the total value of the exit package, but only defines the balance between, on the one hand, measures destined to increase the employability and on the other, the notice period or indemnity. Therefore, there is no expropriation within the meaning of Article 16 of the Constitution.

Article 1 of the First Additional Protocol to the European Convention on Human Rights covers more than expropriation. It includes a prohibition on interference with the peaceful enjoyment of possessions and restrictions on governmental regulations on the use of property.

The Court recalled that interference in the right of property must achieve a balance between the general interest and the protection of individuals' peaceful enjoyment of their possessions. In the present case, the Court considered that the interference by the legislator was limited to establishing minimal measures to increase employability in cases of dismissal and that this measure is pertinent in order to help dismissed employees find a new job. Further, these measures not only promote the general interest, but also the particular interest of the dismissed employee. Finally, proportionality has been respected, as the employability measures only concern one third of the exit package and a minimum notice period or indemnity of 26 weeks is guaranteed.

Right of equal treatment

The breach of the equal treatment right was invoked at two levels:

- between the 30+ week workers on the one hand and employees entitled to shorter notice, whose exit package is not impacted, on the other;
- within the group of 30+ week workers, between employees dismissed via a notice period, during which they have to serve and those who receive an indemnity in lieu of notice. Only the latter have to finance the outplacement by a deduction of four weeks of salary from their indemnity. The former follow the outplacement during the notice period and are paid during this time.

As regards the first distinction, the Court recalled its judgment of 7 July 2011 and the fact that one of the purposes of the Act of 26 December 2013 was not only to indemnify the loss of the previous occupation, but to help the employee find a new job. As for employees with a higher seniority (and therefore greater notice), it is generally more difficult for them to find a new job than for employees with less seniority, so the measure has a reasonable justification. Moreover, the difference in treatment is based on an objective criterion, i.e. notice of more or less than 30 weeks.

Regarding the difference between employees who are dismissed with a notice period and those with an indemnity in lieu of notice, the difference in treatment is relevant and reasonably justified. The former do not receive an indemnity. Reducing their salary would therefore be a disproportionate burden in comparison with the deduction of four weeks' salary for those who do not have to continue to work and will receive an indemnity instead.

Regarding the transition period until 31 December 2015, during which dismissed employees are entitled to waive their right to outplacement in order to avoid the deduction of four weeks' salary, any inequality of treatment will only be caused by their own decision. So, there is no discrimination in this case.

Standstill

The plaintiff also invoked a breach of Article 23 of the Belgian Constitution and Article 4 of the European Social Charter, arguing that the legislator cannot reduce an acquired level of protection in fundamental socio-economic rights. In this view, the compulsory accompanying measures in the case of dismissal and the standardisation of the notice periods between blue collar and white collar workers would significantly impact the protection level of white collars.

The Court considered that the standstill obligation had been respected, as the protection level of employees is not reduced but remains the same, even though one third of the exit package is replaced by employability measures.

Commentary

In its judgment of 7 July 2011, the Constitutional Court stated that the distinction between white and blue collar workers regarding notice periods and also their rights in relation to the first day of sickness (where blue collar workers were not paid benefits on their first day), was no longer justified. Negotiations between the social partners and the Government started, which resulted in the adoption of the Act of 26 December 2013.

The status of white and blue collars is not yet entirely harmonised but now blue and white collar workers are generally entitled to the same notice period. A transition period is foreseen for rights acquired before the new legislation came into force. Also, blue collar workers are now entitled to receive salary for their first day of sickness - as was already the case for white collar workers.

For completeness, it should be noted that another proceeding for annulment against the Act of 26 December 2013 is also pending before the Constitutional Court for what concerns the special (shorter) notice periods for the construction sector.

Apart from validating the first steps towards standardisation of the status of blue and white collars, the Constitutional Court also validated the legislators' new approach on dismissals. Previously, the exit package only dealt with the length of the notice period or the indemnity in lieu of notice. The reasoning behind this system was to give time to the employee in order to find a new job.

To increase the chances of finding a new job, in 2002, an obligation to offer outplacement services for employees aged 45 and over with one year of seniority was introduced. The Act of 26 December 2013 focusses even more on the re-employment of dismissed employees, by providing a right for all the employees dismissed with a notice period or indemnity of more than 30 weeks to access outplacement services and this will form part of the exit package. The legislator went even further by asking the social partners to consider employability-enhancing measures, including but not limited to outplacement, by 1 January

2019, to replace a third of the exit package.

In many ways, therefore, this judgment is a validation of a more modern approach towards dismissal, with no distinction between blue and white collars and the focus on re-employment.

Comments from other jurisdictions

Austria (Jana Eichmeyer / Anna Schmitzer): The Austrian Constitution guarantees the right to equal treatment in Article 7. However, the treatment of white and blue collar workers is not entirely harmonised as yet. There is still a legal distinction between both categories in respect of certain rights, including, for example, about the fact that the statutory notice period is only 14 days for blue collar workers but at least six weeks for white collar workers (increasing on a sliding scale up to five months based on years of service) and the different length of sickness pay. In a 1992 judgment, the Austrian Supreme Court held that the difference between white and blue collar workers is acknowledged by the legislator but could be mitigated by negotiation in collective bargaining agreements.

Austrian employers are also under no obligation to assist dismissed employees with reintegration in the labour market. Their duties in this regard are considered fulfilled by payment of the mandatory social security contributions, which includes unemployment insurance. However, in the last few years outplacements have become quite common features of mutual termination agreements. In Germany this is generally handled by the Federal Employment Agency ('Arbeitsmarktservice', 'AMS'), which is financed by unemployment insurance contributions.

Further, in Austria there is no option to choose between dismissal with notice and an indemnity in lieu of notice. The employer must always respect the notice period and the statutory termination date. If the employer complies with these provisions, the employee has no additional financial entitlement upon termination (except for mandatory severance payment based on the old severance payment system, which applies to both blue and white collar workers). However, the employer has the right to put the employee on paid garden leave during the notice period. This gives the employee the benefit of continued social security.

Even without mandatory outplacement measures, older employees generally enjoy higher protection against dismissal, as the likelihood of finding a new job is a significant part of the assessment the Labour Court would make if there was a challenge about whether a dismissal was unfair on social grounds.

Germany (Dagmar Hellenkemper): Germany eliminated pretty much any differentiation between blue and white collar workers in the 1980s. Today, differentiation can only be found in certain collective agreements, but only to a very limited extent (i.e. collective 'preclusive periods'). In nearly any other area, the courts have decided that any differentiation is not justified and hence discriminatory.

Payment in lieu of notice does not exist in Germany. However, I find the approach of looking at severance payment as a means to help find a new job interesting. In Germany, any kind of severance payment that results from settlements is usually deemed as payment for the loss of employment. The Belgian approach would mean it is deemed to help fund measures to assist employees in finding new jobs.

Subject: Discrimination on other grounds
Parties: CNC / NCK – v – le Conseil des ministres / de ministerraad
Court: *Cour Constitutionnelle / Grondwettelijk Hof* (Belgian Constitutional Court)
Date: 25 June 2015
Case Number: 98/2015
Internet publication: http://www.const-court.be/
→Affaires pendantes et jurisprudence→arrêts→2015-98

*Nicolas Simon is a senior associate at Van Olmen & Wynant in Belgium, www.vow.be

2015/28

Supreme Court follows up on ECJ's 2013 judgment in *Ring* and *Werge* (DK)

CONTRIBUTOR JACOB SAND*

Summary
On 23 June 2015, the Danish Supreme Court followed up on the judgment delivered by the Court of Justice of the EU (the 'ECJ') in joined cases C-335/11 *(Ring)* and C-337/11 *(Werge)*. The issue was whether section 5(2) of the Danish Salaried Employees Act ('DSE') was compatible with Equal Treatment Directive 2000/78 (the 'Directive'). Section 5(2) DSE allows an employer, in certain cases, to dismiss an employee, who has been absent from work for medical reasons for 120 days within a 12 month period, with a reduced period of notice. Can an employer apply this provision even where the employee's absence was on account of disability? The ECJ replied affirmatively, but only if section 5(2) is objectively justified, and even then only if the employee's absence is not attributable to failure by the employer to make reasonable adjustments. The Danish Supreme Court has now, in the national proceedings initiated by Ms Werge, found section 5(2) DSE to be objectively justified. Given that Ms Werge's employer was unaware that her absence was caused by a disability (given that she proved that it was a disability but the employer was unaware of the relevant facts), it had no reason to make adjustments.

Facts
Under the DSE, employers may dismiss an employee with one to six months' notice, depending on the employee's seniority (provided that the employer and employee have not agreed on a longer notice period), regardless whether the employee is on sick leave. However, the employee may claim compensation for unfair dismissal if the termination is considered to be without just cause. A dismissal is without just cause if it is not reasonably justified by the employee's conduct, for example, poor performance or misconduct, or by the circumstances of the company, for example, restructuring.

Under Section 5(2) DSE, the employer and the salaried employee may agree in writing that if the employee during a period of 12 consecutive months has received full salary during sickness for a total period of 120 days, the employer may terminate the employment giving one month's notice (a 'Reduced Notice Period') regardless of the notice period otherwise provided for in the DSE or agreed between the employer and the employee. Under Danish case law, the employee is

not entitled to compensation for unfair dismissal if the employee has been dismissed in accordance with section 5(2) DSE, other than in special circumstances.

The Danish Act on Discrimination on the Labour Market (the 'DLM') prohibits direct and indirect discrimination on grounds of disability. Consequently, the employer may not discriminate on grounds of disability in connection with the dismissal of an employee, and the employer is obliged to take appropriate measures in order to ensure that a disabled employee can obtain or continue his or her employment, unless such measures impose a disproportionate burden on the employer. The DLM, including the definition of the term disability, is based on the Directive.

Ms Werge, a salaried employee, and her employer had agreed that DSE Section 5(2) would apply to their contract of employment.
At the turn of 2003/2004, Ms Werge was absent from work for three weeks for whiplash injuries suffered in a traffic accident. Subsequently, Ms Werge returned to work full-time for about ten months. In the beginning of November 2004, however, Ms Werge was once again absent from work. At first on part-time sick leave, but from the middle of January 2005, on full-time sick leave.
On 21 April 2005, Ms Werge was dismissed with reference to section 5(2) DSE. Accordingly, she was dismissed with a Reduced Notice Period.

After the traffic accident and during Ms Werge's sick leave, a number of medical certificates were obtained from GPs and medical specialists, including a certificate issued by a medical specialist on 4 April 2005. However, the employer never received a copy of this certificate.

Ms Werge, who claimed that she had a disability, filed a lawsuit against the employer with the Danish Maritime and Commercial Court *(Sø – og Handelsretten)*. She claimed (i) salary for the balance of her normal notice period (four months), including pension and holiday allowance, amounting to DKK 108,371.25 and (ii) compensation equalling to 18 months' salary including pension amounting to DKK 438,553.44. Further, Ms Werge argued that any days of sickness due to her disability should be excluded from the 120 days of sickness provided in section 5(2) DSE. Moreover, Ms Werge argued that she had been discriminated against in that the employer had not taken appropriate measures to ensure that she could continue her employment with the employer, such as allowing her to work part time or on reduced hours.

ECJ Judgment
The Danish Maritime and Commercial Court, as the court of first instance, requested the ECJ to give a preliminary ruling on the concept of disability under the Directive. The ECJ was also requested to establish whether the Directive precludes the application of a provision of national law under which an employer is entitled to dismiss an employee with a reduced notice period where the employee has received full salary during periods of illness for a total of 120 days within a period of 12 consecutive months; where:

a. the absence is caused by the disability, or
b. the absence is due to the fact that the employer has not implemented the measures appropriate in the specific situation to enable a person with a disability to perform his work.

In its judgment of 11 April 2013 in the joined cases C-335/11 and C-337/11 (HK Danmark), the ECJ clarified the concept of disability. In addition, the ECJ held as follows:

"Directive 2000/78 must be interpreted as precluding national legislation under which an employer can terminate the employment contract with a reduced period of notice if the disabled worker concerned has been absent because of illness, with his salary being paid, for 120 days during the previous 12 months, where those absences are the consequence of the employer's failure to take the appropriate measures in accordance with the obligation to provide reasonable accommodation laid down in Article 5 of that directive.

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

Judgment
Based on the ECJ judgment and the facts of the particular case, the Danish Maritime and Commercial Court concluded that Ms Werge had a disability, and that she had been directly discriminated against in connection with the dismissal under section 5(2)DSE, as the employer had not taken the appropriate measures to accommodate her needs. Ms Werge was awarded DKK 400,740.21, corresponding to salary for the balance of her normal notice period and the Reduced Notice Period, (including pension and holiday allowance), as well as a compensation corresponding to 12 months' salary (including pension) based on direct discrimination on grounds of disability. The employer appealed the judgment to the Danish Supreme Court.

On 23 June 2015, the Danish Supreme Court overruled the Danish Maritime and Commercial Court's judgment. It held that it was for Ms Werge to prove that her illness had resulted in a disability at the time of the dismissal. Further, the Supreme Court noted that, based on the ECJ's definition of the concept of disability, for the purpose of determining whether an employee is disabled it is not relevant whether the employer knew or should have known of the disability.

The Supreme Court further ruled that for the employer to be obliged to take appropriate measures, it was a prerequisite that the employer knew or should have known Ms Werge had a disability.

Based on the course of the case, the Supreme Court concluded that the employer at the time of the dismissal did not know and had no reason to have known that Ms Werge's illness had resulted in a disability. Accordingly, the employer had not failed to perform its obligation to take appropriate measures.

As for the compatibility of section 5(2) DSE with the Directive, the Danish Supreme Court noted that one of the purposes of section 5(2) DSE is to protect employees - and it does so in two ways.

First, it encourages employers not to dismiss an employee immediately after he or she calls in sick. In the event the employment contract lacks a provision of the kind permitted under section 5(2) DSE, an employer that dismisses an employee on account of sickness must observe the statutory or (if longer) the contractual notice period. Moreover, there is a risk that the employee will start unfair dismissal proceedings and be awarded compensation. In the event the employment contract includes a provision of the kind permitted under section 5(2) DSE, the employer

is more likely to wait before dismissing the employee. The latter may return to work sooner than expected and, if this does not happen within 120 days, the employer is free to dismiss the employee giving no more than one month's notice and without there being a risk of an unfair dismissal case.

Second, the existence of section 5(2) DSE should make employers more likely to hire employees who are at increased risk of sickness. Clearly, this aim of section 5(2) DSE is legitimate. Moreover, the means to achieve the aim are appropriate. In addition, with reference to the way the Danish labour market and social security system are organised, the Danish Supreme Court concluded that section 5(2) DSE does not go beyond what is necessary to achieve that aim. Consequently, the Directive does not preclude section 5(2) DSE, and therefore Ms Werge's days of sickness resulting from her disability could be included in the 120 days of sickness provided by section 5(2) DSE. Consequently, Ms Werge was not entitled to a longer notice period than that given by the employer.

Finally, the Danish Supreme Court ruled that Ms Werge was not entitled to compensation for unfair dismissal.

Commentary

The judgment establishes that the burden of proof that an illness has resulted in a disability lies with the employee.

Further, the judgment concludes that the employer is only obliged to take appropriate measures if it knows or should have known that the employee in question has a disability.

Finally, and most importantly, regardless of the fact that the ECJ in its judgment significantly narrowed and limited the assessment left to the national court in relation to section 5(2) DSE, the Danish Supreme Court decided to apply the exemption described by the ECJ when concluding that section 5(2) DSE is not in violation of the Directive and that any sickness leave as a result of a disability may be included in the 120 days of sickness under section 5(2) DSE, provided that the employee's absence from work is not the result of the employer knowing about the disability but failing to take appropriate measures.

This judgment by the Danish Supreme Court seems to contrast with ECJ case law on sick leave due to pregnancy prior to a mother giving birth, which implies that no such sick leave can be included in the grounds for dismissal.

On 11 August 2015, the Danish Supreme Court made reference in a new case to the case law derived from the *Werge* case, including its own judgment of 23 June 2015. In this most recent judgment, the Danish Supreme Court was faced with the question of whether section 5(2) DSE was in breach of the Directive where: 1) the employer was informed about the employee's disability and 2) the employer had failed to make reasonable adjustments that would most likely would have reduced the absence from work.

The Supreme Court ruled in favour of the employee and accorded her compensation equivalent to nine months' salary after almost 14 years of service, in addition to salary for her normal notice period. This seems to indicate that the Danish Supreme Court acknowledges that section 5(2) DSE may be applied in cases involving disability in light of the ECJ's judgment in joined cases C-335/11 and C-337/11 (HK Danmark) - provided that the employee's absence from work is not fully or partly as a result of a failure by the employer to make reasonable adjustments.

Comments from other jurisdictions

Austria (Jana Eichmeyer / Anna Spiegl): Austrian case law deems it possible and justified to terminate an employee due to excessive sick leave, either in compliance with the mandatory notice period and termination date or with immediate effect. If the employee is sick for 27% of days within one year, the Austrian Supreme Court allows termination of the employment for that reason. Further, an employer can dismiss an employee if his or her sick leave exceeds 126 days, though not with a shortened notice period.

Disabled employees enjoy special protection against dismissal in Austria and this must be taken into account. The employer cannot dismiss a disabled employee without prior approval of the Disability Committee in the Federal Social Office, which will only be given in rare cases involving the employee becoming unable to fulfil his or her work duties. This could happen if the employee has a very high number of sick days. In addition, the employer must put in place appropriate measures to enable the employee to work if possible. It does not matter if the sick leave was caused by 'normal' illness or disability. Note that the employer must take into account whatever level of sick leave is typical for the employee´s particular disability. Only sick leave caused by disability that significantly affects the internal organisation and operational arrangements of the employer and exceeds the 'typical' number of sick days can be used to justify termination on grounds of illness.

Further, whether the employer had any knowledge of the disability is not decisive. The protection for disabled employees is regulated in statute.

Germany (Dagmar Hellenkemper): Section 5(2) DSE is interesting from a German point of view, as Germany does not have any similar provisions. In fact, dismissals on the grounds of illness are very difficult in Germany altogether. The employer has to show that the employee was ill and therefore not able to perform services for a considerate amount of time. There is however no legislation specifying how long the employee must be ill before dismissal can be effective. Generally, the courts find such dismissals invalid where the employee had been ill for less than six weeks per year over the course of three years, but this is determined case-by-case and there is no easy rule of thumb. Where disability comes into the mix, there is even more uncertainty. The employer is required, before dismissing the employee, to conduct an 'operational integration management' procedure *(Betriebliches Eingliederungsmanagement)* for the employee. The goal of this is mainly to find a job the employee is able to carry out despite his or her disability. If this fails, the employer can dismiss the employee on grounds of illness, while showing that there is no job available that the employee could do, given his or her specific limitations.

The Netherlands (Peter Vas Nunes): My interpretation of this judgment is that in Denmark an employer may dismiss an employee with a section 5(2) DSE clause in his contract, giving no more than one month's notice, following 120 of sickness for no other reason than his or her absence from work, even if, for example (i) the employee has been employed for a long time, (ii) he or she has no hope of finding new work, (iii) the absence is on account of a disability and (iv) the employer is aware of that fact. This is compatible with the principle of non-discrimination because section 5(2) DSE is actually designed, *inter alia*, to protect employees. If my interpretation is correct, how does this relate to, for example, the ECJ's ruling in *Mangold*? In that case, German law

allowing easy dismissal of employees hired after age 52 was designed to benefit those employees, the idea being that if it is easy to dismiss someone he or she is more likely to be hired (a well-known paradox in areas of social law such as employment). The ECJ did not go along with this reasoning.

This Danish judgment establishes that the burden of proof that an illness has resulted in a disability lies with the employee. While this finding is hardly surprising, I wonder how relevant it is in practice, seeing that proof of disability, surely, is available through doctors.

Subject: disability discrimination
Parties: HK Danmark acting on behalf of Lone Skouboe Werge - v - Dansk Arbejdsgiverforening acting on behalf of Pro Display A/S in liquidation
Court: *Højesteret* (Supreme Court)
Date: 23 June 2015
Case number: 25/2014
Publication: Available from domstol.dk (Højesterets afgørelsesdatabase)http://domstol.fe1.tangora.com/media/-300016/files/25-2014.pdf. The Danish Maritime and Commercial Court judgment is available from domstol.dk as well. http://domstol.fe1.tangora.com/media/-300016/files/25-2014-SH.pdf

*Jacob Sand, is a partner with Gorrissen Federspiel, www.gorrissenfederspiel.com

2015/29

Employer may not unilaterally waive non-competition clause (PT)

CONTRIBUTOR JOANA VASCONCELOS*

Summary

The employer, having announced to the employee its decision not to comply with the non-competition clause the parties had entered into five years before, refused to abide by it when the employment contract ended. The employee brought the matter before court, demanding payment of the sum specified in the clause in return for one-year's non-competition. The first instance court upheld the employer's position, but the Court of Appeal of Lisbon overturned it, in a ruling that was later confirmed by the Supreme Court of Justice. Both higher court decisions denied the employer the right to cancel a non-competition clause, given the employee's legitimate expectations.

Facts

The defendant in this case was an advertising agency. The claimant was the head of its graphic production department. Four years after the claimant was hired the parties entered into an agreement that included a non-compete clause. It bound the employee to abstain from performing any sort of professional activity in entities competing with the employer for a one-year period following the employment contract´s termination. In consideration of this obligation, the employer was bound to pay the employee, for the duration of the non-compete obligation, monthly compensation equal to his last-earned salary.

Five years later, the employer announced that it had "waived" the non-compete clause, by which it meant that it had cancelled the clause. The employee expressed disagreement and responded that he considered the cancellation unlawful. The employer replied by claiming to be the clause's sole beneficiary and, as such, to be entitled to waive it unilaterally. This statement was rejected by the employee. Six letters were exchanged in which the parties stuck to their respective standpoints.

When, shortly afterwards, the employment contract was terminated, the employee kept to his side of the agreement by refraining from any sort of competitive activity. He urged the employer to keep to its side of the agreement by paying him as provided in the contract. Faced with the employer's refusal, the employee brought the case to court seeking to have the "waiver" declared void.

The court of first instance ruled in favour of the employer, holding that the aim of non-compete clause was exclusively to serve the employer's interests, and that it had therefore been legitimately waived. This judgment was overturned by the Court of Appeal of Lisbon, in a ruling later confirmed by the Supreme Court of Justice, as described below.

Judgment

The question submitted to the Court of Appeal of Lisbon was whether an employer can unilaterally cancel a non-competition clause entered into prior to the termination of the employment contract, the argument being that, until the contract is terminated, the clause operates to the exclusive benefit of the employer. In this view, a non-compete clause does not affect the employee's position until the employment contract has ended. It is then that the clause becomes effective and enforceable.

The Court began by observing that non-compete clauses are usually aimed at pursuing the employer's interest to prevent so-called "differentiated competition" by a former employee whose position enables him or her, upon leaving the business, to divert clientele and/or to disclose confidential information. However, the Court added, the law protects the employee whose freedom of work such clauses restrain, by making their validity dependent on compliance with strict conditions. One of those conditions is that the employee is entitled to adequate compensation.

Moving forward with its analysis, the Court of Appeal of Lisbon noted that for as long as an employment contract continues in existence, Portuguese Labour Law does not grant the employer a prerogative to cancel a non-compete clause contained in it, nor does it allow the parties to agree such a prerogative. In the Court's words, the reason for this is as follows: "the possibility of unilateral cancellation of such clause by the employer goes against *bona fides*, as it enables the employer to recall the non-competition covenant at a moment when the employee is already enduring a limitation on her or his freedom of work". As the Court remarked, from the moment it has been agreed, a non-compete clause prevents an employee from looking for another job or accepting job proposals.

In view of all this, the Court of Appeal of Lisbon considered that the answer to the question at stake lay in the *pacta sunt servanda* principle: contractual clauses resulting from the parties' agreement can only be modified or cancelled by mutual agreement. Accordingly, the court held the employer's 'waiver' of the non-competition clause to be void, and thus ineffective. It ordered the employer to pay the employee the compensation agreed in the non-compete clause, with interest.

The decision was confirmed by the Supreme Court of Justice. In doing so, it deepened its doctrine regarding the impact of non-compete clauses on an employee's position before the employment contract ends. This is a topic that is usually disregarded by those who accept the employer's right to unilaterally waive a non-compete clause, as they tend to focus on the post-contract termination period. The Supreme Court of Justice, in contrast, emphasized the non-compete clause's effect on the employee's situation immediately following its entering into effect and up to termination - a period during which the clause is not yet operational, even though it already has effect. In the Court's words, non-compete clauses: "also limit the employee's full participation in the labour market long before the inactivity period, as they condition her or his possibility and interest in searching or considering other professional options, hence of optimizing his or her career management" - a reality that quite often results in loss of opportunities.

Consequently, while the employment contract is in force, a non-compete clause has the same effect as a 'permanence clause'. A permanence clause is a clause in an employment contract under which the employee, in consideration of the employer incurring significant expenses on his training, agrees not to resign for a certain period, with a statutory maximum of three years, and agrees to refund the training expenses in the event he resigns before the permanence period has expired. A permanence clause binds the employee to the employer by making leaving disadvantageous, thus discouraging it. By analogy, to entitle the employer to unilaterally cancel a non-compete obligation on the grounds that it has not yet become operational, disregarding the limitations the employee is subject to by its mere inclusion in the contract, would be similar to allowing the employer to attain the

same result as a permanence clause without offering anything in return. Moreover, allowing unilateral cancellation disregards the non-compete clause's bilateral nature, as it denies that the clause limits the employee's freedom to work whilst the employment contract is still in operation.

