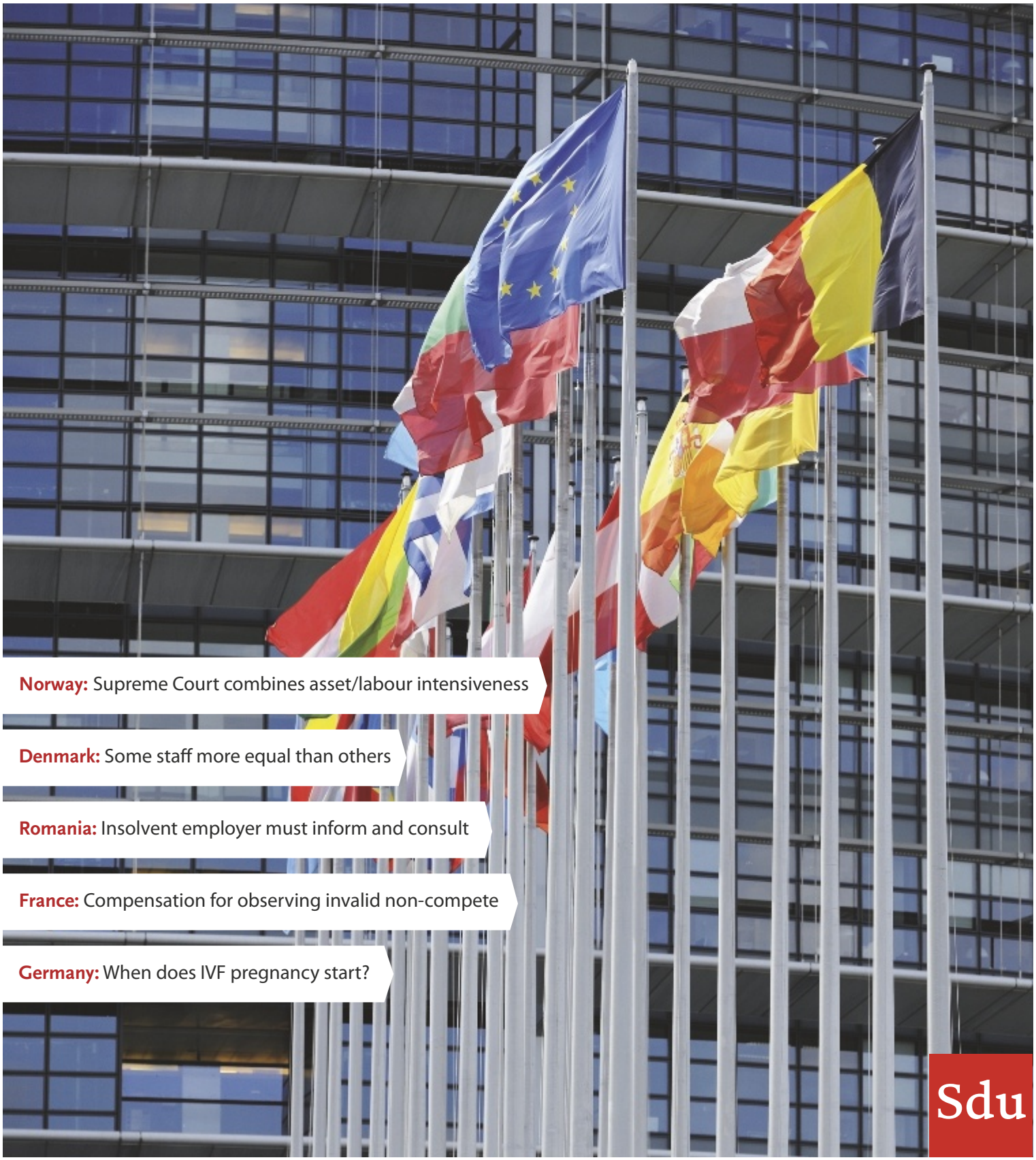
EELA
European Employment Lawyers Association

EELA JOURNAL

European Employment Law Cases

Edition 2015 | 4



Norway: Supreme Court combines asset/labour intensiveness

Denmark: Some staff more equal than others

Romania: Insolvent employer must inform and consult

France: Compensation for observing invalid non-compete

Germany: When does IVF pregnancy start?

Sdu

EELC

European Employment Law Cases (EELC) is a legal journal that is published four times per year. 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. Readers are invited to submit case reports, preferably through the national correspondent in their 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.

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

EELC
European Employment Law Cases

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

ISSN
1877-9107

Subscription rates: one year, including access to website: € 240,-*

* for Dutch subscribers 6% VAT will be added

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Nederlandse uitgeversverbond
Groep uitgevers voor vak en wetenschap

INTRODUCTION

Note: This is the last issue of EELC as the official journal of EELA. As of 2016, EELC will again be an independent legal journal, to which any person can subscribe. The cost will be € 100 per year for four copies per year. Subscriptions can be ordered from the new publishers, Eleven International Publishing at s.hoedt@budh.nl.

This issue contains 17 case reports and one article. The article summarises, very briefly, some major reforms that French law in the field of employment is undergoing. The process of consulting with worker representatives has been streamlined and fixed-term contracts can now be extended twice, to name but some of the quite radical changes.

The Norwegian Supreme Court has again (see EELC 2010/40) taken a holistic approach in a transfer of undertakings case. The case concerned the insourcing of an activity that in itself was labour-intensive (looking after the residents of a building) but involved the use of the building, which was specifically designed for the purpose. The court, avoiding a sharp distinction between asset- and labour-intensiveness, weighed a combination of factors and found there to have been a transfer of undertaking. The Hungarian Supreme, judging in a case where the operation of a petrol station had changes hands, took a more classical approach, holding that the activity was asset-intensive and that there had therefore been a transfer of undertaking.

The UK and Denmark continue to deliver food for thought on the topic of discrimination. May an employer treat equally employees who are in different situations? This philosophically tinted question came up in a Danish case reported in this issue. The employer dismissed all its employees at six months' notice, both those who had been employed for many years and were therefore eligible to a long notice period and recently hired employees who could have been dismissed at short notice. Was this unfair towards the senior staff? No, said the Danish Supreme Court. Two UK case highlight the human rights issues associated with Muslim dress requirements and religious objections against homosexuality cloaked as free speech. A Croatian judgment denied protection to a job applicant who was allegedly discriminated on the grounds of her sex.

A Romanian and a UK judgment illustrate how seriously the obligation to inform and consult the workforce must be taken.

Non-compete and "customer protection" clauses are the subject of judgments by the highest courts in France and Luxembourg. Suppose a former employee has abided by his contract which prevented him from accepting employment with another company. And suppose he later finds out that the restrictive covenant in his contract was invalid. Can he claim compensation form his former employer? The *Cour de cassation* answered in the affirmative. A court in Luxembourg had to deal with a non-compete clause with cross-border implications.

When does a woman who is undergoing in vitro fertilisation become pregnant within the meaning of the law that affords pregnant employees dismissal protection? The German *Bundesarbeitsgericht* settled for the date of the embryo transfer.

I hope that at least one of the judgments reported in this issue of EELC will inspire each reader to look across his or her national border to collect information that is useful for his or her practice area.

The Hague, December 2015,

Peter Vas Nunes
General editor

TRANSFER OF UNDERTAKINGS

DISCRIMINATION

MISCELLANEOUS

2015/39

Care and support for residents of a specialised housing complex is asset-intensive (NO)

CONTRIBUTORS ARE FAGERHAUG and EMILY SANDNES*

Summary
The City of Oslo terminated a service agreement with a private provider of monitoring and caring services to residents of a municipal social housing facility, and started to provide the services themselves.

Five of the employees who were dismissed due to the termination, instituted proceedings against the City of Oslo claiming the arrangement constitute a transfer of undertaking pursuant to the Norwegian Working Environment Act (WEA) chapter 16 (which implements Directive 2001/23/EC in Norway).
The main questions were whether the monitoring services constituted an economic entity before the transfer, and if so, if the entity had retained its identity after the transfer to the City of Oslo. The Norwegian Supreme Court concluded that the arrangement did constitute a transfer of the undertaking.

Facts
In 2005, the City of Oslo initiated a project called *"Gode Hus for Skjeve Liv"*. The project consisted of two steps: (1) to develop a model for the establishment of permanent housing in Oslo for those entitled to housing offers under the Norwegian Social Services Act, and (2) to operate the housing.

The Church City Mission in Oslo (CCM) contributed to the project with academic input based on their extensive experience with people with dual diagnosis issues. CCM was selected as a supplier of the care and support services at a purpose-built housing complex owned by the City of Oslo, and an agreement was concluded between the City of Oslo and CCM, effective from 1 February 2006 until 1 February 2009. Subsequent to a public tender competition in 2009, the agreement was renewed from 1 May 2009 to 1 May 2013. All residents of the housing complex had a history of heavy drug abuse and mental health problems. The services performed by CCM focused mainly on care and support services to help the residents with their everyday life and ensure they received the healthcare and treatment they needed.

In June 2012, the relevant district committee in Oslo decided that the district itself would operate the housing project after expiry of the agreement with CCM. The municipality initially assumed that the takeover of the care and support services was a transfer of the undertaking pursuant to the WEA. In a letter of 12 November 2012 to CCM, it emerged, however, that the municipality had changed its mind following a legal opinion, which stated that the takeover would not be a transfer because CCM was not involved in the lease of the housing complex in any way, nor did they assist the residents in relation to this, and the contractual relationship between the municipality and CCM was therefore solely regarded as the provision of a workforce.

The services were in-sourced to the City of Oslo on 1 May 2013. Subsequent to this, CCM terminated the employment of the employees who had worked at the housing complex. The municipality employed two of CCM's employees to continue working at the housing complex, which constituted about a fifth of CCM's employees at the complex.

Judgment
On 4 June 2013, five of the employees dismissed due to the termination, took out proceedings against the City of Oslo, claiming that their employment with CCM had transferred to the City of Oslo pursuant to the WEA. Further, they also claimed compensation, the level to be determined by the court. In defence, the City of Oslo argued that the transfer of the care and support services did not constitute the transfer of an autonomous entity. The only thing to have transferred from CCM was the operational tasks conducted for the municipality under the expired contract.

On 19 December 2013, the Oslo District Court ruled in favour of the City of Oslo, stating that the transfer did not constitute the transfer of an undertaking.

The plaintiffs appealed the district court's decision to the Borgarting Court of Appeal. The CCM intervened in support of the plaintiffs. The Court of Appeal reached a different conclusion than the district court, as it concluded that the municipal takeover was a transfer pursuant to the WEA, and that the employees had transferred to the City of Oslo. They also ordered the City of Oslo to pay compensation to the plaintiffs.

The City of Oslo appealed the decision to the Supreme Court.

The two main issues considered by the Supreme Court were (i) whether the care and support services constituted an independent economic entity before the transfer, and if so, (ii) whether the entity had retained its identity after the transfer to the City of Oslo.

The Supreme Court stated that in order for a transfer to constitute a transfer of an undertaking, it must involve an independent economic entity and - as the Supreme Court had stated in a previous judgment – this must constitute an operational entity capable of delivering the services that characterise the business activity.[1] CCM's operations at the housing complex were organised independently and physically separate from other activities. The Supreme Court did not place much weight on the City of Oslo's argument that all that was provided at the housing complex was care and support for CCM's other activities, as the Court's view was that the operations did form an independent economic entity.

The Supreme Court then went on to discuss the requirement that the entity must retain its identity after the transfer. The City of Oslo argued that CCM's services were characterized by its employees, and as only 20% of CCMs employees continued working in the housing complex after the transfer, this meant that the entity could not have retained its identity after the transfer.