The Supreme Court of Justice ruled, in line with the Court of Appeal of Lisbon, that "in the absence of a legal provision to the contrary [...] no other conclusion can be reached than the impossibility for non-competition clauses to elude the principle that contracts freely entered into must be thoroughly enforced as accorded and can only be modified by agreement".

Commentary

In this case, the Portuguese courts were for the first time asked to determine whether an employer can unilaterally cancel a non-compete clause. This fact alone would justify special attention to both decisions addressed in the present report (Supreme Court and Court of Appeal). There are, however, several other reasons why the decision stands out as remarkable, three of which are discussed below.

First, the fact that although a non-compete clause is aimed at protecting the employer's interests (provided they exist), it also affects the employee and for that reason, does not "belong" to the employer, who cannot unilaterally decide either to maintain or cancel it.

Second, the employee's interests and expectations derive from the fact – so often forgotten – that it has an immediate effect on the employee's position, whether it is agreed at the beginning or during the course of an employment relationship. The effect it has on the employee is different from the effect after termination, yet it is related: the fact that the employee will be prohibited from competing post-termination deters the employee from seeking other jobs, accepting job offers - and ultimately from leaving the employer - thus ensuring the employer remains in the employer's service.

Third, the judgment clarifies that if an employer could cancel a non-compete clause, this would not only go against *bona fides*, by frustrating the employee's legitimate expectations, but would also be a way of circumventing the limitations on permanence clauses. It would make it possible for the employer to bind the employee using a non-compete clause that it could maintain just for as long as the employer thought necessary to prevent the employee from leaving - and be cancelled as soon as the employer wanted - with no costs or obligations on the employer and no benefit or compensation for the employee.

Comments from other jurisdictions

Austria (Jana Eichmeyer / Anna Spiegl): With regard to non-competition clauses, Austrian labour law makes a distinction between the prohibition against an employee working for a competitor during the employment contract and a restriction on starting an activity for a competitor after the employment relationship has ended. Whereas the general rule that determines that the employee should not compete during the employment relationship applies automatically, after the employment relationship has ended, a non-compete clause must be agreed upon specifically and needs to respect certain statutory restrictions in order to be effective.

There is no general obligation on the former employer to compensate the former employee for compliance with restrictions on competing during the employment set out in the clause. Therefore, an employer may unilaterally waive a pre-termination non-compete clause – particularly as there is no financial incentive and any such waiver would be in the employee's favour. However, post-contractual non-compete clauses without compensation are only enforceable if the employment relationship is terminated by the employee without good cause or by the employer with good cause. In all other cases, the employer loses the right to enforce the non-compete clause. Based on this rule, the only situation in which the former employer would pay the former employee his last-earned remuneration for the duration of the non-compete clause, is where the employer has terminated the contract (presuming the employer still wants the non-compete clause to remain in force).

However, the parties can agree, either in the employment contract or at any time during the employment contract or in the termination agreement, that the employer will pay compensation during the restriction period.

If the employer decides to uphold the clause and in doing so binds itself to compensate the former employee, the Austrian Supreme Court has ruled in a judgment of 1982 that it is not possible for the former employer to stop the payments by simply stating that the non-compete clause is cancelled. Hence, a unilateral cancellation of the non-compete clause by the employer without any reason, such as breach of the clause by the employee, is not valid under Austrian labour law. This would also apply if an agreement for compensation has been made for termination of the contract - such an agreement would exceed the statutory requirements but would be valid and enforceable.

Belgium (Eveline Ankaert): In accordance with the Belgian Employment Contracts Act, an employee must refrain from engaging in unfair competition or assisting in the commission of these both during and after termination of the employment contract. Hence, an employee is allowed to engage in fair competition with his former employer, unless a valid non-compete clause is signed before or during employment. In order to be valid and enforceable the non-compete clause must meet very strict conditions, for example:

- The non-compete clause can only prohibit the employee from engaging in similar activities by a competitor during a certain period of time after termination of the employment contract. Such a prohibition may not last longer than 12 months. Hence, the non-compete clause can only affect the post-contract termination period.
- The non-compete clause must provide for payment by the employer of compensation in one lump sum. The amount of this must be at least 50% of gross salary for the effective period of application of the clause.

As a consequence, Belgian case law accepts that the employer can decide to unilaterally waive the application of a non-compete clause during employment or within a maximum of 15 days following termination of the employment contract. If the employer fails to waive a non-compete clause in time, it will be liable to pay the lump sum compensation.

Croatia (Dina Vlahov Buhin): Under Croatian law the employer may waive a contractual non-compete obligation provided it has informed the employee about this in writing. In such a case, the employer is not obliged to pay the agreed compensation to the employee after the expiry of a three month period from the date of delivery of the written notice

to the employee. Although not expressly stated in law, this provision relates to the post-employment period, meaning that cancellation can only be effected after the employment relationship has ended.
On the other hand, during the employment relationship it should not be possible to "waive" either a contractual non-compete obligation or any other provision mutually agreed between the parties. Although this is not expressly prohibited by law, it is clear that the parties to the employment relationship agree mutually on their rights and obligations (within the limits prescribed by the Croatian Labour Act) and thus none of the provisions of the employment contract, including the non-compete obligation, can be waived unilaterally.

We are therefore of the view that the Croatian courts would have come to the same conclusion as the Court of Appeal of Lisbon and the Supreme Court of Justice in Portugal.

Germany (Dagmar Hellenkemper): Germany has statutory provisions in the Commercial Code that deal with bans on competition and unilateral waivers. First of all, employers are legally obliged to compensate non-competition periods with at least 50% of the former salary. Often, contractual provisions augment this to 75 or 100% of the former salary. The employer may unilateraly cancel the non-compete clause but is only released from its obligation to pay the compensation one year after declaration the cancellation. If the employee stays in the employment relationship for a year after the declaration of cancellation, the employer will not have to pay any compensation. However, if the employment relationship ends, for example, four month after the declaration, the employer will have to compensate the employee for the remaining eight months (if the agreed non-competition period does not end sooner). Usually, part of the compensation period is covered by an existing employment contract that prevents the employee from any competing activity. While the employer is only released from its obligation to pay the compensation one year after the cancellation, the employee is free from his obligation to refrain from competing the minute his employment ends (sometimes at the same time as the cancellation).

Lithuania (Inga Klimasauskienė): Lithuanian case law considers that non-compete agreements are civil transactions even though they are made between the parties to an employment contract. Therefore, an issue such as this would be subject to the Civil Code, as opposed to the Labour Code.

The Civil Code of Lithuania does not specify the content of a non-compete agreement. The general principles, as with all civil transactions, are therefore applied. The parties are free to determine their mutual rights and duties at their own discretion, including agreeing on compensation for non-competition. If the parties agree on compensation for a certain period of time, the parties are bound to comply with the agreement. This corresponds with the position of the Portuguese Courts in the case discussed above, in which they have applied the principle of the *pacta sunt servanda*. With regard to the unilateral withdrawal of a non-compete clause by the employer, such as the one in the present case, it is very likely that the Lithuanian courts would recognize this action as void too, because under the Civil Code of Lithuania, amendments and supplements to a contract must be made in the form in which the contract was formulated. This means that both parties must mutually agree to cancel the clause. There are some exceptions under Lithuanian law that allow for unilateral changes to a contract, but in this case, these are unlikely to apply.

It should be pointed out, however, that a new draft of the Labour Code is currently being debated in Lithuania and non-compete agreements are affected. The draft law says that the parties to an agreement can agree to a non-compete clause up to a specified time limit after the termination of an employment contract, but the time limit should not be longer than two years. As to compensation, the draft establishes that the burden is on the employer to pay the (former) employee compensation amounting to not less than 40% of the salary of the employee was receiving by the day of termination of the employment contract. Unfortunately, however, the draft is silent on the possibility of unilateral waiver of the obligation to pay compensation. This leads to the conclusion that where this is concerned, general civil law principles will continue to apply.

The Netherlands (Peter Vas Nunes):Under Dutch law there is no requirement to pay a former employee any compensation for being bound by a restrictive covenant such as a non-compete undertaking. Such an undertaking benefits only the (former) employer; there is no advantage for the (former) employee. As a consequence, an employer may unilaterally waive its rights under a non-compete clause, either as a gesture of good will or as part of a severance package (the employee perhaps getting lower severance pay than he would otherwise). In 2001, the government introduced a Bill of Parliament that would have changed the system. The plan was to require employers to compensate (former) employees for being bound to a non-compete agreement. The Bill was voted down. Had it passed, a non-compete clause would have changed from something that is favourable for employers to something that in many cases would actually have been attractive for the employee.

In the parliamentary debate, there was discussion about whether the employer should have the right to cancel the agreement, thereby robbing the (former) employee of his entitlement to the compensation. The general opinion was that employers could not do this. This Portuguese judgment confirms that opinion.

Romania (Andreea Suciu, Andreea Tortov): Just like the Portuguese legislation, the Romanian Labour Code expressly regulates non-competition clauses. Such a clause should consist in an obligation by the employee not to carry out a competing activity for a maximum of two years following termination of employment, in exchange for compensation by the employer, payable on a monthly basis. In order to be effective, a non-competition clause must include certain provisions (e.g. activities prohibited to the employee; third parties for whom providing the activity is prohibited; the duration of the non-compete obligation; the geographical area where the employee may be restricted from competing; and the amount of compensation). The purpose of such strict regulations is to avoid a general comprehensive ban on the exercise of a person's trade or profession. Further, a non-compete clause must be agreed and included in the employment agreement either during the employment or when it ends.

Just as in Portugal, in Romania the opinions expressed in professional literature are divided, some authors considering that the employer may unilaterally terminate a non-compete clause, since it only works in its favour. Others consider that the employer cannot waive a non-compete clause because of its consensual character. However, Romanian Courts support the opinion that the employer cannot unilaterally terminate a non-compete clause.

The Constitutional Court of Romania considers that, in theory, such

a clause favours the employer and so it should be able to choose to cancel it. However, in the absence of a legal provision to the contrary, the Court stated in Decision no. 1277/2010 that a non-compete clause could not be unilaterally terminated by either of the parties, as it was of a consensual character - thus implying the parties' agreement both when it was made and, more importantly, when it is terminated. Even so, the Court suggests employers should include in the wording of the agreement a right for the employer to decide whether to apply the non-competition clause or not. Otherwise, the non-competition clause would automatically activate and only terminate at the end of its term or if the parties mutually agree to cancel it.

Subject: Non-competition clause
Parties: Unknown
Court: *Tribunal da Relação de Lisboa* (Court of Appeal of Lisbon) and *Supremo Tribunal de Justiça* (Supreme Court of Justice)
Date: respectively, 18 December 2013 and 30 April 2014
Case Number: 2525/11
Internet Publication:
www.dgsi.pt→bases de dados jurídicas→Acórdãos do Tribunal da Relação de Lisboa→Pesquisa Livre→2525/11
and
www.dgsi.pt→bases de dados jurídicas→Acórdãos do Supremo Tribunal de Justiça→Pesquisa Livre→2525/11

*Joana Vasconcelos (PhD) teaches labour law at the Portuguese Catholic University Law Faculty and is an Of-Counsel at Cuatrecasas Gonçalves Pereira's Lisbon office
www.cuatrecasasgoncalvespereira.com

2015/30

Worker who did not take holiday for a reason other than sickness was not entitled to pay in lieu on termination (UK)

CONTRIBUTOR CLARE BATTERSBY*

Summary
In a case involving a claim for holiday pay, the Employment Appeal Tribunal ('EAT') has allowed an appeal by the employer against findings that the worker was entitled to a payment in lieu of holiday that he had not taken during previous leave years for reasons other than sickness.

Background
The Working Time Directive (93/104/EC) (the 'Directive') provides that all member states must ensure that every worker is entitled to:

"(1) paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice" (Article 7(1)); and
(2) the minimum period of paid annual leave may not be replaced by an allowance in lieu except where the employment relationship is terminated".

The Working Time Regulations 1998 (the 'WTR') implement the Directive in the UK.

Regulation 13(9) of the WTR provides that holiday to which a worker is entitled must be taken in the leave year in respect of which it is due, i.e. the worker must 'use it or lose it'. The leave year is usually set out in the employment contract; it might be a calendar year but is not necessarily so. The WTR provide that if there is no provision in the contract, the holiday year starts on 1 October every year for workers already employed at 1 October 1998 (when the WTR came into force), or on the date of commencement of employment for other workers.

Regulation 13(9) prohibits replacing such holiday with a payment in lieu, except upon termination of employment. This is to ensure that the health and welfare objectives of the Directive are met, namely that workers are taking proper breaks from their work throughout the relevant holiday year.

Regulation 14 deals with payment in lieu of accrued holiday on termination of employment, including how to calculate the amount due if a worker leaves part-way through a leave year.

There has been much discussion at both EC and UK level about what happens if workers are unable to take their holiday in a leave year because they have been off sick for that whole year. In *Pereda v Madrid Movilidad SA [2009] IRLR 959*, the Court of Justice of the European Union made it clear that the Directive requires carry-over of statutory holiday from one leave year to the next in circumstances where a worker chooses not to take their holiday because they are on sick leave.

However, the WTR prevent carry-over of leave (although it is possible, and common, in UK contracts, to allow workers to carry over a limited number of days' holiday to the next leave year, with the approval of the relevant manager.) Given this, it became apparent that the WTR did not correctly implement the Directive. Following *Pereda*, the UK Court of Appeal in *NHS Leeds v Larner [2012] IRLR 825* held that Regulation 13(9) of the WTR should be read as follows (in bold), to bring it in line with the Directive:

"Leave to which a worker is entitled under this regulation may be taken in instalments, but –
(a) it may only be taken in the leave year in respect of which it is due, **save where the worker was unable or unwilling to take it because he was on sick leave and as a consequence did not exercise his right to annual leave***".*

Regulation 14 was also read so as to allow for payment in lieu of such untaken carried over holiday upon termination.

A worker who has not been allowed to take paid holiday or who has not received payment for holiday can bring a claim, either under the WTR, or by bringing a complaint of 'unlawful deduction from wages'. The WTR claim must be brought within three months of a specific non-payment. The unlawful deductions claim must be brought within three months of the last in any series of deductions, which may span more than one year, meaning that unpaid holiday pay from previous years can be recovered in a successful claim.

Facts
Mr King worked as a commission-only salesman for The Sash Window Workshop Ltd ('Sash Window') from July 1999 until the termination of his engagement in early October 2012, when he reached the age of 65.

Other than in 1999, Mr King took time away from work each year. He was not at any time paid for such holiday.

Mr King brought a successful claim for age discrimination in relation to his dismissal at the age of 65. He also brought claims for unpaid holiday, going back to 2000.

The Employment Tribunal ('ET') awarded Mr King holiday pay in three different categories:

1. holiday pay calculated under regulation 14(2) WTR, representing the number of days' holiday that Mr King had accrued but not taken in the holiday year 2012/2013 (the year in which he left Sash Windows), calculated at the date of termination;
2. holiday pay for holiday requested and taken in previous years, calculated as a series of unlawful deductions from wages;
3. holiday pay in lieu of leave that had accrued in previous years but not been taken ("Holiday Pay 3"). This amounted to just under GBP 9,500 (around 24 weeks' holiday). The ET based its decision on the judgment in *Larner*; although, in *Larner*, the employee had not been able to take the holiday because of sickness, the ET held that there was no difference in principle between being unable to take the holiday because of sickness and being refused paid leave. The ET found that Sash Window would have refused the paid leave had Mr King requested it because Sash Window erroneously thought that Mr King was not entitled to it.

The employer appealed to the EAT against the award of Holiday Pay 3.

Judgment

The central question for the EAT was whether the ET was wrong in law to hold that Mr King was entitled to payment for Holiday Pay 3.

The EAT allowed the appeal and remitted the case back to the same tribunal.

The EAT held that the ET had erred in law by assuming that Mr King was unable to take paid leave because it would have been refused by Sash Window if he had asked for it. Mr King did in fact take a large proportion of his holiday entitlement each year but chose not to take all of it. In *Larner*, Lord Justice Mummery had said that the worker must be *"unable or unwilling,* **because of reasons beyond his control**, *to take annual leave"*. The ET failed to make any findings about any restrictions on Mr King's ability or willingness for reasons beyond his control to take holiday. There was nothing to support a conclusion that he was ever prevented from taking holiday. The EAT accepted that, had Mr King been paid for his holiday, he might have been more likely to take his full entitlement. However, there was no evidence that he had ever requested holiday and been refused it. The ET should have based its decision on evidential findings, not on assumptions.

Moreover, any more general right to a payment in lieu of holiday would defeat the health and welfare benefits of the Directive and the WTR, by providing workers with an incentive not to take holiday. Even if Mr King was, in fact, prevented from taking annual leave, he worked the periods in question and was paid in full for them. Had he received holiday pay for the same period, this would have been a double recovery, which would not be consistent with the purposes of the legislation.

Given that Mr King received his full wages for the periods he would otherwise have taken as holiday, there could not have been any unlawful deduction from wages. It was not wages that he lost: it was the benefits of taking periods of holiday. Where an employer has failed to pay correct holiday pay to a worker on termination of employment, the correct remedy is an order from the ET requiring the employer to pay that amount to the worker. However, where the worker's complaint is that the employer has refused to allow him to take his holiday, the correct award is 'compensation', awarded on a just and equitable basis (taking into account the employer's refusal and the loss the worker has suffered), not 'wages', i.e. consideration for work done under the contract.

Commentary

As explained above, it is now established that a worker who is prevented from taking holiday by reason of sickness can carry over that holiday into the next leave year and be paid in lieu of it on termination. The EAT appears at first glance to have widened the scope for holiday pay claims, such that workers who are prevented from taking their holiday for reasons *other than sickness* can also carry that holiday over, as long as those reasons are beyond their control. This could open the floodgates for more claims for holiday pay: for example, would a lawyer who was unable to take all of their holiday in the previous year because of a heavy case-load now be able to be paid that holiday upon termination if they had carried it over? Yes, on first glance but, looking in more detail at the EAT's decision, that seems likely to constitute double recovery as the lawyer would have received full wages for those periods of working. The lawyer might be awarded compensation, however, for having been prevented from taking holiday. As a result of this decision, there is perhaps scope for litigation about what is meant by reasons beyond a worker's control.

Comments from other jurisdictions

Austria (Thomas Pfalz): According to section 4(5) of the Austrian Holidays Act (*Urlaubsgesetz*), entitlement to statutory paid leave is lost two years after the end of the leave year in respect of which it is due, i.e. three years after the entitlement commences. Thus, an employee can carry over his untaken leave into the next leave year and the leave year after that, irrespective of the reasons that prevented him from taking it.

Payment in lieu of accrued leave is regulated in section 10 of the Holidays Act. For the last leave year of the employment relationship, section 10(1) provides for a prorated payment. Further, an employee is entitled to compensation for carried-over leave from previous leave years pursuant to section 4(5).

Romania (Andreea Suciu, Andreea Tortov): The latest amendments to the Romanian Labour Code, in force since 25 January 2015, stipulate that if the employee, for justified reasons, is unable to take the annual leave he or she is entitled to during a calendar year, the employer is obliged to grant the untaken leave within a period of 18 months starting with the next calendar year. However, there are no express statutory provisions about what happens if the employee does not take the leave during those additional 18 months.
Given the employee-friendly approach of the Romanian Courts, it is hard to believe that a decision such as the EAT's would have been made in Romania. Usually, the Romanian Courts oblige the employer to compensate for all untaken leave upon termination of employment, without analysing why the leave was not taken. The Courts base this on Article 269(1)c) of the Romanian Labour Code, which says that employees are entitled to claim compensation within three years of a

specific non-payment. Hence, employees are normally compensated for untaken leave for the last three years prior to termination.
Given that the amendments to the Labour Code are new, there is no case law about 'justified reasons'. It would be interesting to see if the Romanian Courts continue to consider employees to be entitled to an allowance in lieu of untaken annual leave without a justified reason even after the extra 18 months have elapsed.

Subject: working time; holiday pay
Parties: The Sash Window Workshop Ltd, Mr R Dollar - v - Mr C King
Court: Employment Appeal Tribunal
Date: 4 November 2014
Case number: UKEAT/0057/14/MC, UKEAT/0058/14/MC
Hard copy publication:
Internet publication: http://www.bailii.org/uk/cases/UKEAT/2014/0057_14_0112.html

*Clare Battersby is a senior lawyer with Lewissilkinhouse: www.lewissilkin.com

2015/31

Constitutional Court, reversing precedent, prohibits suspension pending criminal investigation (RO)

CONTRIBUTORS ANDREEA SUCIU / ANDREEA TORTOV

Summary
Article 52(b) of the Romanian Labour Code allows an employer to suspend an employee against whom it has filed a criminal complaint, without pay. The Constitutional Court, reversing settled case-law, has recently ruled that Articl 52(b) is unconstitutional.

Facts
This case concerns an employer that filed a criminal complaint against two of its employees and then suspended them without pay in accordance with Article 52(b) of the Romanian Labour Code. The judgment does not reveal what the employees were accused of having done. Said Article 52(b) allows an employer to suspend the employment agreement of an employee without pay if the employer has filed a criminal complaint against the employee or the employee has been charged by the public prosecution for an offence that is incompatible with his or her position. If the employee is cleared of blame, the employer must reinstate him or her and pay compensation for lost salary.

The employees brought proceedings against their employer before the Tribunal in Bihor. They claimed annulment of the decision issued by the employer on the suspension of employment during criminal investigation, arguing that Article 52(b) is unconstitutional for the following reasons:

- it violates the presumption of innocence principle;
- it is incompatible with the right to work as provided in various legal instruments;
- it is at odds with the non-discrimination principle;
- it contradicts the logic that an accessory sanction (in this case, the suspension of the employment agreement) cannot be applied prior to the principal sanction (in this case, the criminal penalty, if any);
- the compensation awarded in the event the suspension is determined to have been unlawful fails to cover the employee's entire (material and immaterial) loss;
- certain categories of persons, such as magistrates and members of Parliament, are excluded from the scope of Article 52(b), in that they can continue working and being remunerated pending the outcome of the criminal investigation;
- there is no statutory limit on the duration of the suspension, which can therefore go on for a long time.

Based on previous judgments by the Constitutional Court, the Tribunal considered Article 52(b) to be constitutional. However, the Tribunal nevertheless decided to refer the matter to the Constitutional Court, in accordance with legal requirements which state that a court (in this case, the Tribunal of Bihor) must refer any raised claim of unconstitutionality to the Constitutional Court, unless the claim of unconstitutionality is declared inadmissible by that court based on certain criteria expressly regulated by law.

Judgment
The Constitutional Court began by repeating its doctrine that Article 52(b) does not infringe the employee's presumption of innocence, nor does it represent discrimination (since it applies to all employees). Further, the Constitutional Court held that:

- suspension is a lawful measure that protects the company against the danger of continuation of the employee's illicit activity;
- the employee is entitled to compensation should the Court find him or her innocent;
- suspension does not imply that the employee is guilty and it is no more than a temporary measure;
- even where the employee's behavior does not represent a crime, it still might represent a disciplinary misconduct sanctioned with disciplinary dismissal; therefore, given that a suspended employment agreement cannot be terminated until a final decision of the court is issued, suspension can be seen as a measure of protection for the employee.

The Constitutional court also held, in broad terms, that suspension does not restrict the right to work, since the employee can still choose to apply for another job. However, it then went on to examine the constitutional right to work in more detail. This right may be restricted, but only if the restriction is in pursuit of a legitimate objective and the means chosen to achieve that objective are effective, if it is necessary (indispensable for achieving the objective) and if it is proportionate (i.e. the interests at stake must be balanced in light of the objective). The Court considered that Article 52(b) does not respect all of these conditions. More specifically, it infringes the proportionality principle. Proportionality must be adhered to when restricting an employee's right to work, since the employer both files the criminal complaint, and then decides to suspend the employment agreement, meaning that the entire process is at the employer's discretion and is therefore open to abuse.

Considering the above, the Constitutional Court ruled on 23 April 2015 that Article 52(b) is unconstitutional. Yet, by that time, both the Tribunal in Bihor and the Court of Appeal in Oradea had already rejected the employees' claim to annul the employer's decision on 23 October 2014 and 18 March 2015 respectively. However, based on the Constitutional Court's ruling of unconstitutionality, the employees are entitled to lodge an appeal on points of law before the Supreme Court. It is not yet

known whether the employees will do so.

Commentary
The Constitutional Court's dramatic change of view is interesting. The reason for this shift may lie in the fact that a series of legal amendments relating to suspension without pay occurred recently. For example, the point at which a magistrate can be suspended from duty has been changed from the time the criminal complaint was filed to the time the magistrate is sent for trial.