In this regard, the Court referred to several cases of the ECJ, C-13/95 *(Süzen)*, C-127/96 *(Hernández Vidal)*, C-51/00 *(Temco)*, C-173/96 and C-247/96 *(Hidalgo)*, implying that in certain service providing industries, where the workforce is the most substantial part of the activity in the business, a significant portion of the workforce must be transferred for the identity to be preserved.[2] In the Supreme Court's view, the

1 cf. Supreme Court of Norway´s decision Rt.2001.1755 section 53.
2 cf. Case of Clece - v - Spain, case number C-463/09 section 36.

workforce at the complex undoubtedly provided an essential element of the service that CCM performed under the contract with the City of Oslo. However, the Supreme Court concluded that the workforce was not the dominant factor in the business, as the use of a customised building was a significant element of the service in itself.

The Court stated that as the workforce was not the dominant factor, the transfer of only 20% of the employees did not preclude the entity from preserving its identity. Further, the court referred to C-340/01 *(Abler/Sodexho)* where the continuous use of a facility's premises and equipment was the decisive factor for the identity to be preserved. However, the court emphasised that it should be careful to make any direct links, as the *Abler/Sodexho* case concerned a production facility/ business. In this case, as CCM only provided services, the facility was an important factor in the assessment, but should not be regarded as the only decisive one.

Project *Gode Hus for Skjeve Liv* was, from the beginning, dependent on the building it served, which was suitable as a residence for people with severe behavioural problems and included safety measures and reinforcements. The property was important for preserving the entity´s identity before and after the transfer, and constituted a major factor in the Supreme Court's assessment of whether the municipal takeover of the services constituted a transfer of the undertaking, as the services were considered closely linked to the building.

In the Supreme Court's view, it was immaterial whether the service provider owned the assets or not, as long as they were placed at the provider's disposal.[3] As long as the office and public areas were made available for CCM for the performance of their services, the Supreme Court did not consider it essential that the City of Oslo owned the premises.

The Supreme Court also took into consideration the fact that the service was based on knowledge and experience gathered over time through the efforts of CCM's employees, during two contract periods. The City of Oslo hired two previous employees of CCM who had extensive experience in CCM at the complex. By hiring those two, the municipality gained access to the experience and insight that characterised CCM's care and support of residents. Further, the Supreme Court found that the care and support services the City of Oslo offered were essentially the same as those offered previously, with only minor adjustments.
The Supreme Court concluded that the transfer of the services should be treated as a transfer of undertaking in accordance with the WEA, and dismissed the appeal.

Commentary
The decision is interesting with regard to the boundaries as to what constitutes a transfer of an undertaking pursuant to the WEA and the directive 2001/23/EC in the service providing sector.

The Supreme Court concludes that a service providing business which is partly identified by its employees, may retain its identity even if only a limited part of the workforce transfers, as long as the workforce is not considered the only dominant feature of the business. However, it is debatable whether the outcome of the case would have been the same if the City had employed even fewer of CCM's employees, or if none had been taken on.

Further, the court concludes that the ownership of business assets is of limited importance, as long as the assets are at the provider's disposal.

The Supreme Court concludes that the specially customised building was an essential element in the identity of the business. The building was significant as an infrastructure to enable provision of the services. The services were specifically connected to the housing complex and they continued to be provided in the same building after the transfer.

However, what constitutes a transfer is always fact-specific and so this particular case may be of limited application.

Comments from other jurisdictions
Austria (Daniela Krömer): Even though cases of transfers of undertakings are fact-specific, this one is nonetheless very interesting, if unsurprising. First, it highlights the importance of a thorough assessment of the (possibly) transferred business. Second, it seems that ownership of the business assets is of limited importance, but what matters is the identity of the business. An Austrian case comes to mind in which the legal basis for the transfer was a cooperation agreement between two companies. The Austrian Supreme Court ruled that it did not matter that the entity - 'organised grouping of resources' - was based for a while on this cooperation agreement, as long as it continued to exist (OGH, 9 ObA 5/00a).

Germany (Dagmar Hellenkemper): In a similar way to the Norwegian decision, the German Courts differentiate between businesses where the economic identity consists mainly of machinery, IP and movable or immovable property and those where the economic identity consists mainly of the 'human capital' of the employees. The latter type are deemed to be 'businesses with few assets' *(betriebsmittelarm)*. There is no guidance on how many employees have to be taken over for the Courts to assume a transfer of a business with few assets. In two separate decisions from 1998 relating to cleaning services, the BAG established that the employment of 2/3 of the staff was not sufficient, while the employment of 85% of the staff constituted a transfer. If there are considerable assets forming the economic identity – in this case, the special housing building – the Courts usually decide on a case by case basis, depending on the know-how and special qualifications of the employees retained by the transferee. The transfer of expertise can represent an additional feature of the transfer of an economic entity. This could include intangible assets such as customer files, business practices and the acquisition of 'know- how providers' with knowledge specific to the business. It is hence likely that the employment of 20% of the staff would be sufficient to establish a transfer of the business.

The Netherlands (Peter Vas Nunes): Some leading Dutch scholars hold the view that in cases where an activity is outsourced, insourced or transferred from one contractor to another, the ECJ focuses mainly, if not exclusively, on the rather strict distinction between what is 'asset-intensive' and 'labour intensive', whereas in 'normal' TUPE situations the ECJ applies all of the *Spijkers* criteria. What makes this Norwegian case interesting is that the Supreme Court seems to not make a sharp distinction between asset and labour intensity, rather attaching importance to the combination of (i) the fact that the service provider made use of the building (in particular, an office within the building) and (ii) the fact that the City took over 20% of the workforce. Would the outcome of the case have been different had the City not offered employment to any of CCM's employees? Or if CCM had not had the use of an office?

3 cf. Case of Abler - v - Sodexho, case number C-340/01 section 41.

This judgment exposes a difficulty that Abler creates. I can imagine (with some difficulty) that the use of a hospital's kitchen equipment makes an activity asset-intensive. Although cleaners also, of necessity, 'use' the building they clean, their activity is not asset-intensive. Where is the borderline? Monitoring and caring for residents seems to fall somewhere in between providing meals *(Abler)* and home-help service *(Hidalgo)* or cleaning *(Hernandez Vidal, Clece)*.

Subject: Transfer of undertakings
Parties: Lucy Catherine Swann, Erik Andre Sætrang Holm, Harald Brustad, Hege Garshol Lofthus and Sondre Solheim – v – the City of Oslo
Court: *Oslo tingrett* (District Court of Oslo), *Borgarting lagmannsrett* (Borgarting Court of Appeal) and *Norges Høyesterett* (the Supreme Court of Norway)
Date: 17 June 2015
Case number: TOSLO-2013-97283, LB-2014-29914, HR-2015-1276-A
Publication: http://www.domstol.no/globalassets/upload/hret/avgjorelser/2015/avdeling-avgjorelser-juni-2015/sak-2014-2260-anonymsiert.pdf

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2015/40

The nature of a transferred activity, including its asset or labour intensiveness, determines the existence of a transfer of undertaking (HU)

CONTRIBUTOR GABRIELLA ORMAI, PETER BAN*

Summary
In the case of an asset-intensive business, a transfer of undertaking may occur if the tangible assets are transferred, even though the employees are not taken over by the transferee.

Facts
The defendant, a private entrepreneur (individual), operated a petrol station based on an operation management agreement with the Hungarian-based oil company, MOL Nyrt (MOL). The petrol station with all of its assets and equipment, was owned by MOL. In December 2011, the defendant concluded a fixed-term employment relationship with the five employees who worked at the petrol station.

In March, 2012 MOL terminated the operation management agreement with the defendant, as a result of which the operation of the petrol station reverted to MOL on 17 April 2012. On that same day, 17 April 2012, MOL entered into a new operation management agreement with a third party regarding the continued operation of the petrol station.

On 20 April 2012, the defendant terminated the contracts of his five employees with immediate effect. He based this decision on a provision in the Labour Code in force at that time, according to which all employment contracts terminate automatically upon the dissolution of a company.

Three of the defendant's employees concluded a new contract of employment with the new operator of the petrol station. They started working there based on new employment contracts which did not recognise their service with the defendant. These three employees and the two who were not hired by the new operator submitted a claim against the defendant. They argued that the termination of their employment relationship by the defendant was unfair and claimed compensation for damages. The defendant argued that, since there was a transfer of undertaking based on the Labour Code, the employment relationships of the five claimants had transferred automatically to the new operator of the petrol station on 17 April 2012, so that the termination notice on 20 April 2012 was ineffective, given that the defendant was not the claimants' employer at the time.

The first instance court accepted the claim submitted by the claimants. According to the reasoning of the first instance court, there was no transfer of undertaking based on the following:

- there was no direct agreement regarding the transfer between the defendant and the new operator company. The defendant could not, and therefore did not, transfer any of the assets to the new operator company, since the assets were owned by MOL.
- MOL, which had a contract with the new operator, was not the employer of the claimants.
- The defendant had no intention to transfer the claimants and the new operator company concluded new contracts of employment with some of the claimants.

The court found that the termination with immediate effect was unfair. The said provision in the Labour Code regarding automatic termination upon dissolution of the employer could not be applied where the employer was an individual, not a company.

The defendant filed an appeal. The second instance court confirmed the ruling of the first instance court. It noted that in the present case the law in respect of transfers of undertakings cannot be taken into consideration since it was not a reason provided in the termination notice and therefore the employer could rely on this in the litigation as a defence.

The defendant submitted a claim for extraordinary review to the Hungarian Supreme Court (Curia). He asked the court to annul the judgment of the second instance court and to reject the claims.

Judgment
The defendant argued that there was a transfer of undertaking; therefore, the new operator company was under a legal obligation to continue the employment of the claimants. If employers failed to comply with the rules on transfer of undertakings, this does not affect the transfer of the employment relationships, as this occurs by operation of law.

The defendant relied on the authority of *Carlito Abler and Others – v - Sodexho MM Catering GmbH (2003) C-340/01*, in which the ECJ stated that a failure to transfer staff does not mean a transfer of an undertaking has not taken place, since the issue is whether the business retains its identity. The defendant also relied on the authority of *Francisca Sánchez Hidalgo and Others and Asociación de Servicios Aser*

and Sociedad Cooperativa Minerva, (1998) C-173/96, and the joined case of *Albert Merckx and Patrick Neuhuys – v - Ford Motors Company Belgium SA, (1996) joined cases C-171/94 and C-172/94* where the ECJ found that the contractual relationship, which is a condition of the transfer, does not necessarily need to be between the transferor and the transferee: it is sufficient if there is an indirect contractual link via a third party. The primary question is whether the business (in the present case the business unit of the petrol station) retains its identity.

In the case at hand, the petrol station had transferred to the new operator company in order to continue operating as a petrol station using the same assets and commercial property, therefore, the business retained its identity. On the day of the transfer of the petrol station (17 April 2012), the employment of the employees working there transferred to the new operator company, as the transferee. Since the transfer took place prior to the delivery of the termination notices by the defendant (20 April 2012), the notices were invalid - the employment had actually terminated earlier.