An employer who suspects an employee of gross misconduct and wishes to dismiss the employee, if possible with compensation for any loss caused by the employee, usually has a choice between two mutually exclusive courses of action:

a. To conduct a disciplinary investigation: This is a legal requirement to enable the employer to dismiss the employee for cause. If the outcome confirms the suspicion, the employer can dismiss the employee for cause, i.e. with immediate effect and without severance pay. Note that suspending the employee without pay during a disciplinary investigation has never been declared unconstitutional and thus is still permitted under Article 52(a) of the Romanian Labour Code. Or
b. To file a criminal complaint: If the outcome confirms the suspicion, the employer may dismiss the employee for cause, unless the court imposes a prison sentence. In the latter case, the employment agreement is terminated by law. However, if the outcome does not confirm the suspicion (i.e. the employee's action is not considered a criminal offence), the employee's misconduct may still be grounds for disciplinary dismissal.

Many factors determine the employer's strategy, such as how certain the employer is that his suspicion is correct, and the employee's financial position. If it is beyond doubt that the employee is guilty of a serious offence and the employee is unlikely to be able to pay compensation, option a. is the obvious choice. In other situations, option b. can have certain advantages. One is that the police are in a better position to collect evidence, without cost to the employer. Another advantage is that the employer can ask the criminal court to award a claim for damages, thereby removing the need for the employer to conduct separate (expensive) civil proceedings.

Comments from other jurisdictions

Germany (Dagmar Hellenkemper): German jurisprudence not only allows the suspension of the employee, but a well-founded suspicion that the employee has committed a criminal offense can even be grounds for dismissal without notice. The Federal German Labour Court (BAG) held that the presumption of innocence was only relative to the penal procedure and not necessarily applicable to civil law. It found that it was intolerable for the employer to keep an employee whom the employer reasonably believed brought harm to the employer. In order to prevent an innocent employee from being dismissed, the employer must take reasonable steps to investigate the facts of the accusation. If at the end of the criminal procedure the employee is proven innocent, he or she may claim the right to reinstatement – or – if the employee contested the dismissal, severance pay, depending on the circumstances.

Subject: Suspension
Parties: *Dorina Marioara Vese* and Marilena Taut (petitioner) – v – Bihor Tribunal
Court: Curtea Constitutionala (Constitutional Court of Romania)
Date: 23 April 2015
Case number: 279/2015
Internet publication: www.ccr.ro→decizii de admitere→scroll down by date

*Andreea Suciu and Andreea Tortov are lawyers with Noerr in Bucharest, www.noerr.com

2015/32

Only 'real' employee, with actual activity in Member State of application, entitled to A1 certificate (LI)

CONTRIBUTOR INGA KLIMAŠAUSKIENĖ*

Summary
An individual who claims to be both self-employed and employed in different Member States, but cannot prove his employment is not automatically entitled to obtain certificate A1 in the Member State in which he says he is employed under Article 13(3) of Regulation (EC) No 883/2004 on the coordination of social security systems ('Regulation 883/2004'). Therefore, the rejection of an application for certificate A1 by the Member State where the person claimed to be employed was reasonable and legitimate.

Facts
The claimant in this case was KW, a Polish national living and working in Poland. He worked there as a self-employed person. In 2013, while continuing to work in Poland on a self-employed basis, he accepted employment in Lithuania with a Lithuanian company. He applied for an A1 certificate for the right to be be subject to Lithuanian social security law.

An A1 certificate is a document based on Article 13 of Regulation 883/2004, which concerns the application of social security legislation within the EU. The principal rule for posting situations is to be found in Article 11(1). This says that individuals are subject to the legislation of a single Member State only. Article 12(1) deals with the most common situation, which is where an employee is posted to another Member State to work there as an employee. Article 12(2) deals with situations in which a self-employed person who normally performs a self-employed activity in one Member State, pursues a similar activity in another Member State. Article 13 deals with hybrid situations. One of these situations is regulated in Article 13(3):

"A person who normally pursues an activity as an employed person and an activity as a self-employed person in different Member States shall be subject to the legislation of the Member State in which he pursues an activity as an employed person."

The judgment is not particularly clear about what KW was seeking. However, he seems to have applied for an A1 certificate stating that both his self-employment in Poland and his employment in Lithuania were governed by Lithuanian social security law, i.e. that he was not covered by – and did not have to contribute to – the Polish social security system. He applied for the certificate in Poland and, when his application was rejected, he applied again in Lithuania. The Lithuanian authorities (the Užsieno išmokų tarnyba, or 'UIT') also turned down his application. Applying Article 13(3) of Regulation 883/2004, the authorities determined that KW had failed to provide evidence that he was really employed in Lithuania. Although he had submitted a copy of an employment agreement with a Lithuanian company, there was no evidence that he actually pursued a more-than-marginal activity under that contract.

KW disagreed with the rejection of his A1 application and brought proceedings before the first instance court of Vilnius.

Judgment

The court began by noting that the situation was governed by Article 13(3) of Regulation 883/2004. Contrary to subsections 1 and 2, subsection 3 of Article 13 does not refer to the requirement that the person's activity in any Member State should be "substantial". Nevertheless, the court held that where a person claims applicability of Article 13(3), there should be evidence that the person actually does perform his activity as an employee in the Member State in question, in this case Lithuania. Article 13(3) does not apply in cases where there is an employment contract but no more than marginal activity. In this case, KW had failed to provide sufficient evidence that his employment in Lithuania was real. On the contrary, the circumstances of the case suggested that his employment there was bogus. How likely is it that someone would travel over 700 kilometres to work in another Member State for a salary of EUR 43 per month? It would seem that KW's application had more to do with a desire to obtain a tax advantage than with his right to free movement within the EU.

The court concluded that the UIT had rightly turned down KW's application for an A1 certificate. KW has not appealed.

Commentary

This case deals with 'tax tourism'. In situations such as that of KW, the level of tax and social insurance contributions in Lithuania would appear to be lower than in Poland. Perhaps KW thought he had discovered a loophole in Regulation 883/2004. Pursuant to the text of Article 13(3) of that Regulation, a person who is self-employed in one Member State (in this case, Poland) and regularly employed in another Member State would owe social insurance contributions in that other Member State only. Article 13(3) does not require the employment in the other Member State to be substantial. This is notable, because Articles 13(1) and 13(2) do have this requirement. This is, I assume, to avoid bogus constructions aimed at tax evasion. Why Article 13(3) lacks such a requirement is not clear. Neither the implementing Regulation - Regulation 987/2009 - nor the 'Practical Guide – the applicable legislation in the EU, EEA and Switzerland' issued by the European Commission (see www.ec.europa.eu/social/main.jsp?catId=868) provide the answer. Article 14(8) of Regulation 987/2009 provides guidelines and the Practical Guide has two extensive paragraphs on the definition of "substantial activity": one covering the situation where an employee works in two or more Member States as an employee and one where a self-employed person works in two or more Member States as a self-employed person. However, Regulation 987/2009 and the Practical Guide are silent on how substantial work needs to be in hybrid situations such as that at issue in the case reported above.

Comments from other jurisdictions

Germany (Dagmar Hellenkemper): This is a very interesting case. German legal literature – much like the Practical Guide - offers no simple answer. Notably, section 3 of Article 13 of Regulation 883/2004 does not refer to substantial employment in a Member State as opposed to self-employment in another Member State. It seems to me that the Lithuanian Court chose an elegant solution in this case: rather than interpreting Article 13 in a way that it would only apply to 'substantial' employment, it held that actual employment in Lithuania was not proven by the plaintiff and did therefore not exist. However, had the employment been real, would the Court have gone as far as to deny the claim, in contravention of the wording of the Regulation?

Subject: Cross-border social insurance
Parties: Employee – v - Foreign Benefit Office of the State Social Insurance Fund Board
Court: Vilnius Region Administrative Court
Date: 31 March 2015
Case number: I-4862-580/2015
Publication: http://liteko.teismai.lt/viesasprendimupaieska/paieska.aspx?detali=2&bnr=I-4862-580/2015&byloseilesnr=&procesinisnr=&eilnr=False&tid=&br=&dr=&nuo=&iki=&teis=&tk=&bb=&rakt=&txt=&kat=&term=

*Inga Klimašauskienė is a Senior Associate at GLIMSTEDT in Vilnius, http://www.glimstedt.lt

2015/33

Court defines "employment agreement for a temporary employment agency worker" narrowly (NL)

CONTRIBUTOR ZEF EVEN*

Summary

Directive 2008/104/EC on temporary agency work applies to employees of a temporary-work agency who are assigned to user undertakings to work temporarily under their supervision and direction. A similar definition was introduced in the Dutch Civil Code in 1999, five years before the directive was adopted. Recently, a Dutch Court of Appeal added an element to the definition. It ruled that, in order to qualify as a temporary employment agency, an employer must perform what is known as an 'allocation function'. This means that the employer must be in the business of bringing together supply and demand of labour by assigning employees to customers. In the case reported below, the employer assigned its employees, not to customers but to another group company in order to perform transportation services there, not temporarily but permanently. The court held that this activity did not meet the 'allocation' requirement and that therefore the company in question was not a temporary employment agency.

At first sight, this may appear to be a domestically Dutch issue.

However, as the Commentary explains, this judgment could be relevant in other European jurisdictions.

Facts

Directive 2008/104/EG on temporary agency work (the 'Directive') aims to protect temporary agency workers ("temps"). According to Article 3(1)(c) of this Directive, a temporary agency worker is a worker with a contract of employment or an employment relationship with a temporary-work agency (an 'Agency') with a view to being assigned to a user undertaking to work temporarily under its supervision and direction (underlining added). Article 3(1)(b) defines 'temporary-work agency' as any natural or legal person who, in compliance with national law, concludes contracts of employment or employment relationships with temporary agency workers in order to assign them to user undertakings to work there temporarily under their supervision and direction (again, underlining added).

Dutch law defines neither of these terms. However, Article 7:690 of the Dutch Civil Code ('DCC') does provide a definition of the contract of employment between an Agency and its temps ("temp contract"). This is defined as a contract of employment whereby, within the context of the employer's profession or business, the employee is placed by the employer at the disposal of a third party in order to perform work under the supervision and direction of the latter by virtue of a contract for services granted by the latter to the employer. With the exception of 'temporary', the elements in this definition are basically the same as those in the Directive, even though Article 7:690 predates the Directive. In the parliamentary history of Article 7:690 DCC, however, the legislator added that the employer should also have a so-called allocation function, in order to qualify as a temporary-work agency. This means that it should bring together supply and demand of labour by assigning employees to customers. This, after all, was the classical role of agencies: supplying workforce in case of illness of the user undertaking's own staff or a sudden increase in its activities. The issue is whether this additional element, the 'allocation function', mentioned in the Parliamentary history, should be regarded as an additional requirement to qualify as a temporary-work agency.

In the case at hand, a company called Velocitas arranged for the transportation of goods for the benefit of its sister company, Velocitas Transportation and its clients.

SNCU is a foundation that is responsible for assuring compliance with the Dutch collective labour agreement for the temporary agency sector. SNCU took the position that Velocitas qualified as a temporary-work agency and should therefore adhere to the aforementioned collective labour agreement, including the obligation to make pension contributions on behalf of the temps and to contribute to a sector-wide training scheme.

The collective labour agreement did not define temporary-work agency, but simply referred to Article 7:690 DCC in the clause defining its scope of applicability. According to SNCU, Velocitas employed staff who were assigned to other companies (the user undertakings, primarily being Velocitas Transportation) to work temporarily under their supervision and direction. For that reason, SNCU took the position that Velocitas fell within the ambit of the collective labour agreement and should therefore observe its terms.

Velocitas challenged this position, arguing that temporary-work agencies must have the required allocation function, which it did not. Velocitas was merely involved with transportation services for the benefit of third parties that contracted out their transportation activities, in a similar way to its sister company Velocitas Transportation – and as Velocitas did not qualify as a temporary-work agency, the collective labour agreement did not apply.

The court of first instance agreed with this position and rejected SNCU's claims. SNCU appealed, arguing that Article 7:690 DCC does not require the employer to have an allocation function in order to qualify as a temporary-work agency and that therefore this element should be disregarded.

Judgment

The Court of Appeal upheld the lower court's judgment, holding that, although the allocation function is not part of the statutory definition of a temp contract, it should nevertheless be read into the definition. The Court of Appeal based its decision on the Parliamentary history of Article 7:690 DCC. As Velocitas' function did not seem to be to bring together the supply and demand of labour in the market (though SNCU was given the chance to prove otherwise) it could not be regarded as a temporary-work agency. In consequence, the collective labour agreement for the temporary agency sector did not apply to Velocitas.

Commentary

Why is whether an employer qualifies as a temporary employment agency relevant? Under Dutch law the relevance is twofold:

- an agenply with the relevant collective agreement, which bestows certain rights on temps, making them more expensive than they might otherwise be;
- temps lack the dismcy must comissal protection that most regular employees have (which is one reason that The Netherlands has so many temps).

SNCU is actively pursuing companies that hire out temporary staff whilst not complying with the relevant collective agreement. Many of those companies do not regard themselves as Agencies. They attempt to avoid the obligation to comply with the relevant collective agreement by defining temporary agency work narrowly.

The outcome of this case is controversial: there is much debate about whether the allocation function matters when determining whether a company qualifies as a temporary-work agency. Although 'allocation function' describes the original role of a temporary-work agency, it is not part of the statutory definition. Moreover, it is not beyond doubt that the legislator intended to include this element in the definition. Commentators take different views on that, as do the courts.

It is somewhat peculiar that the definitions set out Directive 2008/104/EC seem not to have played a significant role in the national discussion. Although Article 7:690 DCC predates the Directive by five years, and the Directive was therefore irrelevant at the moment Article 7:690 DCC was introduced, the Government, when it presented the Bill transposing the Directive (into other legislation) in 2008, observed that the definition of a temp contract in Article 7:690 DCC accorded with Article 3(1) of the Directive.[1] Moreover, the ECJ has held that national legislation implementing a directive must be interpreted in line with that directive, even if it predates the directive.[2]

1 See *TK*, 2010–2011, 32 895, nr. 3, p. 3.

2 See ECJ 13 November 1990, case C-106/89 *(Marleasing)* at §8: *"(...) in applying national law, whether the provisions in question were adopted before*

The Dutch definition of temp contract in Article 7:690 DCC should in my view therefore be interpreted in accordance with the Directive. Adding a restrictive element to this definition may very well be in violation of the Directive.[3] Even so, falling back on the Directive regrettably does not give full clarity, according to some Dutch commentators. It has been argued by some that, although the allocation function as such is missing from the definitions of Article 3(1) of the Directive, the word 'temporarily' used in these definitions implies that the Agency must have an allocation function.

In August 2011, an Expert Group composed of national experts from all 27 Member States (plus some others) issued a report to the European Commission on the transposition of Directive 2008/104. To my knowledge the report has not been published on www.eurlex.eu, though it can be found easily via Google. The following passage from the report deals with the issue discussed above:

Does the Directive apply regardless of the duration of assignments?

Although definitions in Article 3 use the word 'temporarily', there is no limitation to the duration of assignments. Practice differs in different Member States and economic sectors as to the length of assignments, which may be, for instance, a matter of days in certain situations, while in other cases they may last a number of months. In all these situations the assignment remains of a temporary character.

Does the Directive apply to employers which are not temporary-work agencies but occasionally second staff by placing them under the supervision and direction of another undertaking?

Article 1(2) states that the Directive applies to undertakings "which are temporary-work agencies (...)" and Article 3(1)(b) contains an autonomous definition of the notion of "temporary-work agency". Consequently, the Directive may in certain situations be applicable to employers in spite of their not being qualified as temporary-work agencies under national law. However, this may only be the case when the entity under consideration fulfills the conditions laid down in Articles 1 and 3 and, thus, must be considered as a temporary-work agency in the meaning of the Directive.

For instance:

- *A worker employed by a company which is not a temporary-work agency may at a certain point be put at the disposal of another company belonging to the same group of undertakings, in particular to adapt to changing economic circumstances. This is a situation where the Directive would not be applicable. (...)*

In brief, according to the Expert Group, the word 'temporarily' in the Directive does not give a clear indication about the duration of a secondment in any particular case. It could, for example, describe in general terms a situation in which a temporary-work agency brings together the demand and supply of labour - often for only a limited period of time.

Nevertheless, I doubt this is the proper interpretation of the Directive. It seems to me that the expert group merely wanted to get across the idea that assignments that last for many months may very well still fall within the ambit of the Directive. I do not agree that the word 'temporarily' refers to an allocation function. Having said this, it is obviously crucial to have a proper understanding of what exactly constitutes a temp contract. The Dutch Supreme Court has been asked (in another case) to give a definitive respone as to how to interpret Article 7:690 DCC. It will be interesting to see whether the Supreme Court applies the Directive in order to give that interpretation. It may even refer questions to the ECJ for a preliminary ruling, for example, to clarify the word 'temporarily' as used in the Directive. Does this word simply refer to a time-period, or does it (also) introduce the notion of an 'allocation function'? We will have to wait and see.

Comments from other jurisdictions

Austria (Daniela Krömer): The distinction between temporary agency work and the provision of services has also been brought before the Austrian Courts. The Act on Temporary Agency Work *(Arbeitskräfteüberlassungsgesetz, 'AÜG')* states that the hiring-out of workers consists in making workers available to a third party in order to carry out work. There is no time limit set, nor is an allocation function mentioned or required. The only mention of a time limit can be found in the so-called 'group privilege', i.e. if temporary (and if agency work is not the object of the company), agency work within a group of companies does not fall within the Act.

The Austrian understanding of what constitutes temporary agency work is very broad. The Act mentions four criteria that indicate temporary agency work. They are:

1. workers who do not produce any work or service attributable to the subcontractor, which differs or is distinguishable from the goods, services and products of the main contractor;
2. workers who do not perform their work using materials and tools belonging to the subcontractor;
3. workers who are, from a logistical point of view, integrated into the main contractor's company and are subject to its hierarchical and technical supervision;
4. where the subcontractor is not liable for the result of the work or supply of services.

Court rulings indicate that it is sufficient if only one of the four criteria has been met (e.g. the recent judgment of the Supreme Court 8 ObA 7/14h). Strictly speaking, it is not necessary to perform services under the hierarchical supervision of a user undertaking to fall within the Act. The Austrian judiciary was criticised by the ECJ in its judgement C-586/13, *Martin Meat* for interpreting the criteria too broadly (though not in the context of the Directive on Temporary Agency Work but based on the Directive on Posted Workers).

Without knowing too many of the details of the *Velocitas* case, it is likely that at least one of the above-mentioned criteria would have been met – and that the workers would have fallen within the Act on Temporary Agency Work.

or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter (...)".

3 One may argue that taking a restrictive position about who qualifies as a temp may be beneficial to the worker concerned as, if that is the case, he will enjoy dismissal protection. Even so, according to the legislator, Article 7: 690 DCC implements the Directive and therefore potentially also the advantageous elementsof it. It should therefore, in my view, comply with the definitions set out in the Directive.

Subject: Temporary agency work
Parties: Velocitas – v - Stichting Naleving CAO voor Uitzendkrachten SNCU
Court: Court of appeal Arnhem-Leeuwarden zp Arnhem
Date: 16 March 2015
Case number: 200.141.626
Internet publication: www.rechtspraak.nl→zoeken in uitspraken→ ECLI:NL:GHARL:2015:670

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

2015/34

Employee who resigns for 'good cause' bears burden of proof in respect of the cause (LA)

CONTRIBUTOR ANDIS BURKEVICS*

Summary
An employee of a company who is also a member of its Management Board has two capacities, that of employee and that of Board member, even where there is one single contract that covers the employee's work in both capacities. As far as termination is concerned, each capacity is governed by its own set of rules. Therefore, if such an employee claims compensation for having had to resign with immediate effect for 'good cause', the court must assess each element of the 'good cause' according to the appropriate set of rules. It is generally the employee that bears the burden of proof that he or she had good cause to resign with immediate effect. The fact that the employee was (allegedly) unlawfully suspended does not satisfy that proof.

Facts
The claimant in this case was a company that operates a private medical clinic (the 'Company'). The defendant and counter-claimant was a minority shareholder of the Company who was also employed in two capacities: as a member of the management board and as a gynaecologist (the 'Employee').

On 31 January 2013, the Employee, observing the statutory notice period of one month, resigned in both capacities with effect from 1 March. The majority shareholders responded on 6 February by (i) dismissing the Employee with immediate effect in her capacity as a member of the management board, (ii) replacing her by new board members and (iii) suspending her in her capacity as a gynaecologist, also with immediate effect. The reason was that she was suspected of harming, or being on the point of harming, the Company's interests, *inter alia* by illegally obtaining information on the Company's patients. When the Employee attempted to come to work the next day, she was ordered to leave the premises and was cut off from Internet access and her email account.

The Employee reacted the next day by resigning with immediate effect, i.e. 7 February, for 'good cause'. She alleged that, for reasons related to "morality and fairness", she could not continue her employment relationship with the Company. She substantiated the existence of this 'good cause' with the following: (a) she had been unlawfully and rudely suspended, (b) she had been asked to sign an illegal shareholder resolution and (c) the Company and its majority shareholder had submitted false information to the Commercial Register.

The Labour Law provides that an employee has the right to resign with immediate effect on grounds of morality and fairness, in which case (i) the employment contract ends immediately and (ii) the employee is entitled to compensation ranging between one and four months' salary, depending on length of service with the particular employer. In this case that compensation equalled two months of salary, being € 34,914.

The Company brought legal proceedings, claiming invalidity of the Employee's immediate resignation. The Employee counter-claimed for payment of € 34,914. The Company based its claim on the following arguments. First, the Latvian Commercial Law has special rules relating to the termination of the legal relationship between a company and its management board members. The rules of the Labour Law that govern termination of employment contracts do not apply to management board members. Therefore, the Employee's dismissal in her capacity as a management board member on 6 February was valid and therefore her immediate resignation one day later could only have related to her capacity as an employee, i.e. a gynaecologist. Secondly, inasmuch as the Employee's immediate resignation was based on reasons relating to her capacity as a member of the management board (illegal shareholder resolution, false information to Commercial Register), those reasons cannot constitute immoral or unfair behaviour by the Company in its capacity as employer. Finally, the Employee should have challenged her suspension rather that using it as a pretext for resigning for 'good cause'.

The court of first instance rejected the Company's claim and partially awarded the Employee's counter-claim. It reasoned as follows. In the event an employee resigns for good cause, it falls on the employer to demonstrate that the employee's rights have been respected and that the facts on which the employee bases his or her 'good cause' are untrue. In this case, the Company had failed to produce evidence that the Employee had acted illegally. Therefore, her suspension was unlawful. There was no evidence that the Employee would have harmed the Company's interests had she been allowed to continue working until 1 March 2013. Ordering her to leave the Company's premises, cutting her off from Internet and email and accusing her of illegally collecting patient information were actions that harmed the Employee's reputation as a gynaecologist.

The Company appealed without success. It brought 'cassation' proceedings before the Supreme Court.

Judgment
The Supreme Court started by pointing out that the Employee had never challenged the legality of the Company's order by which she was suspended from her work duties. Consequently, that order was still in force and binding also on the court. Further, the Supreme Court indicated that the Labour Law provides for a special procedure allowing an employee to challenge an illegal order regarding suspension from work. Thus, the fact that the Company had suspended the Employee could not be used by her as a valid justification to immediately terminate her employment contract on the basis of conditions related to considerations of morality and fairness. In addition, the Court of Appeal, when hearing the case, had not paid attention to the fact that it was the Employee's failure to comply with the suspension order that had caused the order to leave the Company's premises, the subsequent refusal to let her in and her observation by security guards.

As to the other grounds indicated in the Employee's termination notice, i.e. that she had been requested to sign an illegal shareholders' decision on her revocation from the management board and that the Company and its majority shareholder had submitted falsified information to the Latvian Commercial Register, the Supreme Court indicated that these facts were not relevant in this case because they related to the Employee's capacity as a member of the management board and revocation of a person from the management board of a company is not something that is governed by the Labour Law.

Finally, the Supreme Court concluded that if an employee resigns for 'good cause', it is the employee him/herself who must prove the existence of that good cause, unless the reasons for the termination are related to discrimination by the employer.

On the basis of this line of argument, the Supreme Court cancelled the judgment of the Court of Appeal and sent it back to that Court for review.

Commentary
The Supreme Court delivered its judgment on 20 January 2015. Subsequently, the Court of Appeal heard the case for the second time. In a judgment of 29 April 2015, it satisfied the Company's claim and invalidated the Employee's termination notice. It is now the Employee who has brought cassation proceedings before the Supreme Court. Those proceedings are currently pending.

The Supreme Court's judgment is particularly important from three aspects. Firstly, it clearly indicates that where an employee acts in two capacities based on one employment contract (i.e. as the management board member and as an 'ordinary employee'), the role the employee playing in each case must be established to enable the correct choice of law (i.e. the Commercial Law or the Labour Law) that applies to the particular employment relationship. According to the Commercial Law, members of the management board of limited liability companies can be revoked from the board with immediate effect and, unless there are other individual contractual arrangements, the law does not oblige the company to pay to such management board members any severance or similar payments or to provide any other social guarantees.

Secondly, the judgment sends a message to employees that, if they are considering terminating their employment with immediate effect for 'good cause' with a view to collecting severance pay, they will be obliged to prove the existence of good cause. Until now the lower courts (as in this case) have usually considered that the employer must prove the employee did not have a valid reason for employment termination with immediate effect. Further, employees often were allowed to refer to reasons and considerations that they had not mentioned in their notice of termination. Thus, the employer could not be sure what new arguments it might have to rebut later on.