The Curia found that the request for extraordinary review was justified. In its decision it referred to the court practice of the ECJ and the rules contained in Acquired Rights Directive 2001/23/EC of 12 March 2001, emphasising that the transfer of an undertaking takes place if the business transferred retains its identity following the transfer. The Curia referred to the "Spijkers criteria" of the ECJ in *Spijkers – v - Gebroeders Benedik Abattoir CV (1986) C-24/85*. These provide that, in order to understand whether an economic entity has retained its identity the following must be considered: (i) the transfer of movable and immovable assets; (ii) the transfer of immaterial assets; (iii) the transfer of the majority of the staff; (iv) the similarity of the activities carried out by the economic entity before and after the transfer; (v) the (possible) continuation of the activity carried out before the transfer; (vi) the transfer of clients. The criteria must be considered together, but the presence or absence of one condition alone is not necessarily decisive.

The Curia also emphasised that the lack of a direct contractual relationship between the transferor and the transferee does not exclude a transfer, as ECJ case law does not indicate that is this a requirement.

In the present case the operation of the petrol station owned by MOL was continued by the new operating company. In order to understand whether, as a business, it retained its identity, the Curia referred to the practice of the ECJ, which is to consider the nature of the activity and whether the business is asset or labour–intensive. If the business does not require significant assets (facilities, machinery), it retains its identity by transferring the majority of the employees. On the other hand, if the business is mostly asset-intensive, it retains its identity by transferring the majority of the assets *(Oy Liikenne Ab - v - Pekka Liskojärvi and Pentti Juntunen (2001) C-172/99)*.

In the present case, the operation of the petrol station was transferred together with the right to use the assets, facilities and machinery. Since this right had transferred from the transferor to the new operating company by virtue of the contractual framework with MOL, there was a transfer of the undertaking on 17 April 2012, even though the staff did not transfer on that date. As a consequence, the employment relationships of the claimants automatically transferred to the new operator on the date of the transfer. At the time the termination notices of the defendant were received (after 20 April 2012), it was no longer the employer. As a result, the termination notices had no legal effect.

Commentary

Cases on transfers of undertakings are still rare in Hungarian employment tribunals. This is illustrated by the fact that although the defendant referred to the practice of the ECJ throughout the process, only the Curia considered it, applied the correct test and used arguments based on the nature of the business. The present decision is significant in explaining how the Hungarian rules on transfers of undertakings should be interpreted and confirming that the ECJ case law must be taken into account. We expect more court cases in this field due to increasing awareness of the statutory consequences of transfers of undertakings by employees.

Comments from other jurisdictions

Germany (Dagmar Hellenkemper): It is easy to determine what the Federal Labour Court in Germany would have decided in this case: in EELC 2015-1, we reported a case with striking similarities, about the economic identity of a petrol station. While the Court in our case decided that the transfer of the business required the transfer of assets such as tanks, pumps and roofing, it also explained obiter, that the mere replacement of the leaseholder would constitute a transfer of the business. This seems to be the case at hand as well. While the oil company owned all the immovable and movable assets, the defendant in this case merely operated the gas station. The economic identity (which, according to the BAG consisted of the petrol station equipment with underground tanks, pumps, a special carriageway, roofing, a pole indicating petrol prizes and a shop), remained the same. It is very likely that the German Courts would have come to the same conclusion as the Hungarian Curia.

Subject: Transfer of undertakings
Parties: not known
Court: Curia (Hungarian Supreme Court)
Date: 3 December 2014
Case number: Mfv.I.10.156/2014.
Internet-publication: www.lb.hu-→Sajtó-→Kollégiumok hírei-→Kollégium-→Közigazgatási-→ Szöveg-→type "jogutódlás"-→Akalmaz-→select "2014.december 5".

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2015/41

No discrimination where Muslim candidate was told not to wear a jilbab that could pose a risk to health and safety

CONTRIBUTOR CLARE BATTERSBY*

Summary

In a case involving a claim for indirect discrimination on grounds of religion or belief, the Employment Appeal Tribunal (EAT) agreed that an employer's uniform policy, which required that no garment worn by an employee should present a tripping hazard, did not indirectly discriminate against Muslim women who wore jilbabs (long, flowing garments which cover the body).

Background Law

Section 19 of the Equality Act 2010 (EqA 2010) prohibits indirect discrimination on grounds of religion or belief. Such discrimination takes place where:

- A applies to B a provision, criterion or practice (commonly known as a 'PCP');
- A applies, or would apply, that same PCP to people who do not have the same religion or belief as B;
- the PCP puts or would put someone of B's religion or belief at a particular disadvantage when compared with other people; and
- the PCP puts or would put B at that disadvantage.

Religion or belief means also a lack of religion or belief – so it is equally unlawful to discriminate against someone because they do not share a particular religion or set of beliefs.

If indirect discrimination has taken place, an employer can still defend a claim by showing that such discrimination is objectively justified, i.e. that it is a proportionate means of achieving a legitimate aim. The employer would have to show that their objective corresponds to a real need on the part of the employer, is appropriate with a view to achieving the objective in question, and is necessary to that end.

Facts

Ms Begum is an observant Sunni Muslim whose religion requires that she dress modestly: her manifestation of this is to wear a jilbab. In 2011, she applied for a modern apprenticeship as a nursery assistant with a Montessori nursery. At the time of Ms Begum's application, the nursery had 16 employees, of whom 4 were Muslim women who wore hijabs (head coverings) and one wore a full-length jilbab. The nursery also allowed Muslims time off for Ramadan and facilitated prayer times.

On 18 October 2011, Ms Begum attended a half-day trial at the nursery wearing a jilbab. Following the successful trial, Ms Begum was invited for interview and, ultimately, was offered the apprenticeship. She was again wearing a jilbab. At the interview, Mrs Jalah, the manager of the nursery, and Ms Begum discussed the nursery's policies and procedures, including uniform. Ms Begum was informed that she needed to wear non-slip footwear. Whilst discussing this, Mrs Jalah looked at Ms Begum's shoes and realised she could not see them because they were covered by her jilbab. (Ms Begum was sitting down and so her jilbab was lower than it would have been if she had been standing up.) Mrs Jaleh got the impression that the jilbab was longer than ankle length and, as a result, she considered that Ms Begum's jilbab could be a health and safety risk to the nursery and asked Ms Begum if she might wear a shorter jilbab to work. Mrs Jaleh believed that it was imperative that clothes did not present a tripping hazard for the wearer, the children or for other staff. They had a discussion about the fact that other Muslim women at the nursery wore shorter jilbabs at work and then changed into longer ones after work. Ms Begum said that she would need to discuss with her family the possibility of wearing a shorter jilbab and would revert to Mrs Jalah. She did not seem insulted or offended by the conversation.