Thirdly, the Supreme Court noted that an employee who has been suspended from work cannot use that fact as a valid reason for resigning with immediate effect for 'good cause'. If the employee considers that his or her suspension is unlawful, then the Labour Law allows him or her to challenge the suspension in court and demand compensation for the full range of possible losses related to an unlawful suspension. It can be inferred that in cases where an employer exercises its legal right and issues an order or notice, the employee should challenge this - rather than relying on the actions of the employer as a reason to terminate the contract for 'good cause'.

Subject: status of management board member
Parties: Employee – v – Limited liability company (medical clinic)
Court: Latvijas Republikas Augstākās tiesas Civillietu departaments (Supreme Court of the Republic of Latvia, civil section)
Date: 20 January 2015
Case number: Civil Matter No. C17078813, SKC-1793/2015
Hard Copy publication: Not available
Internet publication: http://at.gov.lv/files/uploads/files/archive/department1/2015/SKC-1793-2015.doc

*Andis Burkevics is a senior associate with the Latvian office of law firm SORAINEN, www.sorainen.com

2015/35

Court orders reinstatement of employee dismissed in 2009, with six years of back pay (IR)

CONTIBUTOR ORLA O'LEARY*

Summary
In Ireland, the normal remedy for unfair dismissal is financial compensation. This is a rare High Court case where the remedy was reinstatement.

Facts
Mr Reilly was a sales manager with the Bank of Ireland ('BOI') with eight years' service and an exemplary work record. In 2009, it came to BOI's attention that inappropriate emails, described as *"pornographic, obscene or offensive"* were being circulated internally and externally by its employees, including Mr Reilly. Mr Reilly was placed on paid suspension pending an investigation and subsequently dismissed for gross misconduct for breach of BOI's email policy.

Mr Reilly initially brought proceedings before the Employment Appeals Tribunal for unfair dismissal under the Unfair Dismissals Acts, 1977-2014 (the 'UD Acts'). The Tribunal found that Mr Reilly was unfairly dismissed and directed that he be reinstated to his old job. BOI appealed the decision to the Circuit Court where it found the dismissal to be unfair but awarded Mr Reilly compensation in the amount of one year's salary. The Circuit Court overturned the EAT's judgment, awarding Mr Reilly compensation instead of reinstatement. Mr Reilly appealed to the High Court.

Judgment
The High Court strongly criticised what it characterised as an attempt by BOI to *"make an example"* out of Mr Reilly. Mr Reilly gave evidence that the practice of circulating such emails was *"widespread"*, that it was simply *"banter"* between colleagues and that senior employees (one of which was subsequently promoted within BOI) were also involved in circulating them.

BOI had been aware that there was an existing problem with employees circulating inappropriate emails but, prior to Mr Reilly's dismissal no employees had been disciplined for such conduct. The High Court noted that if a zero tolerance policy was going to be adopted by BOI, it should

have notified its employees by way of circular notices, team briefings etc. of the policy shift. The High Court overturned the Circuit Court's judgment and ordered BOI to reinstate Mr Reilly to the position he held at the time of his dismissal and to pay him salary for the intervening period.

Commentary

A significant element of the High Court's decision focused on what was held to be the unjustified suspension of Mr Reilly. BOI investigated five employees in relation to the inappropriate emails, but only suspended three of these employees, including Mr Reilly. Mr Reilly was informed verbally that he was being put on paid suspension as *"an issue had arisen in relation to emails"*, but he received no further information at the time of his suspension.

Mr Justice Noonan noted that suspension is an extremely serious measure which can cause irreparable damage to an employee's reputation, and stated that a holding suspension should only be imposed after *"full consideration of the necessity for it pending a full investigation"* of matters. Helpfully, he identified the following four instances where suspension will normally be justified, if it is necessary:

1. To prevent repetition of the conduct complained of;
2. To prevent interference with evidence;
3. To protect individuals at risk from such conduct; or
4. To protect the employer's business and reputation.

On the evidence before him, Mr Justice Noonan did not believe that Mr Reilly's suspension was necessary as BOI had preserved the evidence in relation to the emails, and it was extremely unlikely that Mr Reilly would continue to circulate such emails during the investigation.

Under the Unfair Dismissals Acts, an order may be made in favour of an employee for compensation, re-engagement or reinstatement. In the vast majority of cases where an employee's claim is successful, an award of compensation is made. Traditionally, the Courts have been reluctant to make an award of reinstatement or re-engagement due to the view that following a dismissal, even if the dismissal has been deemed unfair, the relationship between the parties has been damaged to such an extent that returning to the workplace is not a viable option for either the employee or the employer.

Significantly however in this case, the High Court ordered that Mr Reilly be reinstated to the position in BOI that he held at the time of his dismissal in 2009.

As a consequence, BOI will be obliged to put Mr Reilly back in the position he held prior to his dismissal, on the same terms and conditions, without a break in his continuity of service. Mr Reilly will be entitled to back pay from the date of his dismissal in 2009 and all other benefits must be brought up to date.

This is an exceptional remedy and one which is rarely ordered in Ireland. As such the Court went to great length to explain why reinstatement was awarded in this case. In making the award of reinstatement, the High Court in this case was highly critical of the manner in which BOI handled the disciplinary proceedings. The Court described BOI's conduct as *"disproportionate and unreasonable"* and paid particular attention to the way in which BOI *"predetermined and manipulated the entire process"*. Due to the nature of BOI's conduct in this case and the degree to which the dismissal had affected Mr Reilly's reputation and standing, the court was of the view that *"an award of compensation would fall far short of providing adequate redress in this case"*.

Further, the High Court was careful to make clear that the mere fact that an employee may have contributed to his or her own dismissal will not preclude the court from considering whether the remedies of reinstatement or re-engagement are appropriate.

Only time will tell if the Irish Courts and Tribunals will become more at ease with awarding exceptional remedies such as reinstatement or re-engagement. However, what can be said is that this case will act as a strong authoritative basis for employers when implementing disciplinary processes and indeed for employees seeking the appropriate remedy.

Comments from other jurisdictions

The Netherlands (Peter Vas Nunes): The author of this case report makes the following observation: *"Traditionally, the Courts have been reluctant to make an award of reinstatement or re-engagement due to the view that following a dismissal, even if the dismissal has been deemed to have been unfair, the relationship between the parties has been damaged to such an extent that returning to the workplace is not a viable option for either the employee or the employer"*. This view seems obvious, yet the Dutch legislator has never accepted it wholeheartedly. In fact, Parliament recently adopted a law that seems to negate this view.

Since 1940 (not coincidentally, during wartime it has been unlawful and more or less impossible to dismiss an employee (other than for serious cause and barring some exceptions) in the absence of either a governmental permit or a court order. Until 1 July 2015, if a working relationship had broken down, most courts accepted that there was no point in continuing the employment relationship. Applications to terminate the relationship were routinely granted, almost always with an order for the employer to pay the employee severance compensation (the amount of which depended, *inter alia*, on the extent to which each party was to blame for the breakdown of the relationship).

A new law came into effect on 1 July 2015. Since that date, the courts may only terminate an employment relationship if a number of requirements have been satisfied. One is that "reassignment of the employee to another position within a reasonable period, where appropriate with the aid of training, is not possible or cannot reasonably be required of the employer". Another requirement is that one of the situations listed exhaustively in Article 7:669 (3) c to h of the Civil Code exists. In a situation such as that of Mr Reilly, the relevant situations are:

d. "where the employee is unfit for the performance of his contractual duties for reasons other than sickness or medical disability, provided the employer has informed him of this fact in good time and has given him sufficient opportunity to improve his performance and the underperformance was not caused by the employer's failure to provide adequate training or adequate working conditions".

e. "where the employee behaves reprehensibly to such a degree that the employer cannot reasonably be expected to continue the employment relationship".

g. "where the working relationship has broken down to such an extent that the employer cannot reasonably be expected to continue the employment contract".

It remains to be seen how broadly the courts will interpret these provisions. Based on the Parliamentary debate on the Bill that eventually became law, during which the government stressed that the intention of the new rules is for the courts to interpret the provisions narrowly, it is widely anticipated that it will be harder than it was before 1 July 2015 for employers to obtain termination of their relationship with employees on the basis that the relationship has broken down. This will in some cases lead to a continuation of broken down relationships. More often, however, it will simply mean that the employee in such a situation has a stronger bargaining position in respect of the amount of severance compensation he is to be paid in consideration of 'voluntary' separation.

Subject: unfair dismissal
Parties: James Reilly - v - Bank of Ireland
Court: High Court
Date: 17 April 2015
Casenumber: [2015] IEHC 241
Publication: www.courts.ie/judgments→judgments by year and by court

*Orla O'Leary is a solicitor with Mason Hayes & Curran in Dublin, www.mhc.ie

2015/36

Is de facto prohibition of collective dismissal compatible with EU law? (GR)

CONTRIBUTOR EFFIE MITSOPOULOU*

Summary
The Greek Council of State has asked the ECJ to determine whether Greek law prohibiting collective dismissals in the absence of governmental authorisation is compatible with Directive 98/59 and the TFEU.

Facts
The applicant in this case is Heracles General Cement Company, a subsidiary of the French Lafarge Group. Since the start of the financial crisis in 2008, construction activity in the Attica region of Greece has declined by up to 80%, with the result that the demand for cement has gone down dramatically. The situation became so bad that in 2011, the Company's plant in Halkida went almost entirely out of production, its remaining work having been taken over by the Company's plants in Volos and Milaki. In 2012, the Company reduced its non-staffing costs, but this measure yielded insufficient financial relief, so in 2013, management decided to close down the Halkida plant and make the 236 employees redundant. It invited the unions for a consultation meeting to discuss the proposed measures, as required by Greek Law 1387/1983.

Law 1387/1983 transposes (the predecessor of) Directive 98/59. Article 2 of this directive provides as follows:

"1. Where an employer is contemplating collective redundancies, he shall begin consultations with the workers' representatives in good time with a view to reaching an agreement.
2. These consultations shall, at least, cover ways and means of avoiding collective redundancies or reducing the number of workers affected, and of mitigating the consequences [...]
3. To enable workers' representatives to make constructive proposals, the employers shall in good time during the course of the consultations:
a. supply them with all relevant information [...]"

Article 3 (1) of the directive states:

"Employers shall notify the competent public authority in writing of any projected collective redundancies [...]"

In Greece, the competent public authority referenced in the directive is the Ministry of Labour.

Law 1387/1983 goes beyond merely transposing Directive 98/59. It also prohibits employers from implementing a collective redundancy in the absence of authorisation by the Ministry of Labour. Requests for authorisation are judged according to the following criteria: (a) the labour market conditions, (b) the employer's financial situation and (c) the interests of the national economy.

As already mentioned, the Company invited the unions for a meeting. The plan was to provide the unions with written details of the number of redundancies, the timing of those redundancies and all the other information required by law. However, the unions did not show up. They were invited a second time but again they did not appear.

The Company then filed an application for authorisation with the Ministry of Labour. In a decision dated 26 April 2014, the Ministry turned down the application. The reason it gave was that the Company's arguments for wanting to close down the plant and make the workforce redundant were vague and insufficiently substantiated.

The Company filed a petition with the Council of State asking it to annul the ministerial decision and to grant the authorisation. The Company argued that the refusal to authorise the collective redundancy was contrary to Articles 49 and 63 TFEU (regarding, respectively, freedom of establishment and freedom to move capital between states), in combination with Article 16 of the Charter of Fundamental Rights of the EU, which recognises: *"the freedom to conduct a business in accordance with Community law and national laws"*.

Judgment
The Council of State, taking into consideration ECJ case law, had serious second thoughts about whether the Greek prohibition on collective redundancies in the absence of governmental authorisation is compatible with EU law or whether, given the economic crisis and high level of employment, it constitutes an acceptable national measure in favour of employees, justifying a limitation on the right to establishment, the right to free movement of capital and the right to conduct business freely. The Council referred the following questions to the ECJ:

1. Are the provisions of Greek legislation such as those of Article 5(3) of Law 1387/1983, setting as a prerequisite for collective redundancies the Ministry of Labour's authorisation, compatible with the provisions of Directive 98/59 or Article 49 and 63 TFEU?
2. If not, are those national provisions compatible with said

provisions of EU law, given the existence of serious reasons such as the severe economic crisis and the exceptionally high rate of unemployment?

Commentary
The Ministry of Labour has almost never granted authorisation for a collective redundancy. The effect of this is that in practice, collective redundancy is not possible in Greece. Employers faced with the need to reduce their workforce can only do so gradually, by dismissing staff on a non-collective basis (essentially, by dismissing up to six employees per month in most small companies or up to 5% of the workforce per month in companies with over 150 employees) or by declaring insolvency.

Needless to say, this issue may soon appear to be moot, given the rapid developments resulting from the "almost Grexit". The amendments to labour law on collective dismissals have not been voted on yet. This is a hot potato issue.

Comments from other jurisdictions
The Netherlands (Peter Vas Nunes): I have difficulty seeing what would make the *de facto* impossibility of achieving a collective redundancy incompatible with freedom of establishment (Article 49 TFEU) or freedom to move capital from one Member State to another (Article 63 TFEU). The freedom to conduct a business (Article 16 Charter) came to the notice of Dutch employment lawyers when the ECJ applied it, rather surprisingly, in its judgment of 18 July 2013 in the A*lemo-Heron - v -Parkwood* case (C-426/11). The ECJ held that "Article 3 of Directive 2001/23, read in conjunction with Article 8 of that directive, cannot be interpreted as entitling the Member States to take measures which, while being more favourable to employees, are liable to adversely affect the very essence of the transferee's freedom to conduct a business".

It will be interesting to see whether the ECJ applies Article 16 of the Charter in this Greek case and, if so, how. The most far-reaching outcome, which I find difficult to imagine and which could potentially impact Dutch dismissal law, would be that the Greek requirement of an authorisation as such is declared incompatible with EU law. A less far-reaching outcome could perhaps be that that a policy of almost never granting authorisation is incompatible with EU law.

Subject: collective redundancies
Parties: Heracles General Cement Company - v - Ministry of Labour
Court: *Symvoulio Epikratias* (Council of State)
Date: 25 June 2015
Case number: 1254/2015
Publication: www.dsanet.gr and https://lawdb.intrasoftnet.com (both not publicly accessible)

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

2015/37

Employer may not treat involuntary garden leave as paid leave unless the employee can be certain he will be paid during the leave before it begins (GE)

CONTRIBUTOR PAUL SCHREINER *

Summary
If an employee is put on garden leave, his or her entitlement to annual leave can only be fulfilled by the employer by means, either of payment before the leave begins, or an unreserved promise of payment for all remaining leave.

Facts
The plaintiff had been employed by the defendant since 1 October 1987. By a letter dated 19 May 2011, the defendant issued extraordinary notice of termination with immediate effect. The reason for this summary dismissal is not known; presumably the employee had behaved in a manner that his employer considered to constitute gross misconduct. Perhaps worrying that the employee might successfully challenge the dismissal as not having been for a sufficiently compelling reason, the employer also wrote that if the summary dismissal was unlawful, ordinary notice of termination was given under the statutory notice period, which meant that the contract of employment would end on 31 December 2011 in that event. The letter added that, in that event, the employee was released from performing further work for the company with immediate effect. In other words, he was put on (involuntary) "garden leave". On the date of the dismissal, the employee had a remaining vacation entitlement of 15.5 days. In the letter, the employer took the position that those 15.5 days would be treated as taken within the notice period, so that there would be no payment in lieu (the "deduction clause").

The employee brought legal proceedings. He claimed payment of the 15.5 days of paid leave that he had accrued but not taken. On 17 June 2011, in the course of the proceedings, the parties settled the dispute. The settlement agreement provided for: (i) termination of the employment relationship with effect from 30 June 2011; (ii) continuation of the garden leave with full remuneration until that date; (iii) payment of salary for the period 19 May to 30 June 2011 and (iv) full and final settlement of all mutual claims. The settlement did not provide a clause expressly dealing with the employee's remaining vacation entitlement.

Subsequently, the parties argued about whether the release of the plaintiff from his duties was effective or not and, in connection with this, whether the plaintiff still had a claim for payment of unused paid leave, as provided in section 7 of the German Federal Vacation Act (Bundesurlaubsgesetz, the 'BUrlG').
For a good understanding of this case it should be noted that traditional German doctrine allows an employer to place an employee on paid garden leave and determine that the employee is deemed to use up his accrued entitlement to paid leave during the garden leave.

Lower court rulings

The *Arbeitsgericht* held that the garden leave (which eventually lasted from 19 May to 30 June 2011) had enabled the plaintiff to take his 15.5 days of paid leave and that this, combined with the deduction clause in the termination letter meant that he had no claim for payment in lieu of paid leave.
The plaintiff appealed to the *Landesarbeitsgericht* ('LAG') of Hamm. The LAG, overturning the *Arbeitsgericht's* judgment, partly amended that

judgment and ordered the defendant to pay the plaintiff compensation for the leave he had been unable to take. It held that the compensation claims of the plaintiff had not been fulfilled by means of the release combined with the deduction clause. Relying on the case law of the European Court of Justice on Article 7 of the Working Time Directive (2003/88/EC), the LAG reasoned that entitlement to annual leave and entitlement to payment during leave are two different aspects of one claim that has a unitary character. The LAG went on to reference Article 11 (2) BUrlG. It provides that the employee's salary covering the leave period must be paid before the leave begins, i.e. in advance. Clearly, unilaterally placing an employee on garden leave without pay is not compatible with this system in a situation, such as in this case, where the employer alleges that the employment has ceased and where the employee would therefore need to await a court's verdict on his employment status before being paid. Further, the LAG found that the wording of the settlement agreement did not include a grant of leave by means of paid garden leave. The defendant then appealed to the *Bundesarbeitsgericht* (BAG).

Judgment

The BAG confirmed the decision of the LAG insofar as it held that the plaintiff's entitlement to vacation was not completely fulfilled by means of the part of the letter of dismissal regarding release from work in the alternative (i.e. in the event the dismissal needed to be treated as an ordinary dismissal with notice, effective as of 31 December 2011).

Applying section 1 BUrlG and Article 7 of the Working Time Directive, the BAG stated that to fulfil an employee's entitlement to paid vacation, the employee must be put in a situation during his vacation that is comparable to his work time. The employer is, in other words, obliged to pay the employee his usual remuneration during the employee's leave. The Court stated that a release from the duty to perform further work by the employer can only fulfil the employee's entitlement to vacation if the employee knows, before his leave begins, that he will be paid his full salary during the entire leave period. In the present case, the BAG held that the employee could not be sure that he would receive his full remuneration at the time he was dismissed, as it was not clear at that time whether the employment relationship was terminated by the extraordinary or the ordinary termination process. In regard to the ordinary notice of termination, the employee did not know until the settlement was agreed whether he would be paid for the time he was on leave. Moreover, on the date he was dismissed he could not know how many days of paid leave he would be entitled to, given that if his employment continued beyond 19 May 2011, he would continue to accrue paid leave, in which case his entitlement would be more than 15.5 days.

The BAG concluded from the above that an employer can only grant leave by means of a release of duties set out in a termination letter (combined with an deduction clause), if he pays the employee for his leave before the vacation starts or, alternatively, if he promises unreservedly to pay.

Nevertheless, in the final outcome, the BAG overruled the decision of the LAG and held that by the time of the termination of the employment relationship, the plaintiff's claim for paid vacation had already been fulfilled, as the parties had agreed by implication on a release of the plaintiff with deduction of leave entitlement in their court settlement. The BAG gathered from the settlement's clear reference to the termination letter that the parties agreed on compensation for leave by means of paid garden leave from the date of notice until the termination date of 30 June 2011.

Commentary

Until its present decision, the BAG had worked on the assumption that a precautionary (that is to say, conditional) grant of vacation by an employer (the condition being that the termination was invalid) was lawful, as the employer had a legitimate interest in avoiding the accumulation of claims for holiday pay, even if it was unclear whether the employer had to pay leave pending final judgment about termination.

In the decision at hand, the BAG modified this case law, holding that the purpose of annual leave is to give the employee the opportunity to recover from his work and this can only be achieved if the employee knows during his leave that he is being paid for it. Any later award of entitlement to paid leave through a court decision is not sufficient.

From a practical point of view, the judgment will increase the requirements on employers when they grant leave based on summary dismissal in combination with a deduction clause – a quite well-established procedure in German labour law. According to the BAG, an effective grant of leave that fulfills the employee's entitlement to annual leave requires – besides an irrevocable release from the duty to perform further work – payment for leave at the beginning of the release period - or at the very least, an unreserved promise of payment by the employer.

Comments from other jurisdictions

The Netherlands (Peter Vas Nunes): The outcome of this case would have been different under Dutch law, which provides that (barring some exceptions or an agreement to the contrary) it is the employee, not the employer, that determines when his or her leave begins and ends. A Dutch employer cannot unilaterally determine that any period (for example the notice period in the event of termination) constitutes vacation (i.e. paid leave). On the other hand, the final settlement clause would probably have been held to block the employee's claim.

Subject: paid leave
Parties: unknown
Court: *Bundesarbeitsgericht* (Federal Labour Court)
Date: 10 February 2015
Case number: 9 AZR 455/13
Internet publication: www.bundesarbeitsgericht.de→Entscheidungen→type case number in "Aktenzeichen"

*Paul Schreiner is a partner with Luther Rechtsanwaltgesellschaft mbH in Essen, www. Luther-lawfirm.com

2015/38

Ireland - The Workplace Relations Act 2015

CONTRIBUTOR ORLA O'LEARY*

A new structure for dealing with employment claims

The Workplace Relations Act 2015 (the 'Act') was signed into law on 20 May 2015 and is due to commence on 1 October 2015. The Act introduces a long-awaited root-and-branch reform for resolving workplace disputes and enforcing employment law in Ireland.

Employees and employers will no longer have to navigate through a maze of various tribunals, courts, appeals procedures, time limits and enforcement procedures. The current system will be simplified by providing one single point of entry for employment disputes and one sole route of appeal.

The New Two Tier Structure

Under the Act, there will be a simplified, two-tier structure consisting of just one forum for hearing initial complaints, the Workplace Relations Commission ('WRC') and one single appeal body, a new Labour Court.

Workplace Relations Commission

The WRC will be the umbrella body for dealing with all claims lodged from 1 October 2015 onwards. It will incorporate the functions of the Employment Appeals Tribunal ('EAT'), the Rights Commissioner, the Equality Tribunal and National Employment Rights Authority ('NERA'). Regardless of the nature of the claim one single Adjudication Officer will hear the claim in private in the WRC.

Labour Court

The current appeals system is complex. For example, a decision of the EAT under the Unfair Dismissals Acts 1977-2014 is appealed to the Circuit Court, whereas a decision of the Equality Tribunal under the Employment Equality Acts 1998-2011 is appealed to the Labour Court. Going forward, a re-jigged and expanded Labour Court will deal with all appeals from the WRC, with those appeals being heard afresh and in public. Labour Court decisions can be appealed to the High Court, but only on a point of law.

Harmonised Time Limits

The limitation periods in which to bring a claim have also been harmonised. A claimant will have six months to lodge any claim to the WRC, which can be extended by a further six months where there is 'reasonable cause' for the delay. Appeals to the Labour Court must be made within 42 days of the decision unless there are exceptional circumstances for the delay.

New Compliance Matters

WRC inspectors will be empowered to penalise employers for breaches of employment law. Inspectors can issue Fixed Payment Notices (on-the-spot fines) of up to € 2,000 to employers for, by way of example, failing to furnish wage statements to employees. Separately Compliance Notices can also be issued to compel employers to rectify breaches of certain employment laws relating to, for instance, a failure to provide employees with a contract of employment and/or certain breaches of working time rights.

Conclusion

The Act envisages much-needed and relatively radical reform to an out-dated system for resolving workplace disputes in Ireland. The idea behind the new structure is to make the system easier to understand and easier to access. On a practical level, employers do not need to be concerned about changing their day-to-day management of employees and running of their business, as the law will stay the same.

Comments from other jurisdictions

Belgium (Emilie Morelli):

Employment disputes

In Belgium, disputes between an employee (not a statutory agent) and his employer are treated in first instance by the Labour Tribunal. Decisions of the Labour Tribunal can be appealed to the Labour Court. Since September 2014, the Labour Tribunal and the Labour Court are also competent for disputes related to supplementary pensions. Labour Court decisions can be appealed to the Court of Cassation, but only on a point of law.

As a general rule, the employee has one year after the end of his employment contract to file his claim to the Labour Tribunal. For disputes related to supplementary pensions, the employee has five years as from the moment he has "sufficient knowledge to introduce his claim". Appeals to the Labour Court must be filed in the month following the notification of the Labour Tribunal's decision.

Social law enforcement

The Social Inspectorate verifies whether employers respect social law (e.g. working hours, work on Sunday or public holidays and minimum wage scales). The Social Inspectorate can impose administrative penalties. An employer that breaches social law can also be sued before the Criminal Tribunal/Court which can impose criminal measures.

*Orla O'Leary is a solicitor with Mason Hayes & Curran in Dublin, www.mhc.ie

ECJ COURT WATCH

SUMMARIES BY PETER VAS NUNES

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Regojo Dans (C-177/14): Spanish 'personal eventual' are entitled to the same remuneration as comparable permanent workers. [note: judgment of 9 July 2015 is considered separately]

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Pending cases

Case number	Name	Country	Subject	Reference/ Opinionsumma-rized in EELC	Opinion
C-20/13	Unland	GE	Age discrimination	2014-4	-
C-12/14	Comm. v Malta	MA	Social security	2014-4	-
C-25/14	UNIS	FR	Freedom of services	2014-4	19.3.15
C-26/14	Beaudout	FR	Freedom of services	-	19.3.15
C-67/14	Alimanovic	GE	Social security	2014-4	26.3.15
C-72/14	X	NL	Social security	2014-4	13.5.15
C-160/14	Ferreira da Silva	PT	Transfer of undert.	2014-4	11.6.15
C-180/14	Comm. v Greece	GR	Working time	2014-4	-
C-219/14	Greenfield	UK	Part-time employment	2014-4	-
C-258/14	Florescu	RO	Pensions	2014-4	-
C-266/14	Tyco	SP	Working time	2014-4	11.6.15
C-292/14	Stroumpoulis	GR	Insolvency protection	2014-4	-
C-299/14	Garcia-Nieto	GE	Social security	2014-4	4.6.15
C-351/14	Rodriquez Sanchez	SP	Parental leave	2014-4	-
C-407/14	Arjona Camacho	SP	Sex discrimination	2014-4	-
C-422/14	Pujante Rivera	SP	Parental leave	2014-4	-
C-432/14	Van der Vlist	FR	Age discrimination	2014-4	-
C-441/14	Ajos	DK	Age discrimination	2014-4	-
C-453/14	Knauer	AT	Social security	2014-4	-
C-460/14	Massar	NL	Legal insurance	2014-4	-
C-496/14	Vararu	RO	Discrimination other	2015-1	-
C-509/14	Aira Pascual	SP	Transfer of undert.	2015-1	-
C-515/14	Comm. v Cyprus	CY	Free movement	2015-1	-
C-538/14	Comm. v Finland	FI	Race discrimination	2015-1	-
C-596/14	De Diego Porras	SP	Temporary employm.	2015-1	-
C-5/15	Büyüktipi	NL	Legal insurance	2015-3	-
C-16/15	Pérez Lopéz	SP	Fixed-term employm.	2015-3	-
C-98/15	Espadas Recio	SP	Part-time employment	2015-3	-
C-118/15	Martínez Sánchez	SP	Transfer of undert.	2015-3	-
C-122/15	C	FI	Age discrimination	2015-3	-
C-137/15	Plaza Bravo	SP	Sex discrimination	2015-3	-
C-157/15	Achbita*	BE	Religious discrimin.	2015-3	-
C-178/15	Sobczyszyn	PL	Paid leave	2015-3	-
C-184/15	Martínez Andrés	SP	Fixed-term employm.	2015-3	-
C-197/15	Bougnaoui	FR	Religious discrimin.	2015-3	-
C-197/15	Castrejana López	SP	Fixed-term employm.	2015-3	-

*** Reported in EELC 2015-3**

RULINGS

ECJ 14 April 2015, case C-527/13 *(Lourdes Cachaldora Fernández – v - Instituto Nacional de la Seguridad Social (INSS) and Tesoreria General de la Seguridad Social (TGSS)* **("Cachaldora Fernández")**, Spanish case (SEX DISCRIMINATION – SOCIAL SECURITY)

Facts

Ms Cachaldora Fernández made contributions to Spain's social security system during the following periods and on the following basis:

- 15 September 1971 – 31 August 1998: full-time
- 1 September 1998 – 22 January 2002: part-time
- 23 January 2002 – 30 November 2005: no employment ("contribution gap")
- 1 December 2005 – 25 April 2010: full-time

In February 2010, Ms Cachaldora Fernández became disabled as a result of a non-occupational accident or illness. This made her eligible for an invalidity pension under the Spanish General law on social security. She was awarded a pension of € 347 per month. This was 55% of the applicable rate. This is because (i) invalidity pension

is based on the contributions that were made during the eight year period prior to the invalidity, in this case March 2002 to February 2010 and (ii) in the event there is a period during which there is no obligation to contribute, the part-time percentage that was in force on the date preceding that period is applied. In this case, that date was 22 January 2002. On that date, Ms Cachaldora Fernández was working part-time. Thus, her pension for the period from March 2002 to November 2005 was calculated as if she had worked part-time ever since 1971, even though in fact she had worked and contributed on a full-time basis for most of her working life. Had the contribution gap been preceded by a period of full-time employment, Ms Cachaldora Fernández would have been awarded an invalidity benefit of € 763 per month, over twice what she actually received.

National proceedings

Ms Cachaldora Fernández brought proceedings against the authority responsible for administering the invalidity pension systems, the INSS. The court dismissed her claim. She appealed. The court of appeal referred two questions to the ECJ. The first was whether the INSS's decision constituted indirect gender discrimination within the meaning of Directive 79/7 on equal treatment for men and women in matters of social security. The second question related to the Framework Agreement on part-time work annexed to Directive 97/81.

ECJ's findings

1. The national provision at issue is not applicable to all part-time workers, but only to workers who have had a gap in their contributions during the reference period of eight years preceding the date of the event giving rise to the invalidity, when that gap follows a period of part-time work. Accordingly, general statistical data concerning the group of part-time workers, taken as a whole, are not relevant to establish that many more women than men are affected by that provision. Furthermore, even if it appears that a worker such as Ms Cachaldora Fernández is disadvantaged because she worked part time during the period immediately preceding the gap in her contributions, it is possible that some part-time workers may also benefit from the rule of national law at issue in the main proceedings. In all cases where the last contract that preceded professional inactivity is a full-time contract, but where the workers, for the remainder of the calculation period or even throughout their entire working lives, worked only part-time, they will benefit since they will receive a pension that is overvalued in relation to the contributions actually paid. In those circumstances, the statistical data on which the national court has based its assessments cannot lead to the conclusion that the group of workers disadvantaged by the rule of national law at issue in the main proceedings is mainly composed of part-time workers and, in particular, female workers (§ 24-32).
2. In the light of the foregoing, the national provision at issue cannot be regarded as placing predominantly one particular category of workers at a disadvantage, in this case those working part-time and, in particular, women. That provision cannot, therefore, be regarded as being an indirectly discriminatory measure within the meaning of Article 4(1) of Directive 79/7 (§ 33).
3. The pension at issue in the main proceedings is a statutory social security pension. Consequently, that pension cannot be regarded as constituting an employment condition within the meaning of Clause 4(1) of the Framework Agreement and does not, therefore, fall within its scope (§ 38).

Ruling (judgment)

1. Article 4(1) of Council Directive 79/7/EEC [.....] must be interpreted as not precluding a rule of national law which provides that the contribution gap existing within the reference period for calculating a contributory invalidity pension after a period of part-time employment, are taken into account by using the minimum contribution bases applicable at any time, reduced as a result of the reduction coefficient of that employment, whereas, if those gaps follow full-time employment, there is no provision for such a reduction.
2. The Framework Agreement on part-time work [.....] must be interpreted as not applying to legislation of a Member State which provides that the contribution gaps existing within the reference period for calculating a contributory invalidity pension, after a period of part-time employment, are taken into account by using the minimum contribution bases applicable at any time, reduced as a result of the reduction coefficient of that employment, whereas, if those gaps follow full-time employment, there is no provision for such a reduction.

ECJ 30 April 2015, case C 80/14 *(Union of Shop, Distributive and Allied Workers (USDAW) and B. Wilson - v - WW Realisation 1 Ltd in liquidation, Ethel Austin Ltd and Secretary of State for Business, Innovation and Skills)* **("USDAW")**.

Facts

Woolworths and Ethel Austin were companies active in the high street retail sector throughout the UK. They become insolvent, went into administration and dismissed thousands of employees. One of those employees was Ms Wilson. She and her union USDAW sought protective awards' on the basis of the Trade Union and Labour Relations (Consolidation) Act 1992 ('TULCRA'). They alleged that the consultation process provided for in TULCRA had not been followed. That process is based on Directive 98/59 on collective redundancies. The directive defines 'collective redundancies' as "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 State, the number of redundancies is: (i) either , over a period of 30 days : [.....] 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". The directive allows Member States to introduce legislation that is more favourable to workers.

TULCRA transposes the Directive by obligating employers to inform and consult with employee representatives "where an employer is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less". Thus, the UK has elected to apply option (ii) of the Directive. Failure to comply with the information and consultation process entitles the relevant unions and employees to a 'protective award'.

National proceedings

Protective awards were made in favour of those former employees of Woolworths and Ethel Austin who had worked in stores employing 20 or more staff. Approximately 4,500 employees were denied a protective award on the grounds that they had worked in stores with fewer than 20 employees and that each store was to be regarded as a separate 'establishment'. On appeal, the Employment Appeal Tribunal held that a reading of Section 188(1) TULCRA compatible with Directive 98/59 required the deletion of the word 'establishment'. This meant that the

said approximately 4,500 former employees were eligible for payment of protective awards. The Secretary of State appealed to the Court of Appeal. It referred questions to the ECJ.

ECJ's findings

1. In *Rockfon* (C-449/93) and *Athinaiki* (C-270/05), the ECJ interpreted the term 'establishment' as a distinct entity, having a certain degree of permanence and stability, which is assigned to perform one or more given tasks and which has a workforce, technical means and a certain organisational structure, but which need not have any legal, economic, financial, administrative or technological autonomy. Where an 'undertaking' *[in this case, Woolworths or Ethel Austin, Editor]* comprises several entities meeting these criteria *[in this case, several stores, Editor]*, it is the entity to which the redundant workers are assigned to carry out their duties that constitutes the 'establishment' (§ 45-53).
2. The meaning of 'establishment' in subsection (ii) of Article 1 (I)(a) of the Directive is the same as that of 'establishment' in subsection (i) (§ 54-60).
3. USDAW and Ms Wilson interpret Article 1(i)(a)(ii) of the Directive as requiring account to be taken of the total number of redundancies across all the establishments of an undertaking. That would significantly increase the number of workers entitled to protection under the Directive. However, it would be contrary to the objective of ensuring comparable protection for workers' rights in all Member States. Moreover, it would entail different costs for employers in different Member States, depending on the manner in which they have transposed the Directive. It follows that the Directive requires that account be taken of the dismissals in each establishment considered separately (§ 61-68).

Ruling (judgment)

The term 'establishment' in Article 1(1)(a)(ii) of Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies must be interpreted in the same way as the term in Article 1(1)(a)(i) of that Directive.

Article 1(1)(a)(ii) of Directive 98/59 must be interpreted as not precluding national legislation that lays down an obligation to inform and consult workers in the event of the dismissal, within a period of 90 days, of at least 20 workers from a particular establishment of an undertaking, and not where the aggregate number of dismissals across all of the establishment or across some of the establishments of an undertaking over the same period reaches or exceeds the threshold of 20 workers.

ECJ 13 May 2015, case C-182/13 *(Valerie Lyttle and others – v - Bluebird UK Bidco 2 Limited)* **("Lyttle")**, UK case (COLLECTIVE REDUNDANCY)

Facts

The plaintiffs in this case were Ms Lyttle and three others. They were employed in Northern Ireland by a company called Bonmarché. This company operated a total of 394 stores across the UK, selling women's clothing. In Northern Ireland, Bonmarché had 20 stores, each employing fewer than 20 staff. One of the plaintiffs worked in a store in Belfast, one worked in Lurgan, one in Banbridge and one in Omagh. Each store was treated as an 'individual cost centre', whose budget was decided on by the head office in England.

Bonmarché became insolvent and was transferred to Bluebird. It began a restructuring process entailing the closure of many stores, including those in which the plaintiffs worked. The number of stores in Northern Ireland dropped from 20 to 8 and the number of staff employed in Northern Ireland was reduced from 180 to 75. The plaintiffs were among those who were dismissed. The dismissal process was not preceded by any consultation process as referred to in Directive 98/59 on the approximation of the laws of the Member States relating to collective redundancies. This Directive requires an employer who is contemplating collective redundancies to consult with the workers' representatives. In Article 1(i)(a), the Directive defines 'collective redundancies' as meaning dismissals effected by an employer where the number of redundancies, over a certain period, is – according to the choice of each Member State – either (i) at least a certain number of employees in 'establishments' normally employing more than a certain number of workers or (ii) over a period of 90 days, at least 20, whatever the number of workers normally employed in the establishments in question. The UK has opted for system (ii). Accordingly, the consultation obligation applies "where an employer is proposing to dismiss 20 or more employees at one establishment within a period of 90 days or less".

National proceedings

The plaintiffs brought proceedings before the Industrial Tribunal (Northern Ireland). This court referred questions to the ECJ on the meaning of 'establishment' in the Directive. Does this expression have the same meaning in option (i) as in option (ii)? Does the Directive preclude national legislation that requires consultation in the event of the dismissal (within 90 days) of at least 20 workers from a particular establishment or where the aggregate number of dismissals across all or some of the establishments of the undertaking exceeds 20 workers?

ECJ's findings

1. The term 'establishment' is not defined in the Directive and must be interpreted in an autonomous manner (§ 26).
2. In *Rockfon* (C-449/93), the ECJ interpreted 'establishment' as designating the unit to which the redundant workers are assigned to carry out their duties, regardless whether that unit's management has the authority to independently effect collective redundancies. In *Athinaiki* (C-270/05), the ECJ held that an 'establishment', in the context of an undertaking, may consist of a distinct entity, having a certain degree of permanence and stability, which is assigned to perform one or more given tasks and which has a workforce, technical means and a certain organisational structure allowing for the accomplishment of those tasks. By the use of the words 'distinct entity' and 'in the context of undertaking, the ECJ clarified that the terms 'undertaking' and 'establishment' are different and that an establishment normally constitutes a part of an undertaking. That does not, however, preclude the establishment being the same as the undertaking where the undertaking does not have several distinct units (§ 27-31).
3. In *Athinaiki,* the ECJ further held that since Directive 98/59 concerns the socio-economic effects that collective redundancies may have in a given local context and social environment, the entity in question need not have any legal autonomy, nor need it have economic, financial, administrative or technological autonomy, in order to be regarded as an 'establishment'. Consequently, where an 'undertaking' comprises several entities meeting the criteria set out above, it is the entity to which the workers made redundant are assigned to carry out their duties that constitutes the 'establishment' for the purposes of the Directive (§ 32-33)
4. The meaning of the terms 'establishment' or 'establishments'

in Article 1(1)(a)(i) of the Directive is the same as that of the terms 'establishments' or 'establishments' in Article 1(1)(a)(ii). The option in Article 1(1)(a)(ii), with the exception of the difference in the periods over which the redundancies are made, is a substantially equivalent alternative to the option in Article 1(1)(a)(i). There is nothing in the wording of Article 1(1)(a) to suggest that a different meaning is to be given to the terms 'establishment' or 'establishments' in the same subparagraph of that provision (§ 34-38).

5. Interpreting Article 1 (i) (a) (ii) so as to require account to be taken of the total number of redundancies across all the establishments of an undertaking would, admittedly, significantly increase the number of workers eligible for protection under Directive 98/59, which would correspond to one of the objectives of that directive. However, it should be recalled that the objective of that directive is not only to afford greater protection to workers in the event of collective redundancies, but also to ensure comparable protection for workers' rights in the different Member States and to harmonise the costs which such protective rules entail for EU undertakings (§ 42-43).
6. Interpreting 'establishment' so as to require account to be taken of the total number of redundancies across all the establishments of an undertaking would, first, be contrary to the objective of ensuring comparable protection for workers' rights in all Member States and, secondly, entail very different costs for the undertakings that have to satisfy the information and consultation obligations under Articles 2 to 4 of that directive in accordance with the choice of the Member State concerned - which would also go against the EU legislature's objective of rendering comparable the burden of those costs in all Member States. It should be added that that interpretation would bring within the scope of Directive 98/59 not only a group of workers affected by collective redundancy but also, in some circumstances, a single worker of an establishment — possibly of an establishment located in a town separate and distant from the other establishments of the same undertaking — which would be contrary to the ordinary meaning of the term 'collective redundancy'. In addition, the dismissal of that single worker could trigger the information and consultation procedures referred to in the provisions of Directive 98/59, provisions that are not appropriate in such an individual case (§ 44-45).
7. It follows from the foregoing that the definition in Article 1(1)(a)(i) and (a)(ii) of Directive 98/59 requires that account be taken of the dismissals effected in each establishment separately (§ 49).
8. In the present case, on the basis of the information available, it appears that each of the stores at issue in the main proceedings is a distinct entity that is ordinarily permanent, entrusted with performing specified tasks, namely primarily the sale of goods, and which has, to that end, several workers, technical means and an organisational structure in that the store is an individual cost centre managed by a manager. Accordingly, such a store is capable of qualifying as a separate 'establishment': this is, however, a matter for the referring tribunal to establish in the light of the specific circumstances of the dispute in the main proceedings (§ 51-52).

Ruling (judgment)

The term 'establishment' in Article 1(1)(a)(ii) of Council Directive 98/59 [.....] must be interpreted in the same way as the term in Article 1(1)(a)(i) of that Directive. Article 1(1)(a)(ii) of Directive 98/59 must be interpreted as not precluding national legislation that lays down an obligation to inform and consult workers in the event of the dismissal, within a period of 90 days, of at least 20 workers from a particular establishment of an undertaking and not where the aggregate number of dismissals across all of the establishments or across some of the establishments of an undertaking over the same period reaches or exceeds the threshold of 20 workers.

ECJ 13 May 2015, case C-392/13 *(Andrés Rabal Cañas - v - Nexea Gestión Documental SA and Fondo de Garantía Salarial)* **("Rabal Cañas")**, Spanish case (COLLECTIVE REDUNDANCY).

Facts

Mr Rabal Cañas worked for a company called Nexea. It had two establishments: one in Madrid with 164 employees and one in Barcelona with 20 employees including Rabal Cañas. In July 2012, Nexea dismissed 14 employees in Madrid. In August 2012 it dismissed two employees in Barcelona. In September it dismissed one more in Madrid. In October and November it did not renew the temporary contracts of five employees, three in Madrid and two in Barcelona. In December it dismissed 13 in Barcelona including Rabal Cañas.

Rabal Cañas claimed that his dismissal was void on the ground that Nexea had failed to follow the procedure for collective redundancies as provided in Article 51 of the Spanish Workers' Statute. It provides that a consultation process shall be followed where, over a period of 90 days, a termination of employment on economic, technical, organisational or production grounds affects at least (a) 10 workers in undertakings employing fewer than 100 workers *[underlining added, Editor]*. This provision is the Spanish transposition of Directive 98/59. The latter defines collective redundancies as "dismissals effected by an employer for one or more reasons not related to the individual workers concerned, where the number of redundancies is (i) [...] or (ii) over a period of 90 days, at least 20 whatever the number of workers normally employed in the establishment in question" *[underlining added, Editor]*. The court referred four questions to the ECJ.

ECJ's findings

1. Does the Directive preclude national legislation which defines the concept of 'collective redundancies' using the undertaking (in this case Nexea as a whole) as the sole reference unit and not the establishment (in this case, the Barcelona branch only)? The Directive does not define 'establishment'. This term must be interpreted autonomously (§ 40-42).
2. In *Rockfon* (C-449/93), the ECJ interpreted 'establishment' as designating the unit to which the workers are assigned to carry out their duties, regardless whether that unit has a management that can independently effect collective redundancies. In *Athinaiki* (C-270/05), the ECJ clarified this as follows. An establishment may consist of a distinct entity, having a certain permanence and stability, which is assigned to perform one or more given tasks and which has a workforce, technical means and a certain organisational structure. An 'undertaking' may have one or more 'establishments'. Since the Directive concerns the socio-economic effects that collective redundancies may have in a given local context and social environment, the entity in question need not have any legal autonomy, nor need it have economic, financial, administrative or technical autonomy, in order to be regarded as an 'establishment' (§ 43-47).
3. Although the offices in Madrid and Barcelona had a single production manager and joint accounting and budgetary management and although they carried out identical tasks,

the Barcelona office had a manager of its own. Therefore, the establishment in Barcelona was capable of meeting the criteria for being an establishment within the meaning of the Directive (§ 50-51).

4. Replacing 'establishment' by 'undertaking' can be favourable to workers if that element is additional. This is the case where it provides for information and consultation in the event 10 workers are dismissed in establishments normally employing more than 20 and less than 100 workers (§ 51-54).
5. In the present case, the dismissals at issue did not reach the threshold of 10% of Nexea's workforce (under Spanish law) nor the threshold of more than 20 in the Barcelona establishment (under the Directive) (§ 55-56).
6. Article 2 of the Directive provides that it shall not apply to collective redundancies effected under contracts of employment concluded for limited periods of time. This means that non-extension of a fixed-term contract does not count for the purpose of assessing whether the Directive's threshold has been met (§ 59-67).

Ruling (judgment)

1. Article 1(1)(a) of Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies must be interpreted as precluding national legislation that introduces the undertaking and not the establishment as the sole reference unit, where the effect of the application of that criterion is to preclude the information and consultation procedure provided for in Article 2 to 4 of that directive, when the dismissals in question would have been considered 'collective redundancies', under the definition in Article 1(1)(a) of that directive, had the establishment been used as the reference unit.
2. Article 1(1) of Directive 98/59 must be interpreted as meaning that, for the purposes of establishing whether 'collective redundancies', within the meaning of that provision, have been effected, there is no need to take into account individual terminations of contracts of employment concluded for limited periods of time or for specific tasks, when those terminations take place on the date of expiry of the contract or on the date on which that task was completed.
3. Article 1(2)(a) of Directive 98/59 must be interpreted as meaning that, for the purposes of establishing the existence of collective redundancies effected under contracts of employment concluded for limited periods of time or for specific tasks, it is not necessary for the cause of such collective redundancies to derive from the same collective contractual framework for the same duration or the same task.

ECJ 21 May 2015, case C-65/14 *(Charlotte Rosselle –v- INAMI and UNM)* **("Rosselle")**, Belgian case (MATERNITY LEAVE)

Facts

Mrs Rosselle was a teacher in the Flemish Community. She was a public servant. On 1 September 2009 she (i) obtained non-active status in order to teach a language immersion classes in the French Community, "non-active" meaning that she continued to be a public servant but without pay for the time being and (ii) became a salaried employee, teaching in language immersion classes in the French Community. She was already pregnant on 1 September 2009. She went on maternity leave on 11 January 2010. She applied to the sickness insurance fund to which she was affiliated, the UNM, for a maternity allowance. Her application was turned down because she did not satisfy the requirement under Belgian law that a worker must have worked for at least 120 days as a salaried employee in the six months preceding her maternity leave. Belgian law exempts dismissed public servants from this requirement, but not non-active public servants.

National proceedings

Mrs Rosselle appealed against the rejection of her application to the *Tribunal de travail de Nivelles*, which asked the ECJ whether Belgian law infringes Maternity Directive 92/85 and/or Sex Discrimination Directive 2006/54.

ECJ's findings

1. Directive 92/85 requires the Member States to ensure that workers are entitled to a continuous period of maternity leave of at least 14 weeks, during which they must receive an "adequate" allowance. Article 11(4) provides that that allowance may be made conditional upon the worker fulfilling certain eligibility conditions, adding: "These conditions may under no circumstances provide for periods of employment in excess of 12 months immediately prior to the presumed date of confinement" (§29-36).
2. Directive 92/85 is the tenth individual directive pursuant to Framework Directive 89/391 on occupational safety and health. Thus, the provisions of the Framework Directive also apply to Directive 92/85. One of those provisions is that it applies to all sectors of activity, both public and private (§37).
3. In some language versions, the second paragraph of Article 11(4) of Directive 92/85 refers to periods (plural) of previous employment. The other versions do not exclude the possibility that there may be more than one previous period of employment (§38-39).
4. Directive 92/85 does not lay down any condition as to the nature of previous periods of employment (§40).
5. It follows that a Member State may not impose a new six-month minimum contribution requirement prior to eligibility for a maternity allowance merely because the employment status of the worker has changed (§41-42).
6. Moreover, to require a new minimum contribution period upon each change of employment status could undermine the minimum level of protection under Directive 92/85 (§43-46).
7. Given the above, there is no need to address Directive 2006/54 (§50).

Ruling (judgment)

The second subparagraph of Article 11(4) of Council Directive 92/85 must be interpreted as precluding a Member State from refusing to grant a worker a maternity allowance on the ground that, as an established public servant having obtained non-active status for personal reasons in order to work as a salaried employee, she has not completed, in the context of her work as a salaried employee, the minimum contribution period required under national law in order to be eligible to receive that maternity allowance, even if she has worked for over 12 months immediately prior to the presumed date of confinement.

ECJ 18 June 2015, case C-586/13 *(Martin Meat kft – v – Géza Simonfay, Ulrich Salburg)* **("Martin Meat")**, Hungarian case (FREE MOVEMENT-WORK PERMIT)

Facts

In 2007, the Austrian meat packing company Alpenrind concluded a contract with the Hungarian company Martin Meat. The contract required Martin Meat to process 25 sides of beef per week. Martin Meat performed this work in Alpenrind's slaughterhouse in Austria, using its own Hungarian workers. Martin Meat rented the premises and the machinery from Alpenrind, but used its own equipment. Alpenrind's manager gave general instructions to Martin Meat's manager. The latter organised the work of the employees to whom he gave instructions.