Ms Begum never took up the job at the nursery. Instead, she brought a claim in the Employment Tribunal (ET) that she had been subjected to a detriment on grounds of religion or belief. She claimed that Mrs Jalah had told her that she could not work at the nursery if she were dressed as she was at the interview. She also claimed that the uniform policy discriminated indirectly against Muslims and could not be objectively justified.

ET decision

The ET dismissed the claim on the facts, finding that Ms Begum had not at any point been told that she could not wear a jilbab while working at the nursery. It held that asking Ms Begum whether she was willing to wear a jilbab that did not present a tripping hazard was not a detriment. Ms Begum claimed that the PCP was a refusal to allow staff to wear full-length clothing in the form of a jilbab, that this applied to her and disadvantaged her and other Muslim women and that it was then up to the nursery to prove that this could be objectively justified. The ET held that the nursery's PCP was that all members of staff must dress in ways that did not endanger the health and safety of themselves, their colleagues or of the children in their care: no garment should present a trip hazard. That PCP applied equally to staff of all religions and did not put Muslim women at a disadvantage. The tribunal referred in its decision to sections of the Qu'aran and the Hadith which had been quoted in the hearing and stipulated that Muslim women should wear garments that covered their bodies from neck to ankle. The tribunal considered that Muslim women could wear a full length jilbab that was not a trip hazard (because it did not cover the shoes) and still meet these criteria.

The ET also held that the PCP did not place Ms Begum at a disadvantage. Crucially, it held that Ms Begum was never told that she could not wear a full-length jilbab to work. Merely raising the question as to whether Ms Begum could wear a shorter jilbab to work was not and could not be a detriment. Ms Begum chose not to proceed with her application for a placement at the nursery: she was not prevented from working there.

If the ET was wrong, and the application of the PCP meant that Ms Begum was disadvantaged (by not being able to take up the position of trainee nursery assistant), then any indirect discrimination was objectively justified as a proportionate means of achieving the legitimate aim of ensuring and protecting the health and safety of staff and children. The ET was satisfied that Mrs Jalah had sufficient experience to be able to decide whether a garment constituted a potential tripping hazard. There was a real need for the nursery to safeguard the health and safety of the staff and children.

Grounds of Appeal

Ms Begum appealed to the EAT on five grounds:

- Ground 1: That the ET had made a perverse finding of fact about the perceived or actual length of the jilbab Ms Begum wore to her interview;

- Ground 1A: That the ET failed to provide adequate reasons for its factual finding on the perceived (and/or actual) length of the jilbab Ms Begum wore to interview;
- Ground 2: That the ET failed to make a critical finding of fact as to the length of Ms Begum's jilbab (whether perceived or actual) whilst she was standing up and/or moving around: the length of the jilbab was relevant to the PCP;
- Ground 3: That the ET failed properly to identify the PCP and/or the indirectly discriminatory nature/effect of that PCP;
- Ground 4: That the ET misapplied the law when dealing with the question of detriment/disadvantage and/or failed to take into account relevant evidence: just because Ms Begum chose not to take up the post did not mean she had suffered no disadvantage; and
- Ground 5: That the ET failed properly to consider the question of justification and/or give adequate reasons for its conclusion on that issue, namely that there was no proper assessment of the nature or severity of the risk to health and safety.

The EAT Judgment

The appeal was dismissed.

As a general principle, the wearing of a jilbab is a manifestation of Ms Begum's religious belief. Therefore, a PCP that might prevent the wearing of a jilbab can engage the protection of section 19 of the EqA 2010, unless the employer can show that the PCP is objectively justified. It was for the ET to determine whether or not the jilbab Ms Begum wore constituted a risk to health and safety and whether, if Ms Begum was prevented from wearing her jilbab, the nursery's aim of protecting health and safety was objectively justified.

This case clearly turned on its facts. In relation to grounds 1 and 2, the EAT found that it was likely that there was some confusion about the exact length of the jilbab given that Ms Begum was sitting down. However, it was impossible for the EAT to say that the finding of the ET was perverse. The ET had expressly rejected Ms Begum's submission that she was required to wear a knee-length jilbab. It is for the ET to decide which evidence to accept and which to reject; in this case, the ET was entitled to prefer Mrs Jalah's evidence to Ms Begum's. The perversity test is a very high threshold that Ms Begum had not managed to overcome. It was not necessary for the ET to determine the precise length of the jilbab that Ms Begum wore to interview. The ET had made findings that Ms Begum was never instructed not to wear any particular jilbab – she could wear a full length jilbab if she wished, provided it was not a tripping hazard. The EAT held that the ET's findings were not perverse – the ET had given reasons for its findings and had evidence to justify them. The EAT could not reverse findings the ET had made.

As for ground 3, the ET was entitled to have regard to the evidence of Mrs Jalah, an experienced nursery teacher and manager, as to the justification for the PCP that prevented the wearing of garments that could constitute a tripping hazard. Mrs Jalah took her health and safety obligations very seriously. The EAT was of the opinion that the PCP formulated by the ET was patently not wrong or unreasonable. Moreover, a PCP can be informal and there is no requirement to define it carefully or in great detail.

The law required that a broad meaning should be given to "detriment": was the treatment of such a kind that a reasonable worker would or might take the view that, in all the circumstances, it was to his or her detriment? However, the EAT found that ground 4 could not be relevant given that the PCP had been found not to have been discriminatory. If there is no discriminatory PCP, Ms Begum cannot have suffered a detriment or been placed at a disadvantage.