Martin Meat took the position that its contractual relationship with Alpenrind was one of supply of services and that it posted its workers to Austria in order to perform those services. The Austrian authorities, on the other hand, took the position that Martin Meat actually hired out workers to Alpenrind, an activity that in 2007 (three years after Hungary's accession to the EU) required a work permit. Accordingly, Alpenrind was fined over € 700,000. Alpenrind claimed this sum from Martin Meat, which in turn claimed it from its lawyers, who had advised it that its contractual relationship with Alpenrind was not one of manpower supply.

National proceedings

The Central District Court in Pest (Hungary) referred two questions to the ECJ. The first question related to the nature of the contract between Alpenrind and Martin Meat: was it a contract for the provision of services (contracting out) or was it the hiring-out of workers (manpower supply)? The second question was whether Austria was entitled to restrict the hiring-out of Hungarian workers on its territory in 2007. Both questions referenced the ECJ's 2011 ruling in *Vicoplus* (C-307/09). In that case, the ECJ provided a definition of hiring out workers within the meaning of Posting Directive 96/71. It also held that Articles 56 and 57 TFEU (freedom to provide cross-border services) do not preclude a Member State from making, during the transitional period following the accession of ten new Member States in 2004, the hiring-out of workers from those Member States subject to the obtaining of a work permit, given that hiring out temporary workers involves the movement of workers, not the freedom to provide services. The ECJ drew a distinction between (i) "a temporary movement of workers who are sent to another Member State to carry out work there as part of a provision of services by their employer" and (ii) a hiring-out of workers where "the movement of workers to another Member State constitutes the very purpose of a transnational provision of services".

ECJ's findings

1. Germany and Austria negotiated a specific derogation from the 2003 Act of Accession which entitled them to restrict the freedom to provide services by companies from the new Member States in certain sensitive sectors for a number of years. That derogation does not restrict Germany and Austria from regulating the influx of Hungarian workers on their territory further than if the derogation had not existed. Consequently, if the service at issue qualified as the hiring-out of workers, as defined in *Vicoplus*, Austria was allowed to require work permits (§20-30).
2. Which are the relevant factors to be taken into consideration in order to determine whether a contractual relationship must be classified as a hiring-out of workers within the meaning of the Posting Directive? (§31-32).
3. There is a hiring-out of workers, within the meaning of Article 1(3)(c) of Directive 96/71 where three conditions are met. First, hiring-out of workers is a service provided for remuneration in respect of which the worker who has been hired out remains in the employ of the undertaking providing the service, no contract of employment being entered into with the user undertaking. Second, it is characterised by the fact that the movement of the worker to the host Member State constitutes the very purpose of the provision of services effected by the undertaking providing the services. Third, in the context of such hiring-out, the employee carries out his tasks under the control and direction of the user undertaking (§ 33).
4. If it flows from the obligations in a contract that the service provider is required properly to perform the services stipulated therein, it is, in principle, less likely that there is a hiring-out of workers than if the service provider is not liable for the consequences of a supply of services inconsistent with the terms of the contract. In the present case, it is for the national court to verify the extent of the respective obligations of the parties in order to identify the party liable for the consequences of improper performance. A relevant circumstance in that regard is that Martin Meat's remuneration varies in accordance, not only with the quantity of meat processed, but also with the quality of that meat (§ 36-37).
5. Furthermore, the fact that Martin Meat was free to determine the number of workers it considered useful to send to Austria indicates that the subject matter of the supply of services at issue is not the movement of workers in the host Member State, but that that movement is ancillary to the performance of the service set out in the contract concerned and that it is therefore a posting of workers, within the meaning of Article 1(3)(a) of Directive 96/71 (§ 38).
6. However, in the case in the main proceedings, neither the fact that the service provider has only one client in the host Member State, nor the fact that that service provider rents the premises in which the services are performed and the machines, provide any useful evidence to determine whether the genuine purpose of the supply of services at issue is the movement of workers in that Member State (§ 39).
7. A distinction must be made between control and direction over the workers themselves and verification by a client that a service contract has been performed properly. It is normal for a client to verify in one way or another that the service delivered is in conformity with the contract. Moreover, in the context of a supply of services, a client may give certain instructions to the service provider's workers on how the service contract should be performed without entailing direction and control over the service provider's workers within the meaning of the third condition laid down in the judgment in *Vicoplus*, provided that the service provider gives them the precise and individual instructions it deems necessary for the performance of the services (§ 40).

Ruling (judgment)

1. Annex C to the Act concerning the conditions of accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded, must be interpreted as meaning that the Republic of Austria is entitled to restrict the hiring-out of workers on its territory, even though that provision does not concern a sensitive sector.
2. In order to determine whether that contractual relationship must be classified as a hiring-out of workers, within the meaning of Article 1(3)(c) of Directive 96/71, it is necessary to take into consideration each element indicating whether the movement of workers in the host Member State is the very purpose of

the supply of services on which the contractual relationship is based. In principle, evidence that such a movement is not the very purpose of the supply of services at issue are, inter alia, the fact that the service provider is liable for the failure to perform the service in accordance with the contract and the fact that that service provider is free to determine the number of workers he deems necessary to send to the host Member State. By contrast, the fact that the undertaking which receives those services checks the performance of the service for compliance with the contract or that it may give general instructions to the workers employed by the service provider does not, as such, lead to the finding that there is a hiring-out of workers.

ECJ 18 June 2015, 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 in The Netherlands 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.

ECJ's findings

1. Unlike a non-resident such as Mr Kieback, a taxpayer residing in the Netherlands has the possibility of having negative income relating to a dwelling located in the Netherlands which he owns taken into account, even if, having left during the course of the year to reside in another country, that non-resident has not received, in the Netherlands, all or almost all his income from that year. It is therefore common ground that the treatment reserved under Dutch law for non-resident taxpayers is less favourable than that from which resident taxpayers benefit (§ 17-18).
2. The principle of equal treatment with regard to remuneration would be rendered ineffective if it could be undermined by discriminatory national provisions on income tax. Nevertheless, discrimination can arise through the application of different rules to comparable situations or the same rule to different situations (§ 20-21).
3. In relation to direct taxation, residents and non-residents are generally not in comparable situations, because the income received in the territory of a Member State by a non-resident is in most cases only a part of his total income, which is concentrated at his place of residence, and because 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 in general is the place where he has his usual abode (§ 22).
4. There could be discrimination within the meaning of the EC Treaty between residents and non-residents only if, notwithstanding their residence in different Member States, it were established that, having regard to the purpose and content of the national provisions in question, the two categories of taxpayers are in a comparable situation. Such is the case particularly where a non-resident taxpayer receives no significant income in his Member State of residence and derives the major part of his taxable income from an activity pursued in the Member State of employment, so that the Member State of residence is not in a position to grant him the advantages which follow from taking into account his personal and family circumstances. In such a case, discrimination arises from the fact that the personal and family circumstances of a non-resident who receives the major part of his income and almost all his family income in a Member State other than that of his residence are taken into account neither in the State of residence nor in the State of employment (§ 24-26).
5. When a non-resident leaves during the course of the year to pursue his occupational activity in another country, there is no reason to infer that, by sole virtue of that fact, the State of residence will not therefore be in a position to take the interested party's aggregate income and personal and family circumstances into account. Moreover, since, after leaving, the party concerned could have been employed successively or even simultaneously in several countries and been able to choose to fix the centre of his personal and financial interests in any one of those countries, the State where he pursued his occupational activity before leaving cannot be presumed to be in a better position to assess that situation with greater ease than the State or, as the case may be, the States in which he resides after leaving (§ 29).
6. It follows that a non-resident taxpayer who has not received, in the State of employment, all or almost all the family income from which he benefited during the year in question as a whole is not in a comparable situation to that of residents of that State, so account does not need to be taken of his ability to pay tax charged, in that State, on his income. The Member State in which a taxpayer has received only part of his taxable income during the whole of the year at issue is therefore not bound to grant him the same advantages which it grants to its own residents (§ 34).

Ruling (judgment)

Article 39(2) EC must be interpreted as not precluding a Member State, for the purposes of charging income tax on a non-resident worker who has pursued his occupational activity in that Member State during part of the year, from refusing to grant that worker a tax advantage which takes account of his personal and family circumstances, on the basis that, although he received, in that Member State, all or almost all his income from that period, that income does not form the major part his taxable income for the entire year in question. The fact that that worker left to pursue his occupational activity in a non-member State and not in another EU Member State does not affect that interpretation.

ECJ 9 July 2015, case C-177/14 *(María José Regojo Dans -v- Consejo de Estado)* **("Regojo Dans")**, Spanish case (FIXED TERM EMPLOYMENT)

Facts

Spanish law distinguishes four types of public servant: (i) career civil servants; (ii) interim civil servants; (iii) staff engaged under employments contracts (either fixed-term or permanent); and (iv) *'personal eventual'* (i.e. staff appointed on a non-permanent basis to perform duties in positions of trust or in special advisory positions). Pursuant to the law relating to public servants (the LEBEP), public servants within categories (i), (ii) and (iii) are entitled to three-yearly length-of-service increments, i.e. their salary is raised by a certain amount once every three years. *Personal eventual* are not eligible for three-yearly increments: their remuneration is governed by different legislation. Moreover, the law provides that their appointment and termination shall be discretionary and their contract terminates automatically upon termination of the appointment of the individual for whom they perform trust or advisory duties.

Ms Regojo Dans worked for the Council of State (*Consejo de Estado*). She had been employed there since 1980. Her position was that of Head of the Secretariat of the President of the Second Division. This was a personal eventual position. In 2012 she applied for a three-yearly increment. Her request was denied on the ground that she was not a public servant within one of the categories (i), (ii) or (iii).

National proceedings

Ms Regojo Dans appealed to the *Tribunal Supremo,* claiming, *inter alia*, that the refusal to recognise her right to the increments constituted a difference of treatment contrary to clause 4 of the Framework Agreement on fixed-term work annexed to Directive 1999/70. This clause 4 consists of several paragraphs. Paragraph 1 provides that "in respect of employment conditions, fixed-term workers shall not be treated in a less favourable manner than comparable permanent workers solely because they have a fixed-term contract or relation unless different treatment is justified on objective grounds". Paragraph 4 states that "period of service qualifications relating to particular conditions of employment shall be the same for fixed-term workers as for permanent workers except where different length of service qualifications are justified on objective grounds". The *Tribunal Supremo* referred three questions to the ECJ.

ECJ's findings

1. The definition of "fixed-term workers" in The Framework Agreement encompasses all workers without drawing a distinction according to whether their employer is in the public or private sector and regardless of the classification of their contract under domestic law (§ 29-33).
2. An employment contract, such as that of Ms Regojo Dans, which automatically terminates when the person to whom the duties are discharged ceases to hold the post, is a fixed-term contract within the meaning of the Framework Agreement (§ 34).
3. Clause 4 of the Framework Agreement must be understood as expressing a principle of EU social law which cannot be interpreted restrictively (§ 40-42).
4. The three-yearly length-of-service increments are covered by the concept of 'employment conditions' referred to in clause 4(1) of the Framework Agreement (§ 43).
5. In order to assess whether workers are engaged in the same or similar work for the purposes of the Framework Agreement, account must be taken of a number of factors, such as the nature of their work, their qualifications and abilities, the training requirements and the working conditions. The Spanish Government observes that non-permanent staff constitute a professional category distinct from the other categories of civil servant provided for under Spanish law, as regards their employment relations and the functions or duties they perform, as well as recruitment criteria or the rules governing their remuneration. In other words, that the differences in treatment between non-permanent staff and other national civil servants are not limited solely to the length-of-service increment at issue in the main proceedings. In addition, the Spanish Government states that, unlike career civil servants who are selected under procedures guaranteeing observance of the constitutional principles of equality, merit and ability, non-permanent staff are appointed on a discretionary basis in order to carry out specific, non-permanent duties entailing trust or special advice. Termination of their appointment is also discretionary and occurs automatically on termination of the appointment of the postholder for whom the duties are discharged. However, the order for reference indicates that the functions performed by Ms Regojo Dans do not consist in the performance of a specific duty linked to a public authority, but relate more to the carrying out of tasks involving assistance with administrative activities (§ 44-49).
6. It is for the referring court to determine whether, as regards the receipt of the three-yearly length-of-service increments at issue in the main proceedings, career civil servants and non-permanent staff, in respect of which a difference in treatment in terms of employment conditions is alleged, are in a comparable situation. If the referring court finds that the duties performed by Ms Regojo Dans in her capacity as a non-permanent member of staff of the Consejo de Estado are not identical or similar to those performed by a career official within that administration or other public entities in which she previously worked in that same capacity, it would follow that she is not in a comparable situation to that of a career civil servant. If, on the other hand, the referring court holds that Ms Regojo Dans performed, in her capacity as a non-permanent staff member, identical or similar duties to those performed by a career civil servant of the Consejo de Estado or other similar institution, the only fact that could distinguish her situation from that of a career civil servant would appear to be the temporary nature of the employment relationship which linked her to her employer when carrying out the periods of service as a non-permanent member of staff. In such a case, she would be in a comparable situation to that of a career civil servant and it would be necessary to ascertain whether there was an objective ground justifying the difference in treatment between those two workers (§ 50-53).
7. According to the settled case-law of the Court, the concept of 'objective grounds' in clause 4(1) of the Framework Agreement must be understood as not permitting a difference in treatment between fixed-term workers and permanent workers to be justified on the basis that the difference is provided for by a general, abstract national norm, such as a law or collective agreement. The concept requires the unequal treatment found to exist to be justified by the existence of precise and specific factors, characterising the employment condition to which it relates, in the specific context in which it occurs and on the basis of objective and transparent criteria, in order to ensure that that unequal treatment in fact responds to a genuine need, is appropriate for achieving the objective pursued and is necessary for that purpose. Those factors may result, in particular, from the specific nature of the tasks for the performance of which fixed-term contracts have been concluded and from the inherent characteristics of those tasks or, as the case may be, from

pursuit of a legitimate social-policy objective of a Member State. By contrast, reliance on the mere fact of the temporary nature of the employment of staff in the public administration does not meet those requirements and is therefore not capable of constituting an 'objective ground' within the meaning of clause 4(1) of the Framework Agreement (§ 54-56).

8. Career civil servants on active duty or on secondment who hold posts reserved for non-permanent staff receive the three-yearly length-of-service increments. The fact that such career civil servants may benefit from those increments, including during the period when they perform the duties assigned to the non-permanent staff, is at variance with the argument that the particular nature of the duties entailing trust and special advice that non-permanent staff undertake distinguishes those two types of staff and justifies a difference in treatment between them as regards the grant of those increments (§ 61).

Ruling (judgment)

1. The concept of a 'fixed-term worker', within the meaning of clause 3(1) of the Framework Agreement [.....] must be interpreted as applying to a worker such as the applicant in the main proceedings.
2. Clause 4(1) of the Framework Agreement [.....] must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which excludes, without justification on objective grounds, non-permanent staff from the right to receive a three-yearly length-of-service increment granted, inter alia, to career civil servants when, as regards, the receipt of that increment, those two categories of workers are in comparable situations, a matter which is for the referring court to ascertain.

ECJ 9 July 2015, Case C-229/14 *(Ender Balkaya - v - Kiesel Abbruch- und Recycling Technik GmbH)* **("Balkaya")**, German case (COLLECTIVE REDUNDANCY)

Facts

The limited liability company (GmbH) Kiesel Abbruch closed down its operations and dismissed all of its employees, including Mr Balkaya, without giving notice of the projected redundancies as required by the German rules on collective redundancy. Those rules, which are contained in Article 17 of the *Kündigungsschutzgesetz* ("KSchG") transpose Directive 98/59 and apply where, over a period of 30 days, more than five workers are made redundant in establishments normally employing more than 20 workers. Mr Balkaya was given notice of termination on 7 January 2013. On that date, Kiesel Abbruch employed 19 workers, not counting:

(i) a director, Mr L, who was not also a shareholder; and

(ii) Ms S, a trainee office assistant, whose entire remuneration was funded by the government in the context of a requalification training programme. Kiesel Abbruch did not pay her a salary.

National proceedings

Mr Balkaya challenged the validity of his dismissal on the basis that, at the time he was dismissed, Kiesel Abbruch normally employed 21 (i.e. more than twenty) workers. The court referred two questions to the ECJ. It noted that Article 17(5)(1) KschG provides that in establishments of one legal person (such as a GmbH) "the member or the body that is responsible for the legal representation of that person" (i.e. the directors) shall not be regarded as workers for the purpose of the collective redundancy rules. The court also noticed that German law clearly distinguishes the status of director as an officer appointed by the general meeting of shareholders, on the one hand, from the rights and obligations vis-à-vis the company, as determined by the director's service contract on the other. According to German case law, such a service contract is not a contract of employment.

ECJ's findings

1. The concept of 'worker', referred to in Article 1(1)(a) of Directive 98/59, cannot be defined by reference to the legislation of the Member States but must be given an autonomous and independent meaning in the EU legal order. Otherwise, the methods for calculation of the thresholds laid down in that provision, and therefore the thresholds themselves, would be within the discretion of the Member States, which would allow the latter to alter the scope of that directive and thus to deprive it of its full effect (§ 33).
2. The essential feature of an employment relationship is that, for a certain period of time, a person performs services for and under the direction of another person, in return for which he receives remuneration. It is clear from the settled case law of the Court that the nature of the employment relationship under national law is of no consequence as regards whether or not a person is a worker for the purposes of EU law (§ 34-35).
3. The fact that a person is a member of the board of directors of a capital company is not enough in itself to rule out the possibility that that person is in a relationship of subordination to that company (see *Danosa* C 232/09 and *Commission - v - Italy*, C 596/12). It is necessary to consider the circumstances in which the board member was recruited; the nature of the duties entrusted to that person; the context in which those duties were performed; the scope of the person's powers and the extent to which he or she was supervised within the company; and the circumstances under which the person could be removed. A member of a board of directors of a capital company who, in return for remuneration, provides services to the company which has appointed him and of which he is an integral part, who carries out his activities under the direction or supervision of another body of that company and who can, at any time, be removed from his duties without such removal being subject to any restriction, satisfies, prima facie, the criteria for being treated as a 'worker' within the meaning of EU law (§ 37-39).
4. The Court rejects the submission made by Keisel Abbruch and the Estonian government that a director, such as the one in question in the main proceedings, does not need the protection afforded by Directive 98/59 in the event of collective redundancies. In that regard, it must be held, first, that there is nothing to suggest that an employee who is a board member of a capital company, in particular, a small or medium sized company such as that at issue in the main proceedings, is necessarily in a different situation from that of other persons employed by that company as regards the need to mitigate the consequences of his dismissal, and, *inter alia*, to alert, for that purpose, the competent public authority so that it is able to seek solutions to the problems raised by all the projected collective redundancies. Second, it must be observed that a national law or practice, which does not take into account the board members of a capital company in the calculation provided for in Article 1(1)(a) of Directive 98/59 of the number of workers employed, is liable not only to affect the protection afforded by that directive to those members, but, above all, to deprive all the workers employed by certain establishments, normally employing more than 20

workers, of the rights which they derive from that directive and it thus undermines its effectiveness (§ 45-47).

5. The concept of 'worker' in EU law extends to a person who serves a traineeship or periods of apprenticeship in an occupation that may be regarded as practical preparation related to the pursuit of the occupation in question, provided that the periods are served under conditions of genuine and effective activity as an employed person, for and under the direction of an employer. The Court has stated that that conclusion cannot be invalidated by the fact that the productivity of the person concerned is low, that he does not carry out full duties and that, accordingly, he works only a small number of hours per week and thus receives limited remuneration. In the second place, it is also clear from the Court's case law that neither the legal context of the employment relationship under national law, in the framework of which the vocational training or internship is carried out, nor the origin of the funds from which the person concerned is remunerated and, in particular, in the present case, the funding of that remuneration through public grants, can have any consequence in regard to whether or not the person is to be regarded as a worker (§ 50-51).

Ruling (judgment)

1. Article 1(1)(a) of Directive 98/59 [.....]must be interpreted as precluding a national law or practice that does not take into account a member of the board of directors of a capital company, such as the director in question in the main proceedings, who performs his duties under the direction and subject to the supervision of another body of that company, receives remuneration in return for the performance of his duties and does not himself own any shares in the company when calculating the number of workers employed, as stipulated by that provision.]
2. Article 1(1)(a) of Directive 98/59 must be interpreted as meaning that it is necessary to regard as a worker for the purposes of that provision a person, such as the one in question in the main proceedings, who, while not receiving remuneration from his employer, performs real work within the undertaking in the context of a traineeship — with financial support from, and the recognition of, the public authority responsible for the promotion of employment — in order to acquire or improve skills or complete vocational training.

ECJ 9 July 2015, case C-87/14 *(European Commission -v - Ireland)* (WORKING TIME)

Directive 2003/88

Article 2 of Working Time Directive 2003/88 defines "working time" as any period during which the worker is working, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practice. Article 3 requires Member States to ensure that every worker is entitled to a minimum daily rest period of 11 consecutive hours per 24-hour period. Article 5 requires Member States to ensure that, per each seven-day period, every worker is entitled to a minimum uninterrupted rest period of 24 hours plus the 11 hours' daily rest period. Article 6 requires Member States to ensure that the average working time for each seven-day period, including overtime, does not exceed 48 hours. Article 16 allows the Member State, within limits, to lay down reference periods. Article 17(5) allows certain derogations by means of, *inter alia*, collective agreements. Ireland transposed the Directive with respect to junior doctors ("non-consultant hospital doctors", "NCHDs") fully and correctly through "The European Communities (Organisation of Working Time) (Activities of Doctors in Training) Regulations 2004 (the "2004 Regulation").

The action

On 23 November 2009, the Commission sent Ireland a letter of formal notice that it had failed to fulfil its obligations under the Directive by not allowing certain provisions in (i) a collective agreement between the Health Service Executive (the public body representing the health authorities) and the Irish Medical Association and (ii) a Standard Contract of Employment for NCHDs. These provisions:

- treat certain training time as not being "working time";
- allow a reference period of 12 months for calculating the maximum weekly working time;
- suggest that hospitals need not respect the 2004 Regulation.

Moreover, the Commission criticized Ireland for its slow progress in ensuring compliance with the Directive. Ireland disputed the Commission's view, and on 18 February 2014, the Commission brought infraction proceedings against Ireland under Article 258 TFEU.

ECJ's findings
Training time

1. The collective agreement identifies three categories of training time as follows:

A. scheduled and protected time off-site attendance at training, as required by the training programme;
B. on site regular weekly/fortnightly scheduled educational and training activities including conferences, 'grand rounds', morbidity and mortality conferences;
C. research, study and so on.

The Commission took the view that categories A and B are to be regarded as "working time". Ireland noted that, first, the training hours concerned represent a 'protected' training period during which NCHDs are not available to pursue their professional activities and, secondly, the relationship between NCHDs and their training organisation is separate from that which exists between NCHDs and their employer. The training requirements for NCHDs do not form an integral part of their employment. The employer does not direct the conduct of such training, does not determine the activities NCHDs must undertake under that training, nor the progression of NCHDs within that training, and it does not determine the place (§ 16-18).

2. The classification of 'working time' within the meaning of Directive 2003/88 as a period when the worker is present results from his obligation to be at the disposal of his employer. The determining factor is that he is required to be physically present at the place determined by the employer and to be available to the employer in order to be able to provide appropriate services immediately in case of need (§ 20-21).
3. The fact that training times A and B are required 'by the training programme' and take place in a place determined 'by that programme', does not justify the conclusion that NCHDs are required to be physically present at the place determined by the employer and to remain there at the disposal of that employer so

as immediately to be able to provide appropriate services as the need arises. It follows from the foregoing that the Commission has not demonstrated that training times A and B constitute 'working time' within the meaning of Directive 2003/88. Consequently, in relation to the Collective Agreement, it has not established the existence of a practice that contravenes that Directive (§ 24-26).

4. The Commission has not established a practice which infringes the Directive's provisions regarding reference periods (§ 32-35).
5. The Commission argues as follows. There is nothing in the Standard Contract of Employment to show that doctors are entitled to the minimum daily and weekly rest periods prescribed in the Directive and it does not limit the total length of the working week. Moreover, the Standard Contract states, "Work outside the confine of this contract is not permissible if the combined working time [...] exceeds the maximum weekly hours as set out in (the 2004 Regulation)". This suggests that the limits provided by the 2004 Regulation do not apply to the Standard Contract. Ireland counters that, although it is not set out in the wording of the Standard Contract, the protection provided by the 2004 Regulation is an integral part of it. Moreover, by referring to certain provisions in the Standard Contract in isolation, the Commission fails to take into account the clear legal context of the Contract (§ 36-40).
6. The Commission does not dispute the transposition of Directive 2003/88 by the 2004 Regulation. It merely argues, referring in particular, to certain provisions of Clause 5 of the Standard Contract of Employment, that the 2004 Regulation is not applied in practice. Further, it is not disputed by the parties that the legal framework resulting from the legislation transposing Directive 2003/88, namely the 2004 Regulation, is clear and applicable in any event. In those circumstances, by referring to certain provisions of the Standard Contract of Employment in isolation, the scope of which is, moreover, subject to discussion between the parties, the Commission has not succeeded in establishing the existence of a practice contrary to Directive 2003/88 (§ 42-44).
7. Ireland admits that it has not been possible in practice to achieve a situation of complete compliance with Directive 2003/88 in every instance, but it disputes that that is because of a failure on its part in its obligation to take the necessary measures to achieve such a situation. It maintains that it has made constant and concerted efforts to achieve total conformity in practice and that it continues to deal with all instances of non-compliance, including through the use of financial penalties. According to Ireland, the Commission's argument is, in essence, tantamount to saying that the simple fact that the regulation transposing Directive 2003/88 is not respected in all instances is sufficient to justify a finding of failure to fulfil obligations by the Member State concerned under EU law (§ 46-47).
8. It does not suffice for the Commission to refer to progress reports compiled during 2013 and 2014 by the Irish authorities and to the declaration of the Irish Medical Organisation which concludes that, even if progress has been made in the application of Directive 2003/88, Ireland still does not fully comply with its obligations resulting under that Directive, to establish that Ireland has not applied Directive 2003/88. It is incumbent on the Commission to show, without being able to rely on any presumption, that the practice alleged to be contrary to the Directive can be attributed, in one way or another, to Ireland (§ 49).

Ruling (judgment)

The ECJ dismisses the action.

ECJ 16 July 2015, case C-222/14 *(Konstantinos Maïstrellis - v - Ypourgos Dikaiosynis, Diafaneias kai Anthropinon Dikaiomaton)* **("Maïstrellis")**, Greek case (PARENTAL LEAVE)

Facts

Mr Maïstrellis, a judge, applied for parental leave after his wife gave birth to a child. His application was turned down. Initially, it was turned down on the ground that only female judges are eligible for parental leave. The Council of State struck down the decision rejecting the application for parental leave as being at odds with Directive 96/34. Following this judgment, Mr Maïstrellis applied anew. His application was turned down again. This time, the reason was that a male civil servant is only eligible for parental leave if his wife works or exercises a profession, which was not so in this case.

National proceedings

Mr Maïstrellis brought a second action before the Council of State. That court referred a question to the ECJ, asking whether Directive 96/34 (which implements the Framework Agreement on parental leave) and Directive 2006/54 on equal treatment of men and women in employment preclude national regulations providing that if a civil servant's wife does not work the male spouse is not entitled to parental leave unless the wife is unable to meet the child's needs due to serious illness or injury.

ECJ's findings

1. Clause 2.3 of the Framework Agreement on parental leave sets out conditions and rules that the Member States may adopt. Those conditions and rules do not provide that one of the parents can be denied the right to parental leave, inter alia, because of the employment status of his or her spouse. Thus, going by the literal wording of the Framework Agreement, the Greek legislation at issue is not compatible with Directive 96/34 (§ 31-36).
2. A literal interpretation of the Framework Agreement is supported by its objectives, which are also reflected in the Charter (§37-40).
3. It follows from the wording and the objectives of the Framework Agreement that each parent individually is entitled to parental leave, which means that Member States cannot adopt provisions under which a father exercising the profession of civil servant is not entitled to parental leave in a situation where his wife does not work (§41).
4. The conditions for granting parental leave fall within employment and working conditions within the meaning of Directive 2006/54 (§45).
5. The situation of a male employee and that of a female employee parent are comparable as regards the bringing-up of children (§47).
6. Under Greek law, mothers who are civil servants are always entitled to parental leave, whereas fathers who are civil servants are entitled to it only if the mother of their child works. Far from ensuring full equality in practice between men and women in working life, that law is liable to perpetuate a traditional distribution of the roles of men and women by keeping men in a role subsidiary to that of women in relation to the exercise of their parental duties (§ 48-50).
7. The deprivation, for the father of the child, of the right to parental

leave because of the employment situation of his wife in no way constitutes a measure to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (§ 51).

8. In these circumstances, it should be held that the provision at issue in the main proceedings constitutes direct discrimination on grounds of sex (§ 52).

Ruling (judgment)

The provisions of Directive 96/34 must be interpreted as precluding national provisions under which a civil servant is not entitled to parental leave in a situation where his wife does not work or exercise any profession, unless it is considered that, due to a serious illness or injury, the wife is unable to meet the needs related to the upbringing of the child.

ECJ 16 July 2015, case C-83/14 *(CHEZ Razpredelenie Bulgaria AD - v - Komisia za zashtita ot diskriminatsia)* **("CHEZ")**, Bulgarian case (ETHNIC ORIGIN DISCRIMINATION)

Facts

Ms Nikolova runs a grocer's shop in a district of the town of Dupnitsa, a district inhabited by individuals of Roma origin. In 1999 and 2000, the electricity company CHEZ installed the electricity meters for all the consumers of that district on the concrete pylons forming part of the overhead electricity supply network, at a height of between six and seven metres, whereas in the other districts the meters installed by CHEZ are placed at a height of 1.70 metres, usually in the consumer's property, on the façade or on the wall around the property ('the practice at issue').

In December 2008, Ms Nikolova lodged an application with the Bulgarian Commission for Protection against Discrimination (KZD) in which she contended that the reason for the practice at issue was that most of the inhabitants of the her district were of Roma origin, and that she was accordingly suffering direct discrimination on the grounds of nationality ('narodnost'). She complained in particular that she was unable to check her electricity meter for the purpose of monitoring her consumption and making sure that the bills sent to her, which in her view overcharged her, were correct.

National proceedings

The Administrative Court of Sofia referred questions to the ECJ on the concept of 'ethnic origin' in Directive 2000/43 and on certain aspects of that Directive. The Court noted that it was apparent from the context of the case that CHEZ considered that it is above all persons of Roma origin who make unlawful electricity connections. The court also noted that in the almost identical case of *Belov* (C-394/11), the ECJ declined jurisdiction.

ECJ's findings

[The ECJ's findings are omitted because this is not an employment law case. The court's judgment is, however, interesting enough for employment lawyers to reproduce in EELC.]

Ruling (judgment)

The concept of 'discrimination on the grounds of ethnic origin', for the purpose of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and, in particular, of Articles 1 and 2(1) thereof, must be interpreted as being intended to apply in circumstances such as those at issue before the referring court — in which, in an urban district mainly lived in by inhabitants of Roma origin, all the electricity meters are placed on pylons forming part of the overhead electricity supply network at a height of between six and seven metres, whereas such meters are placed at a height of less than two metres in the other districts — irrespective of whether that collective measure affects persons who have a certain ethnic origin or those who, without possessing that origin, suffer, together with the former, the less favourable treatment or particular disadvantage resulting from that measure.

Directive 2000/43, in particular Article 2(1) and (2)(a) and (b) thereof, must be interpreted as precluding a national provision which lays down that, in order to be able to conclude that there is direct or indirect discrimination on the grounds of racial or ethnic origin in the areas covered by Article 3(1) of the directive, the less favourable treatment or the particular disadvantage to which Article 2(2)(a) and (b) respectively refer must consist in prejudice to rights or legitimate interests.

Article 2(2)(a) of Directive 2000/43 must be interpreted as meaning that a measure such as that described in paragraph 1 of this operative part constitutes direct discrimination within the meaning of that provision if that measure proves to have been introduced and/or maintained for reasons relating to the ethnic origin common to most of the inhabitants of the district concerned, a matter which is for the referring court to determine by taking account of all the relevant circumstances of the case and of the rules relating to the reversal of the burden of proof that are envisaged in Article 8(1) of the directive.

Article 2(2)(b) of Directive 2000/43 must be interpreted as meaning that:

- that provision precludes a national provision according to which, in order for there to be indirect discrimination on the grounds of racial or ethnic origin, the particular disadvantage must have been brought about for reasons of racial or ethnic origin;
- the concept of an 'apparently neutral' provision, criterion or practice as referred to in that provision means a provision, criterion or practice which is worded or applied, ostensibly, in a neutral manner, that is to say, having regard to factors different from and not equivalent to the protected characteristic;
- the concept of 'particular disadvantage' within the meaning of that provision does not refer to serious, obvious or particularly significant cases of inequality, but denotes that it is particularly persons of a given racial or ethnic origin who are at a disadvantage because of the provision, criterion or practice at issue;
- assuming that a measure, such as that at issue, does not amount to direct discrimination within the meaning of Article 2(2)(a) of the directive, such a measure is then, in principle, liable to constitute an apparently neutral practice putting persons of a given ethnic origin at a particular disadvantage compared with other persons, within the meaning of Article 2(2)(b);
- such a measure would be capable of being objectively justified by the intention to ensure the security of the electricity transmission network and the due recording of electricity consumption only if that measure did not go beyond what is appropriate and necessary to achieve those legitimate aims and the disadvantages caused were not disproportionate to the objectives thereby pursued. That is not so if it is found, a matter which is for the referring court to determine, either that other appropriate and less restrictive means enabling those aims to be achieved exist or, in the absence of

such other means, that that measure prejudices excessively the legitimate interest of the final consumers of electricity inhabiting the district concerned, mainly lived in by inhabitants of Roma origin, in having access to the supply of electricity in conditions which are not of an offensive or stigmatising nature and which enable them to monitor their electricity consumption regularly.

OPINIONS

Opinion of Advocate-General Mengozzi of 20 May 2015 in Case C-177/14 *(Maria José Regojo Dans – v - Consejo de Estado)* **("Regojo Dans")**, Spanish case (FIXED-TERM EMPLOYMENT)

Facts

Spanish law distinguishes four types of public servant: (i) career civil servants; (ii) interim civil servants; (iii) staff engaged under employment contracts (either fixed-term or permanent); and (iv) *'personal eventual'* (i.e. staff appointed on a non-permanent basis to perform duties in positions of trust or in special advisory positions). Pursuant to the law relating to public servants (the LEBEP), public servants within categories (i), (ii) and (iii) are entitled to three-yearly length-of-service increments, i.e. their salary is raised by a certain amount once every three years. Personal eventual are not eligible for three-yearly increments: their remuneration is governed by different legislation. Moreover, the law provides that their appointment and termination shall be discretionary and their contract terminates automatically upon termination of the appointment of the individual for whom they perform trust or advisory duties.

Ms Regojo Dans worked for the Council of State *(Consejo de Estado)*. She had been employed there since 1980. Her position was that of Head of the Secretariat of the President of the Second Division. This was a *personal eventual position*. In 2012 she applied for a three-yearly increment. Her request was denied on the ground that she was not a public servant within one of the categories (i), (ii) or (iii).

National proceedings

Ms Regojo Dans appealed to the *Tribunal Supremo*, claiming, *inter alia*, that the refusal to recognise her right to the increments constituted a difference of treatment contrary to clause 4 of the Framework Agreement on fixed-term work annexed to Directive 1999/70. This clause 4 consists of several paragraphs. Paragraph 1 provides that "in respect of employment conditions, fixed-term workers shall not be treated in a less favourable manner than comparable permanent workers solely because they have a fixed-term contract or relation unless different treatment is justified on objective grounds". Paragraph 4 states that "period of service qualifications relating to particular conditions of employment shall be the same for fixed-term workers as for permanent workers except where different length of service qualifications are justified on objective grounds". The *Tribunal Supremo* referred three questions to the ECJ.

Opinion

1. The first question encompassed two sub-questions. The first is whether *personal eventual* qualify as 'workers' within the meaning of the Framework Agreement. That agreement does not define the term 'worker'. It is clear from the agreement's preamble that Member States are free to define the term as they wish. The only restriction is that a Member State may not arbitrarily exclude a category of persons from the protection offered by the Framework Agreement. As the referring court notes, *personal eventual* may not be excluded from the benefit of the Framework Agreement on account of their status as public servants. However, they may be excluded if their relationship with the public authorities is substantially different from that of other workers. Although it is up to the referring court to determine whether this is the case, it would not seem to be so (§ 20 – 27).
2. The second part of question 1 is whether *personal eventual* qualify as 'fixed-term' workers within the meaning of the Framework Agreement. Clause 3 (1) of that agreement defines a fixed-term worker as a person having a contract the end of which "is determined by objective conditions such as reaching a specific date, completing a specific task, or the occurrence of a specific event". The employment relationship of *personal eventual* may come to an end in two scenarios: (i) automatically, where the appointment of the individual's line manager terminates or (ii) on a discretionary basis. In the first scenario, the employment ends as a result of an 'objective condition' being fulfilled, namely the termination of the appointment of the worker's manager (§ 28 – 35).
3. In summary and in answer to the first question, *personal eventual* qualify as fixed-term workers within the meaning of the Framework Directive (§ 36).
4. The second question is whether the principle of non-discrimination means that *personal eventual* cannot be refused the three-yearly length of service increments paid to public servants within categories (i), (ii) and (iii). This involves examining, first, whether *personal eventual* are in a situation comparable to that of public servants within categories (i) (who are permanent workers) and (iii) (some of whom are permanent workers) and, if so, whether there is a difference in treatment (§ 37- 39).
5. Clause 3(2) of the Framework Agreement defines 'comparable permanent worker' as a "worker with an employment contract or relationship of indefinite duration, in the same establishment, engaged in the same or similar work/occupation, due regard being given to qualifications/skills". What is "same or similar work"? There are four previous ECJ rulings that can shed light on this question. One is *Montoya Medina* (case C-273/10). The others are *O'Brien* (case C-393/10), *Brunnhofer* (case C-381/99) and *Kenny* (case C-427/11). *Montoya Medina* concerned university lecturers. The ECJ did not require an in-depth examination of the tasks performed by, respectively, permanent and fixed-term lecturers, for example, the subjects taught and the teaching level or of their training (e.g. years of experience). In other words, the ECJ construed 'same or similar' work broadly. On the other hand, in *O'Brien* (which dealt with the Framework Agreement on part-time work) and in *Brunnhofer* and *Kenny* (both of which dealt with gender discrimination), the ECJ interpreted that term narrowly. Given the objectives pursued by the Framework Agreement on fixed-term work, 'same or similar' in that agreement should be interpreted broadly, similarly to the way in which the ECJ interpreted the term 'employment conditions' in Clause 4(1). The view taken by the ECJ in the gender discrimination case *Wiener Gebietskrankenkasse* (case C-309/97), that a psychiatrist and a psychologist performing exactly the same work are not in comparable situations solely because their qualifications are different, is questionable (§ 40 – 57).
6. The mere fact that *personal eventual* hold positions of trust or special advisory positions does not make them incomparable to other public servants. The referring court must therefore examine whether the work actually carried out by Ms Regojo Dans, namely office work, is similar to that carried out by certain

public servants, such as other secretaries within the *Consejo de Estado* (§ 58 – 68).

7. What if there is no comparable permanent worker within the *Consejo de Estado*? Clause 3(2) of the Framework Agreement provides that "where there is no comparable permanent worker in the same establishment, the comparison shall be made by reference to the applicable collective agreement, or where there is no applicable collective agreement, in accordance with national law, collective agreements or practice". The ECJ has ruled on this clause several times. The gist of those rulings is that the worker must be sought amongst those workers whose employment conditions can be attributed to the same source. In this case, a comparable permanent worker should be sought amongst the secretaries of other Spanish consultative bodies and courts before widening the search to civil servants within other administrations (§ 69 – 76).
8. It is clear that there is a difference in treatment between, on the one hand, public servants within the categories (i), (ii) and (iii) and, on the other, *personal eventual* . Given that interim public servants (category (ii)) and some of the staff engaged under employment contracts (category (iii)) are employed on a fixed-term basis, the difference in treatment in relation to them is not covered by the Framework Agreement. However, the difference in treatment between, on the one hand, career civil servants (category (i)) and some of the staff engaged under employment contracts and, on the other, *personal eventual* is covered by the Framework Agreement. The issue is whether this difference is objectively justified (§ 77 – 83).
9. The Spanish government argues that the objective of rewarding staff loyalty is a social policy objective capable of justifying the unequal treatment. However, given the fact that Ms *Regojo Dans* has over 31 years of service with the Spanish public authorities, it is doubtful whether the measure at issue is proportionate. It is difficult to see how the fact that Ms *Regojo Dans* exercises authority not enjoyed by the other secretaries would justify the refusal of additional remuneration (§ 84 – 89).

Proposed reply

1. Clauses 2(1) and 3(1) of the framework agreement on fixed-term work [...] are to be interpreted as meaning that it is for the Member States to define the employment contract or employment relationship. However, the referring court must ensure that that definition does not result in the arbitrary exclusion of non-permanent staff from the protection afforded by the Framework Agreement. Indeed, non-permanent staff must be afforded such protection where the nature of their relationship with the public authorities is not substantially different from the relationship between persons who, under Spanish law, fall within the category of workers and their employers.
2. Clause 3(1) of the Framework Agreement is to be interpreted as meaning that the automatic termination of the appointment of a worker on account of the termination of the appointment of his or her line manager is an objective condition determining the end of the employment relationship, even though the employment relationship may also come to an end simply upon the decision of the line manager.
3. In order to assess whether workers are engaged in 'the same or similar' work within the meaning of Clause 3(2) of the Framework Agreement, it must be determined whether, in the light of a number of factors, such as the nature of the work, training requirements and working conditions, those workers can be regarded as being in a comparable situation. In the light of the objectives of the Framework Agreement, the concept of 'the same or similar' work cannot be interpreted strictly. The specific nature of the tasks for the performance of which the fixed-term contract was concluded and the inherent characteristics of those tasks cannot therefore be taken into account to determine whether workers are engaged in 'the same or similar' work. Nor can account be taken of the — actual or merely potential — performance of a second activity, which differs from the common activity, since that second activity is merely incidental to the common activity.
4. Clause 3(2) of the Framework Agreement is to be interpreted as meaning that, where there is no comparable permanent worker in the same public authority or the same department of a public administration, that worker must be sought amongst the permanent workers whose employment conditions were defined by the same entity and who are engaged in the same or similar work.
5. Clause 4(1) of the Framework Agreement is to be interpreted as meaning that a length-of-service increment comes within the concept of an 'employment condition' within the meaning of that provision.
6. Rules governing the appointment of non-permanent staff and the termination of their appointment on a discretionary basis cannot constitute an objective ground justifying a difference in treatment within the meaning of Clause 4(1) of the Framework Agreement. However, the objective of rewarding the loyalty of staff in a public authority is such an objective ground. Nevertheless, the refusal to grant a length-of-service increment to a member of staff who has completed more than 30 years of service in the public authority cannot be regarded as appropriate for achieving such an objective. As for the specific nature of the tasks for the performance of which the fixed-term contract was concluded and the inherent characteristics of those tasks, they do constitute an 'objective ground' within the meaning of Clause 4(1) of the Framework Agreement. The exercise by the fixed-term worker of authority not enjoyed by a comparable permanent worker cannot, however, justify the less favourable treatment of the fixed-term worker.

Opinion of Advocate General Bot of 11 June 2015 in case C-266/14 *(Federación de Servicios Privados del sindicato Comisiones Obreras (CC. OO) – v - Tyco Integrated Security SL and Tyco Integrated Fire & Security Corporation Servicios SA)* **("Tyco")**, Spanish case (WORKING TIME)

Facts

Tyco is a company that installs and maintains intruder detection and anti-theft systems. Until 2011, its technicians came into one of the provincial offices every morning to pick up their company car and drive to the first customer, and at the end of the day they returned to the office. The time spent travelling from home to the provincial office in the morning and the time spent travelling from the office to home in the evening did not count as working time and was not paid for. In 2011, Tyco closed its provincial offices and switched to the following work system. Each technician drives home in his company car at the end of the working day. The next morning he drives from home to the first customer. He gets his instructions from the sole remaining head office in Madrid through his smart phone.

Tyco took the position that the time spent driving from home to the first customer (sometimes over a distance of over 100km) and the time

spent driving from the last customer back home was not working time. It based this position on Article 34(5) of the Workers' Statute: "Working time shall be calculated in such a way that a worker is present at his place of work both at the beginning and at the end of the working day". According to the referring court, this is based on the idea that the worker is free to choose where to have his home and, therefore, to live at a greater or lesser distance from his place of work.

CC.OO is a union. It took the position that the time spent travelling from home to the first customer and from the last customer back home qualifies as working time.

National proceedings

The union brought the matter before the *Audiencia Nacional*. It was uncertain whether said Article 34(5) complies with Directive 2003/88, which defines 'working time' as "any period during which the worker is working, at the employer's disposal and carrying out his activity or duties, in accordance with national law and/or practice" and it defines 'rest period' as "any period which is not working time". Accordingly, it referred a question to the ECJ.

Opinion

1. Directive 2003/88 does not provide for any intermediate category between 'working time' and 'rest periods'. Neither the intensity of the work carried out by the employee nor his output are among the elements that characterise 'working time'. There are no 'grey periods' (§ 27-29).
2. The concepts of 'working time' and 'rest periods' must be interpreted autonomously and in accordance with the Directive's aim of improving workers' living and working conditions (§25-26 and 30).
3. The definition of 'working time' is based on three criteria: a professional criterion ("carrying out his activity or duties"), an authority criterion ("at the employer's disposal") and a spatial criterion (at the workplace). In situations where all three criteria are met, Tyco's interpretation of Article 34(5) is at odds with the Directive (§32).
4. For workers who are not assigned a fixed or habitual place of work ('peripatetic' workers), travelling is an integral part of their activity. Consequently, the professional criterion has been met (§ 33-38).
5. The workers in this Spanish case are at the disposal of their employer, since the distances to be travelled depend exclusively on the latter's wishes. If the employer decides to change the order of the customers or cancel an appointment, the worker must follow that instruction. Fear that workers might take advantage of the journeys at the beginning and end of the day to carry on personal business is insufficient reason rule out that peripatetic workers are subject to their employers' instructions even when not at the job site. They may be asked to take the most direct route and the employer can monitor their movements. Thus, these workers are "at the employer's disposal" while driving from home to the first customer and from the last customer to home (§39-47).
6. It is not disputed that travelling between customers forms part of the workers' working time. Accordingly, prior to 2011, the travelling time between the office and the first customer and between the last customer and the office counted as time worked. There is no reason why travelling to and from those same customers should have become different in 2011. The workers can no longer calculate freely the distance between their home and their workplace. To describe the daily travelling, which the workers are required to undertake to visit customers in respect of which they have neither control nor knowledge, as "rest time" would impose on them a disproportionate burden and be contrary to the objective of protection of the safety and health of workers contained in the Directive. On the other hand, it does not seem disproportionate that that burden should be taken on by employers which have chosen, through the use of new technology, to organise that new way of organising the work, thereby benefitting from a reduction in cost (§48-58).

Proposed reply

Point 1 of Article 2 of Directive 2003/88 must be interpreted as meaning that, in circumstances such as those in the main proceedings, the time that peripatetic workers spend travelling from their home to the first customer designated by their employer and from the last customer designated by their employer to their homes constitutes 'working time' within the meaning of that provision.

NEW PENDING CASES[1]

Case C-5/15 *(Gökhan Büyüktipi - v - Achmea)* **("Büyüktipi")**, reference lodged by the Dutch Gerechtshof Amsterdam on 12 January 2015 (LEGAL EXPENSES INSURANCE)

Must the term 'inquiry or proceedings' in Article 4(1)(a) of Council Directive 87/344 [.....] be interpreted as also covering the objection stage before the CIZ (Dutch Medical Care Assessment Centre), in which any person who has received a negative decision from the CIZ on a request for an assessment may lodge a notice of objection with the CIZ, requesting that the decision be reviewed?

Case C-16/15 *(Maria Elena Pérez López - v - Servicio Madrileño de Salud)* **(Pérez López)**, reference lodged by the Spanish Juzgado Contencioso-Administrativo de Madrid on 19 January 2015 (FIXED-TERM WORK)

1. Does Article 9.3 of State Law 55/2003 [...] infringe the Framework agreement on fixed-term work [...] and is it therefore inapplicable, because it encourages abuse arising from the use of successive appointments of 'occasional' (eventual) regulated staff, in that it:
   - does not fix a maximum total duration of successive appointments of occasional regulated staff, nor a maximum number of renewals of those appointments;
   - leaves to the discretion of the authorities the decision as to whether to create permanent posts where more than two appointments are made for the provision of the same services for a total period of 12 months or more in a period of two years; and
   - allows appointments of occasional regulated staff to be made without requiring that the notices of appointment indicate the specific objective reasons of a temporary, occasional or extraordinary nature justifying those appointments?
2. Does Article 11.7 of the Order of the Ministry of Economic Affairs and Finance of the Community of Madrid of 28 January 2013 infringe the Framework Agreement on fixed-term work [...] and is it therefore inapplicable, because it provides that "at the end of the appointment period, termination of service and payment of all outstanding remuneration corresponding to the period of services provided must be carried out in all cases, including those in which the person concerned is subsequently to be reappointed",

1 See "Contents" for pending cases reported in previous issues of EELC

irrespective, therefore, of whether or not the specific, objective reasons justifying the appointment have come to an end, as required under Clause 3.1 of the Framework Agreement?

3. Is it in accordance with the intended purpose of the Framework Agreement on fixed-term work [...] for the third subparagraph of Article 9.3 of State Law 55/2003 to be interpreted to the effect that, if more than two appointments are made for the provision of the same services for a total period of 12 months or more in a period of two years, a permanent post must be created in the heathcare institution, so that the worker appointed on an occasional basis becomes appointed to cover that post on an interim basis?
4. Is the application to occasional regulated staff of the same severance pay provided for in the case of workers with occasional employment contracts, given that the two situations are substantially identical, in accordance with the intended purpose of the Framework agreement on fixed-term work [...] since it would not make sense for workers of the same type, providing services in the same entity (the Madrid Health Service), carrying out the same tasks and meeting the same temporary needs to be treated differently upon the termination of their employment, in the absence of any apparent reason that would prevent comparisons being made between fixed-term relationships in order to avoid discriminatory situations?