The ET's reasons were not inadequate (ground 5), it was entitled to rely on Mrs Jalah's experience and to assess her reliability. The ET's reasons were clear from the judgment.

Commentary

The EAT said that this case turned on its own facts. Fatal to Ms Begum's appeal was the fact that she was attempting to revisit findings of fact made by the ET. Although the decision seems to be the correct one, it is perhaps surprising that the ET did not seek more detailed evidence of an assessment of the risk that Ms Begum's jilbab could have presented if she wore it at the nursery, rather than relying on what Mrs Jalah perceived from the other side of a desk, albeit that Mrs Jalah was experienced in such matters.

In addition, whilst a sensible and measured discussion about the nursery's uniform could not constitute a detriment, it is easy to see how such a discussion, if handled insensitively or poorly, could lead either to a detriment (e.g. if the candidate does not go ahead with her application and therefore does not get a job) or even to an act of harassment if the conduct has the purpose or effect of violating the candidate's dignity.

Comments from other jurisdictions

Greece (Harry Karampelis): Following the review of the case and EAT's reasoning, two issues arise: the issue of whether there was discrimination on ground of religion and the issue of proportionality. On the first issue, since (i) at the time of Ms Begum's application, the nursery had 16 employees, of whom four were Muslim women who wore hijabs and one who wore a full-length jilbab, and the nursery also allowed Muslims time off for Ramadan and facilitated prayer times; (ii) it was imperative that clothes did not present a tripping hazard; (iii) the nursery only suggested that Ms Begum should not wear a jilbab covering her shoes; (iv) Mrs. Jalah had sufficient experience to decide whether a garment was a tripping hazard and there was a real need to safeguard children and staff; and (v) Ms Begum chose not to proceed with her application (she was not prevented from working there), the EAT seems to have correctly ruled that there was no indirect discrimination. A Greek Court would have ruled similarly under Greek law.

The court needed to balance the right to express religious beliefs with the right to safety at the nursery. Based on the facts, the right to safety weighed more heavily, particularly given that there was evidence that the nursery had put appropriate practices in place and was a respecter of diversity.

Subject: Religious discrimination
Parties: Begum; Pedagogy Auras UK Ltd (t/a Barley Lane Montessori Day Nursery)
Court: Employment Appeal Tribunal
Date: 19 November 2014
Case number: UKEAT/0309/13/RN
Hard copy publication:
Internet publication: http://www.bailii.org/uk/cases/UKEAT/2015/0309_13_2205.html

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2015/42

The dismissal of an employee for expressing negative views about a colleague's homosexuality was both directly and indirectly discriminatory on the grounds of religion or belief (UK)

CONTRIBUTOR DENISE TOMLINSON*

Summary

An Employment Tribunal has found that the employer of a Christian nursery worker both directly and indirectly discriminated against her on the grounds of her religion or belief when they dismissed her for expressing negative views about homosexuality to a lesbian colleague. Her claim for harassment was not upheld as the Employment Tribunal found that the employer's conduct was not unwanted because the employee welcomed the disciplinary proceedings as an opportunity to express her religious beliefs in more detail.

Background

The European Framework Directive (2000/43/EC) which covers discrimination on grounds of religion or belief, disability, sexual orientation and age is, together with other European discrimination directives, implemented into UK legislation by the Equality Act 2010.

The Equality Act 2010 prohibits direct discrimination, indirect discrimination and harassment of a person because of a protected characteristic. Both religion or belief and sexual orientation are protected characteristics under Section 4 of the Equality Act 2010. The Employment Appeal Tribunal case of *Nicholson - v - Grainger Plc [2010] 2 All E.R. 253* laid down guidelines for determining what types of belief are capable of constituting a protected characteristic. For a 'belief' to be capable of protection, it must:

- be a genuinely held belief;
- be a belief as to a weighty and substantial aspect of human life and behaviour;
- attain a certain level of cogency, seriousness, cohesion and importance;
- be worthy of respect in a democratic society, not be incompatible with human dignity and not conflict with the fundamental rights of others;
- "have a similar status or cogency to a religious belief".

As some religious groups hold negative views about homosexuality, there is the potential for conflict between the protected characteristics of religion or belief and sexual orientation. Employers may, therefore, find themselves in the position of having to balance competing rights. Specifically, employers may need to address the conflict in the situation where an employee, as in this case, expresses negative views about homosexuality in the name of freedom of religious expression.

Facts

Ms Mbuyi is an evangelical Christian who was employed as a nursery worker by Newpark Childcare (Shepherds Bush) Ltd. Newpark also employed another female nursery worker, "LP", who is a lesbian living with a civil partner.

There were various incidents that formed part of the disciplinary proceedings against Ms Mbuyi including Ms Mbuyi remarking to LP "Oh my god, are you a lesbian?", giving LP a Bible as a gift and giving another colleague a Christian book as part of a secret Santa Christmas gift exchange.

However, the key incident in the case was a conversation between Ms Mbuyi and LP. After Ms Mbuyi referred to activities at her church, LP said that she wouldn't be interested in attending church until it recognised her relationship so she could get married there. Ms Mbuyi replied that "God is not OK with what you do", adding that "we are all sinners". LP was upset by the discussion and was sent home for the day. Ms Mbuyi asserted that it had been LP who had instigated this conversation and provoked Ms Mbuyi to answer honestly.

Ms Myubi was subsequently called to a disciplinary hearing, during which she stated to the disciplinary panel that she believed that homosexuality was a sin. Following the disciplinary hearing, Ms Mbuyi was dismissed for discriminatory and "wholly inappropriate" conduct. The disciplinary panel did not investigate Ms Mbuyi's allegation that LP had initiated the discussion and specifically asked Ms Mbuyi what God thought of her living arrangements.