Case C 98/15 *(Maria Begoña Espades Recio - v - Servicio Público de Empleo Estatal)* **("Espades Recio")**, reference lodged by the Spanish Juzgado de lo Social No 33 de Barcelona on 27 February 2015 (PART-TIME WORK).

1. [...] Must Clause 4 of the Framework Agreement on part-time work [...] be interpreted as applying to a contributory unemployment benefit such as that provided for in Article 210 of the Spanish Ley General de Seguridad Social, funded exclusively by the contributions paid by the employee and the undertakings having employed her, and based on the periods of employment in respect of which contributions were paid in the six years preceding the legal situation of unemployment?
2. If the previous question is answered in the affirmative [...], must Clause 4 of the Framework Agreement be interpreted as precluding a national provision which, as is the case of Article 3(4) of Real Decreto 625/1985 of 2 April (Rules on unemployment benefits), to which rule 4 of paragraph 1 of the seventh additional provision of the Ley General de Seguridad Social refers — in the case of 'vertical' part-time work (work carried out only three days a week) — disregards, for the purposes of calculation of the duration of unemployment benefit, days not worked even though contributions were paid in respect of those days, with the resulting reduction in the duration of the benefit granted?
3. Must the prohibition of direct and indirect discrimination on grounds of sex laid down in Article 4 of Directive 79/7 (2) be interpreted as prohibiting or precluding a national provision which, as is the case of Article 3(4) of [Real Decreto 625/1985], in the case of 'vertical' part-time work (work carried out only three days a week), excludes days not worked from the calculation of days in respect of which contributions have been paid, with the resulting reduction in the duration of unemployment benefit?

Case C 118/15 *(Confederatión Sindical ELA, Juan Manuel Martínez Sánchez - v - Aquarbe S.A.U. Consorcio de Aguas de Busturialdea)* **("Martínez Sánchez")**, reference lodged by the Spanish Tribunal Superior de Justicia del País Vasco on 9 March 2015 (TRANSFER OF UNDERTAKINGS)

Does Article 1(1)(b) of Council Directive 2001/23/EC [...] in conjunction with Article 4(1) thereof, preclude an interpretation of the Spanish legislation intended to give effect to the Directive, 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 that 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-122/15 *(C - v - Veronsaajien oikeudenvalvontayksikko)* **("C")**, reference lodged by the Finnish Korkein hallinto – oikeus on 10 March 2015 (AGE DISCRIMINATION)

1. Are the provisions of Article 3(1)(c) of Directive 2000/78/EC to be interpreted as meaning that national legislation such as the provisions on supplementary tax on pension income of the first and fourth subparagraphs of Paragraph 124 of the Tuloverolaki (Law on income tax) fall within the scope of EU law, and the provision concerning the prohibition of discrimination on grounds of age laid down in Article 21(1) of the Charter of Fundamental Rights of the European Union should consequently be applied in the present case? Questions 2 and 3 are submitted only in the event that the ECJ's reply to Question 1 is that the matter falls within the scope of EU law.
2. If the first question is answered in the affirmative, are Article 2(1) and (2)(a) or (b) of Directive 2000/78/EC and the provisions of Article 21(1) of the Charter of Fundamental Rights of the European Union to be interpreted as precluding national legislation such as the provisions of the first and fourth subparagraphs of Paragraph 124 of the Tuloverolaki concerning the supplementary tax on pension income, under which the pension income received by a natural person, the receipt of which is based at least indirectly on the person's age, is burdened in certain cases with more income tax than would be charged on the equivalent amount of employment income?
3. If those provisions of Directive 2000/78/EC and the Charter of Fundamental Rights of the European Union preclude national legislation such as the supplementary tax on pension income, must it also be assessed in the present case whether Article 6(1) of that directive is to be interpreted as meaning that national legislation such as the supplementary tax on pension income may nevertheless be regarded in terms of its aim as objectively and reasonably justified within the meaning of that provision of the directive, in particular on the basis of a legitimate employment policy, labour market or vocational training objective, since the purpose expressed in the preparatory materials for the Tuloverolaki is, by means of the supplementary tax on pension income, to collect tax revenue from recipients of pension income who are capable of paying, to narrow the difference of tax rates between pension income and employment income, and to improve incentives for older persons to continue working?

Case C-137/15 *(María Pilar Plaza Bravo - v - Servicio Público de Empleo Estatal, Dirección Provencial de Alava)* **("Plaza Bravo")** reference lodged by the Spanish Tribunal Superior de Justicia del País Vasco on 20 March

2015 (SEX DISCRIMINATION).

Is it contrary to Article 4(1) of Council Directive 79/7/EEC [...] on the progressive implementation of the principle of equal treatment for men and women in matters of social security, in circumstances such as those of this case, for national legislation under which, in order for the amount of the benefit for total unemployment to be received by an employee following the loss of her only part-time employment to be calculated, a reduction coefficient for part-time work that corresponds to the percentage represented by the part-time working hours in relation to the hours completed by a comparable worker employed full-time is applied to the maximum amount [of unemployment benefit] generally laid down by law, regard being had to the fact that in that Member State the vast majority of part-time workers are women?

Case C-157/15 *(Samira Achbita, Centrum voor gelijkheid van kansen en voor racismebestrijding - v - G4S Secure Solutions NV)* **("Achbita")**, reference lodged by the Belgian Hof van Cassatie on 3 April 2015 (RELIGIOUS DISCRIMINATION).

Should Article 2(2)(a) of Council Directive 2000/78/EC [...] be interpreted as meaning that the prohibition on wearing, as a female Muslim, a headscarf at the workplace does not constitute direct discrimination where the employer's rule prohibits all employees from wearing outward signs of political, philosophical and religious beliefs at the workplace?

Case C-178/15 *(Alicja Sobczyszyn – v - Szkola Podstawowa w Rzeplinie)* **("Sobczyszyn"),** reference lodged by the Polisch Sąd Rejonowy we Wroclawiu on 20 April 2015 (PAID LEAVE)

Must Article 7 of Directive 2003/88/EC [.....] according to which Member States are to take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice, be interpreted as meaning that a teacher who has taken convalescence leave [.....] also obtains a right to the annual leave provided for in the general provisions of labour law in the year in which he exercised the right to convalescence leave?

Case C-184/15 *(Florentina Martínez Andrés - v - Servicio Vasco de Salud)* **("Martínez Andrés")**, reference lodged by the Spanish Tribunal Superior de Justicia de la Comunidad Autónoma del Pais Vasco on 23 April 2015 (FIXED-TERM EMPLOYMENT)

Must clause 5(1) of the Framework Agreement on fixed-term work [.....] be interpreted as precluding national legislation which, in a situation of abuse arising from the use of fixed-term employment contracts, does not acknowledge that staff regulated under administrative law who are engaged on an occasional basis ('personal estatutario temporal eventual', 'occasional regulated staff'), as opposed to staff who are in precisely the same position but who are employed by a public authority under contract, have a general right to remain in post on an indefinite but not permanent basis, in other words, to hold the temporary post until it is filled in the manner prescribed by law or eliminated in accordance with legally established procedures?

If the previous question is answered in the negative, must the principle of equivalence be interpreted as meaning that the national court may regard the situation of staff who are employed by a public authority under a fixed-term contract and that of occasional regulated staff as similar in cases where there has been misuse of fixed-term employment contracts, or, when assessing similarity, must the national court consider factors other than the fact that the employer is the same, the services provided are the same or similar and the contract of employment has a fixed term, such as the precise nature of the employee's relationship, whether contractual or regulated, or the power of the public authorities to organise the way they function, which justify treating the two situations differently?

Case C-188/15 *(Asma Bougnaoui and ADDH - v - Micropole Univers SA)* **("Bougnaoui")**, reference lodged by the French Cour de cassation on 24 April 2015 (RELIGIOUS DISCRIMINATION)

Must Article 4(1) of Council Directive 78/2000/EC [.....] be interpreted as meaning that the wish of a customer of an information technology consulting company no longer to have the information technology services of that company provided by an employee, a design engineer, wearing an Islamic headscarf, is a genuine and determining occupational requirement, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out?

Case C-197/15 *(Juan Carlos Castrejana López - v - Ayuntamiento de Vitoria)* **("Castrejana López"),** reference lodged by the SpanishTribunal Superior de Justicia de la Comunidad Autónoma del Pais Vasco on 29 April 2015 (FIXED -TERM EMPLOYMENT)

Must clause 5(1) of the Framework Agreement [.....] be interpreted as precluding national legislation which, in a situation of abuse arising from the use of fixed-term employment contracts, does not acknowledge that 'funcionarios interinos' (i.e. temporary civil servants regulated under administrative law), as opposed to staff who are in precisely the same position but who are employed by a public authority under contract, have a general right to remain in post on an indefinite but not permanent basis, in other words, to hold the temporary post until it is filled in the manner prescribed by law or eliminated in accordance with legally established procedures?

If the previous question is answered in the negative, must the principle of equivalence be interpreted as meaning that the national court may regard the situation of staff who are employed by a public authority under a fixed-term contract and that of temporary civil servants as similar in cases where there has been misuse of fixed-term employment contracts, or, when assessing similarity, must the national court consider factors other than the fact that the employer is the same, the services provided are the same or similar and the contract of employment has a fixed term, such as the precise nature of the employee's relationship, whether contractual or administrative, or the power of the public authorities to organise the way they function, which justify treating the two situations differently?

If the previous questions are answered in the negative, must the principle of effectiveness be interpreted in such a way that the issue of the appropriate penalty is to be heard and determined within the same proceedings as those in which the misuse of fixed-term employment contracts is established, through interlocutory proceedings in which the parties may request, claim and prove what they deem to be appropriate in that regard, or, on the contrary, is it permissible for the injured party to be referred, for that purpose, to new administrative or judicial proceedings, as the case may be?

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2012/47 (PL)	dismissal protection after disclosing discrimination
2013/21 (UK)	is post-employment victimisation unlawful?
2013/41 (CZ)	employee must prove discriminatory intent
2013/53 (UK)	dismissal following multiple complaints
2014/29 (SL)	withdrawing opera singer from roles infringes right to work and dignity
2014/45 (AT)	unproven accusation no reason for dismissal
2014/60 (FR)	double compensation for harassment
2015/4 (CR)	burden of proof re mobbing, dignity and discrimination

Unequal treatment other than on expressly prohibited grounds

2009/50 (FR)	"equal pay for equal work" doctrine applies to discretionary bonus
2010/8 (NL)	employer may pay union members (slightly) more
2010/10 (FR)	superior benefits for clerical staff require justification
2010/50 (HU)	superior benefits in head office allowed
2010/51 (FR)	superior benefits for workers in senior positions must be justifiable
2011/59 (SP)	not adjusting shift pattern discriminates family man
2012/19 (CZ)	inviting for job interview by email not discriminatory 2012/22 (UK) disadvantage for being married to a particular person: no marital status discrimination
2012/47 (PL)	equal pay for equal work
2013/27 (PL)	no pay discrimination where comparator's income from different source
2014/17 (IT)	law on union facilities unconstitutional
2014/19 (GE)	widow's pension conditioned on being married during husband's employment
2014/21 (UK)	caste = race
2014/23 (BE)	different termination rules for blue and white collars finally ended
2014/43 (PL)	Supreme Court sets rules on burden of proof in pay discrimination cases
2015/5 (FR)	Supreme Court reverses doctrine on cadre/non-cadre discrimination
2015/23 (DK)	employee may pay union members more
2015/27 (BE)	Constitutional Court validates unified status white/blue collars

Burden of proof

2015/4 (CR)	burden of proof re mobbing, dignity and discrimination

Sanction

2011/25 (GE)	how much compensation for lost income?
2011/38 (UK)	liability is joint and several
2011/39 (AT)	no damages for discriminatory dismissal
2011/42 (Article)	punitive damages
2012/48 (CZ)	Supreme Court introduces concept of constructive dismissal
2012/49 (UK)	UK protection against dismissal for political opinions inadequate
2013/54 (GE)	BAG accepts levelling-down
2015/3 (CZ)	discriminatory non-rehire: no reinstatement

MISCELLANEOUS

Employment status

2009/37 (FR)	participants in TV show deemed "employees"
2012/37 (UK)	"self-employed" lap dancer was employee
2015/11 (MA)	traineeship separate from employment

Concept of pay

2014/32 (LA)	severance compensation = pay

Information and consultation

2009/15 (HU)	confidentiality clause may not gag works council member entirely
2009/16 (FR)	Chairman foreign parent criminally liable for violating French works council's rights
2009/53 (PL)	law giving unions right to appoint works council unconstitutional
2010/18 (GR)	unions lose case on information/consultation re change of control over company
2010/19 (GE)	works council has limited rights re establishment of complaints committee
2010/38 (BE)	EWC member retains protection after losing membership of domestic works council

2010/52 (FI) Finnish company penalised for failure by Dutch parent to apply Finnish rules
2010/72 (FR) management may not close down plant for failure to consult with works council
2011/16 (FR) works council to be informed on foreign parent's merger plan
2011/33 (Article) reimbursement of experts' costs
2012/7 (GE) *lex loci labori* overrides German works council rules
2012/11 (GE) EWC cannot stop plant closure
2013/7 (CZ) not all employee representatives entitled to same employer-provided resources
2013/14 (FR) requirement that unions have sufficient employee support compatible with ECHR
2013/44 (SK) employee reps must know reason for individual dismissals
2014/13 (Article) new French works council legislation

Collective redundancy

2009/34 (IT) flawed consultation need not imperil collective redundancy
2010/15 (HU) consensual terminations count towards collective redundancy threshold
2010/20 (IR) first case on what constitutes "exceptional" collective redundancy
2010/39 (SP) how to define "establishment"
2010/68 (FI) selection of redundant workers may be at group level
2011/12 (GR) employee may rely on directive
2012/13 (PL) clarification of "closure of section"
2012/39 (PL) fixed-termers covered by collective redundancy rules
2012/42 (LU) Directive 98/59 trumps Luxembourg insolvency law
2013/33 (Article) New French legislation 1 July 2013
2013/46 (UK) English law on consultation inconsistent with EU directive
2015/36 (GR) de facto prohibition of collective dismissal EU-compatible?

Individual termination

2009/17 (CZ) foreign governing law clause with "at will" provision valid
2009/54 (PL) disloyalty valid ground for dismissal
2010/89 (PL) employee loses right to claim unfair dismissal by accepting compensation without protest
2011/17 (PL) probationary dismissal
2011/31(LU) when does time bar for claiming pregnancy protection start?
2011/32 (PL) employer may amend performance-related pay scheme
2011/60 (UK) dismissal for rejecting pay cut fair
2012/50 (BU) unlawful dismissal before residence permit expired
2012/53 (MT) refusal to take drug test just cause for dismissal
2014/43 (PL) Supreme Court rules on redundancy selection criteria
2014/63 (GE) redundant worker not entitled to job abroad
2014/65 (SK) inadequate consultation with employee reps can invalidate dismissal
2015/8 (Article) new Italian dismissal rules
2015/34 (LA) employee resigning for "good cause" bears burden of proof
2015/35 (IR) court orders retroactive reinstatement, 6 years back pay

Paid leave

2009/35 (UK) paid leave continues to accrue during sickness
2009/36 (GE) sick workers do not lose all rights to paid leave
2009/51 (LU) *Schultz-Hoff* overrides domestic law
2010/21 (NL) "rolled up" pay for casual and part-time staff allowed
2010/35 (NL) effect of *Schultz-Hoff* on domestic law
2010/55 (UK) Working Time Regulations to be construed in line with Pereda
2011/13 (SP) Supreme Court follows *Schultz-Hoff*
2011/43 (LU) paid leave lost if not taken on time
2011/61 (GE) forfeiture clause valid
2011/62 (DK) injury during holiday, right to replacement leave
2012/10 (LU) *Schultz-Hoff* with a twist
2012/12 (UK) Offshore workers must take leave during onshore breaks
2012/57 (AT) paid leave does not accrue during parental leave
2013/9 (GE) conditions for disapplying *Schultz-Hoff* to extra-statutory leave
2013/12 (NL) average bonus and pension contributions count towards leave's value
2013/58 (NL) State liable for inadequate transposition following Schultz-Hoff
2014/10 (NL) all-in wages for small part-timers not prohibited
2014/57 (UK) holiday pay to include overtime but not retrospectively
2014/66 (AT) does working time reduction affect accrued leave?
2015/30 (UK) worker forgoing holiday gets no payment in lieu
2015/37 (GE) garden leave not paid leave unless payment certain

Parental leave

2011/29 (DK) daughter's disorder not force majeure
2014/59 (FI) employee may take maternity leave during parental leave
2015/17 (LV) employee entitled to equivalent work following leave

Working time

2010/71 (FR) Working Time Directive has direct effect
2010/85 (CZ) worker in 24/24 plant capable of taking (unpaid) rest breaks
2010/87 (BE) "standby" time is not (paid) "work"
2011/28 (FR) no derogation from daily 11-hour rest period rule
2011/45 (CZ) no unilateral change of working times
2011/48 (BE) compensation of standby periods
2011/51 (FR) *forfait jours* validated under strict conditions
2013/29 (CZ) obligation to wear uniform during breaks: no working time
2013/31 (FR) burden of proof re daily breaks
2014/51 (CZ) Supreme Court opens door to working time reduction claims

Privacy

2009/18 (LU) unauthorised camera surveillance does not invalidate evidence
2009/40 (PL) private email sent from work cannot be used as evidence
2010/37 (PL) use of biometric data to monitor employees' presence disproportionate
2010/70 (IT) illegal monitoring of computer use invalidates evidence
2012/27 (PO) personal data in relation to union membership
2012/40 (CZ) valid dismissal despite monitoring computer use without warning
2013/11 (NL) employee not entitled to employer's internal correspondence
2013/13 (LU) Article 8 ECHR does not prevent accessing private emails
2013/57 (UK) covert surveillance to prove unlawful absence allowed
2015/14 (FR) dismissal based on illegally collected evidence: damages

Information on terms of employment

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

Fixed-term contracts

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

Minimum wage

2011/64 (IR) Irish minimum wage rules unconstitutional
2014/1 (NL) deduction of expenses not prohibited
2014/34 (Article) Germany introduces minimum wage
2015/16 (NL) employer may deduct expenses from posted workers' minimum wage

Temporary agency work

2011/50 (GE) temps not bound by collective agreement
2012/60 (GE) no hiring temps for permanent position
2014/8 (GE) permanent "temp" not employee of user undertaking
2014/24 (FI) may Member State restrict use of temps?
2015/33 (NL) court defines "employment agreement for temps" narrowly

Amendment of terms

2009/19 (FI) employer may amend terms unilaterally
2012/54 (GR) economic woes justify 20% salary cut
2015/12 (CY) financial difficulties cannot justify reduction of salary and benefits

Collective agreements

2010/17 (DK) Football Association's rules trump collective agreement
2014/25 (SK) employer liable for invalid collective agreement

Industrial action

2009/32 (GE) "flashmob" legitimate form of industrial action
2009/33 (SE) choice of law clause in collective agreement reached under threat of strike valid
2010/69 (NL) when is a strike so "purely political" that a court can outlaw it?
2014/62 (UK) union recognition scheme compatible with ECHR
2014/64 (GR) no order to stop boycotting employer's products

Free movement

2010/36 (IR) Member States need not open labour markets to Romanian workers
2013/47 (PL) when is employment "genuine" for social security purposes?
2014/26 (FR) Supreme Court rejects E101 posting certificates
2014/28 (AT) employer may not delegate duty to have wage payment evidence on hand
2014/31 (CZ) typical and atypical frontier workers
2015/32 (LI) A1 certificate only for "real" employee

Conflict of laws

2010/53 (IT) "secondary insolvency" can protect assets against foreign receiver
2011/63 (IT) American "employer" cannot be sued in Italy
2012/8 (BE) posted workers benefit from Belgian law
2012/9 (NL) to which country was contract more closely connected?
2012/28 (AT) choice of law clause in temp's contract unenforceable
2013/48 (FR) provisions of mandatory domestic law include international treaties
2014/9 (FR) allowing employee to work from home does not alter place of work
2014/30 (NO) where to sue foreign airline?
2015/13 (AT) implied choice of law

Human rights

2011/30 (IT) visiting Facebook at work no reason for termination
2011/44 (UK) dismissal for using social media
2012/55 (NL) Facebook posting not covered by right to free speech

2013/10 (UK) employee may voice opinion on gay marriage on Facebook
2014/12 (GE) leaving church cause for immediate termination

Restrictive covenants

2014/48 (UK) restrictive covenant to be construed literally
2015/29 (PT) employer cannot waive non-compete clause

Miscellaneous

2009/19 (FI) employer may amend terms unilaterally
2009/38 (SP) harassed worker cannot sue only employer, must also sue harassing colleague personally
2009/39 (LU) court defines "moral harassment"
2010/17 (DK) Football Association's rules trump collective agreement
2010/52 (NL) employer liable for bicycle accident
2010/54 (AT) seniority-based pay scheme must reward prior foreign service
2010/88 (HU) employer not fully liable for traffic fine caused by irresponsible employee
2011/9 (NL) collective fixing of self-employed fees violates anti-trust law
2011/11 (FI) no bonus denial for joining strike
2011/47 (PL) reduction of former secret service members' pensions
2011/49 (LA) forced absence from work in light of EU principles
2011/64 (IR) Irish minimum wage rules unconstitutional
2012/6 (FR) parent company liable as "co-employer"
2012/41 (DK) summary dismissal, burden of proof
2012/43 (UK) decision to dismiss not covered by fair trial principle
2012/52 (FR) shareholder to compensate employees for mismanagement
2012/54 (GR) economic woes justify 20% salary cut
2012/58 (CZ) employer cannot assign claim against employee
2012/59 (IR) illegal foreign employee denied protection
2013/30 (RO) before which court may union bring collective claim?
2013/32 (FR) employee not liable for insulting Facebook post
2013/45 (RO) court may replace disciplinary sanction with milder sanction
2013/49 (HU) employee may not undergo lie detection test
2014/27 (UK) covert recording admitted as evidence
2014/33 (UK) new tribunal fee regime
2014/46 (UK) employer may not increase disciplinary sanctions on appeal
2014/47 (FR) shareholder liable to former staff for causing receivership
2014/48 (UK) restrictive covenant to be construed literally
2014/49 (BU) employer may delegate authority to dismiss
2014/50 (LU) testing for drug use subject to strict conditions
2014/58 (NL) how extensive is legal expenses coverage?
2014/67 (Article) new Irish Whistleblowing law
2015/15 (PT) "secret" Facebook posting justified dismissal
2015/31 (RO) employer may not suspend pending criminal investigation
2015/38 (Article) new Irish Workplace Relations Act

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 (EECL 2015-1).

26 February 2015, C-515/13 *(Landin)*: ECJ accepts exclusion of retirees from transition award (EECL 2015-1).

4. Disability discrimination

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

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).

16 July 2015, C-83/14 *(CHEZ)*: ECJ clarifies concept of ethnic origin (EELC 2015-3)

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).

9 July 2015, C-177/14 *(Regojo Dans)*: Spanish *personal eventual* entitled to same remuneration as permanent workers (EELC 2015-3).

7. Temporary agency work

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

18 June 2015, C-586/13 *(Martin Meat)*: how to distinguish manpower supply from provision of services (EELC 2015-3)

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).

14 April 2015, C-527/13 *(Cachaldora Fernández)*: gap in contributions to invalidity scheme following part-time employment may lead to lower benefits than following full-time employment (EELC 2015-3).

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).

9 July 2015, C-87/14 *(Commission –v- Ireland)*: Ireland in compliance re junior doctors (EELC 2015-3).

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).

18 June 2015, C-9/14 *(Kieback)*: no nationality discrimination by taxing non-resident worker differently (EELC 2015-3).

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)

21 May 2015, C-65/14 (*Rosselle*): time as non-active public servant counts for determining contribution period (EELC 2015-3).

16 July 2015, C-222/14 *(Maïstrellis)*: male civil servant entitled to parental leave, even if wife does not work (EELC 2015-3).

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).

13 April 2015, C 80/14 *(USDAW)*: UK law requiring info and consultation where 20+ workers from one establishment (rather than from across all establishments) are to be dismissed (EELC 2015-3).

13 May 2015, C-182/13 *(Lyttle)*: same as USDAW (EELC 2015-3).

13 May 2015, C-392/13 *(Rabal Cañas)*: Directive precludes Spanish law making undertaking rather than establishments sole reference unit; non-renewal fixed-term does not count for establishing collective redundancy (EELC 2015-3).

9 July 2015, C-229/14 *(Balkaya)*: directors and trainees are "workers" within meaning of directive (EELC 2015-3).

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.

List of national correspondents

Country	Name	Website
Austria	Andreas Tinhofer, MOSATI Rechtsanwälte	www.mosati.at
Belgium	Chris van Olmen, Van Olem & Wynant	www.vow.be
Bulgaria	Kalina Tchakarova, Djingov, Gouginski, Kyutchukov & Velichkov	www.dgkv.com
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Luxembourg	Michel Molitor, Molitor	www.molitorlegal.lu
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Northern Ireland	ELG	
Norway	Norsk Arbeidsrettslig Forening	www.arbeidsrettsligforening.no
Poland	Stowarzyszenie Prawa Pracy	www.spponline.pl
Portugal	Associação Portuguesa Direito do Trabalho (APODIT)	www.apodit.com
Romania	none	
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