After an unsuccessful internal appeal, Mrs Mbuyi brought a tribunal claim asserting direct and indirect discrimination and harassment on grounds of her religion or belief. Ms Mbuyi did not have sufficient length of service to bring a claim for unfair dismissal under UK law.

Judgment

The Employment Tribunal found that Ms Mbuyi had been discriminated against directly and indirectly on the grounds of her religion or belief but dismissed her claim for harassment.

With regard to direct discrimination, the Employment Tribunal found that Newpark's treatment of Ms Mbuyi was not because of her Christian faith in general, rather it was on account of her Biblical belief that homosexuality is a sin. The Employment Tribunal was prepared to accept this as a genuinely held belief, worthy of respect in a democratic society, not incompatible with human dignity and not in conflict with the fundamental rights of others. Therefore, they upheld Ms Mbuyi's claim of direct discrimination.

The Employment Tribunal upheld Ms Mbuyi's claim of indirect discrimination on the basis that dismissal was "not proportionate" and so not objectively justified. Newpark had conceded that it had applied a provision, criterion or practice – that employees should not express adverse views of homosexuality – which put employees with Ms Mbuyi's beliefs at a particular disadvantage. The Employment Tribunal found that although Newpark had the legitimate aim of providing its services in a non-discriminatory way, it had not adopted proportionate means of achieving this - for example, by imposing an absolute ban on discussing the matters in question and failing to make clear that dismissal would result.

The Employment Tribunal dismissed the claim of harassment on the grounds that Newpark's conduct was not "unwanted" by Ms Mbuyi because she welcomed the disciplinary hearing as an opportunity to express her religious views.

The Employment Tribunal also noted that although Ms Mbuyi was not bringing a claim for unfair dismissal, there were numerous and notable procedural failings throughout the disciplinary process which would have rendered the dismissal unfair.

Commentary

The so-called "clash of rights" in the workplace between Christian religious beliefs and sexual orientation has recently come to the

forefront, following a string of cases decided in the European Court of Human Rights. However, this latest case does not represent a turning point nor does it point to religion or belief prevailing over sexual orientation, as has been claimed in some quarters.

The decision was very fact-specific and, as an Employment Tribunal ruling, cannot be seen as a binding precedent for other cases. A key component of the judgment was the finding that there had been a number of procedural failings in the disciplinary process which clearly does not take the issue of conflicting rights any further forward. Further, there is nothing in the judgment which suggests a judicial change of direction or that any preceding conflict of rights cases would now be decided differently.

The main principle that can be drawn from the case is to remind employers that they should seek to be even-handed when dealing with a clash between sexual orientation and religious beliefs. Where an employee professes a genuinely held, legitimate Christian belief, the employer should not stereotypically assume his or her comments are homophobic without satisfying itself there is proper evidence of that.

More generally, employers should proceed with caution and tact when dealing with sensitive matters of this nature and attempt to find a mutually acceptable compromise where appropriate. In this case, it appears the employer moved far too quickly towards a disciplinary process without fully investigating the matter or considering other possible ways to defuse the situation.

Comments from other jurisdictions

Romania (Andreea Suciu): According to a judgment of the Romanian Supreme Court of June 2013, if the court finds a dismissal 'not proportionate' and not objectively justified, it may replace that sanction by a lesser one. The Romanian court would have most probably considered Mrs. Mbuyi's behaviour towards LP as discriminatory but not serious enough to justify dismissal. Thus, it would have replaced the dismissal by another, lesser sanction, for example a written warning, salary reduction or temporary demotion and, if expressly requested by the employee, the court would have also have reinstated Mrs. Mbuyi retroactively. Length of service is not a condition under Romanian law for bringing a claim for unfair dismissal.

Subject: Discrimination on grounds of religion or belief
Parties: Mbuyi - v - Newpark Childcare (Shepherds Bush) Ltd.
Court: Employment Tribunal
Date: 4 June 2015
Case number: ET/3300656/14

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2015/43

No protection for rejected job applicant (CR)

CONTRIBUTORS DINA VLAHOV BUHIN AND DARIJA LONCARIC*

Summary

The Labour Code does not protect job applicants. Anti-discrimination legislation does protect job applicants, provided they specify their discrimination claim and seek the correct remedy.

Facts

The defendant in this case was a company called KD Autotrolej d.o.o. ('Autotrolej'). It had a vacancy for a trainee. The Employment Bureau posted the vacancy on its website on 14 May 2010. The requirements for the position were a university degree in economics and computer proficiency. No work experience was required.

The plaintiff was Ms Maja Babic. She met the requirements for the position and sent Autotrolej an application. She received no response until two months later, when Autotrolej informed her in writing that they had selected another person for the position and that her application was therefore unsuccessful.

The plaintiff did some investigations. She discovered that Autotrolej's internal regulations stated that the position of trainee required an economics degree issued by the Faculty of Economics. She also found out that the successful applicant was a man with an economics degree issued by the Faculty of Tourism Management. Moreover, it appeared that Autotrolej had informed the Employment Bureau, at the time they submitted the vacancy, that the vacancy had already been filled. In other words, the successful male candidate had already been selected before the selection procedure had begun.

The plaintiff brought legal proceedings against Autotrolej. She asked the court (i) to annul Autotrolej's decision to select the successful male candidate; (ii) to dismiss; and (iii) to initiate new selection proceedings. She based this claim on the Labour Code, arguing that Autotrolej had prejudiced her rights by following a non-transparent and discriminatory selection procedure without clearly set criteria.

The court of first instance turned down the claim. It noted that the Labour Code does not contain any provision on which someone who is not already an employee can base a claim. The Labour Code only protects employees. As for the allegation of discrimination, the court noted that the plaintiff had failed to specify any grounds for discrimination and that in any case, she had not produced enough of an indication that she was actually discriminated against to justify shifting the burden of proof.

The Court of Appeal upheld the decision of the first instance court. It concurred with the lower court's finding that the Labour Code cannot provide a basis for a claim by a job applicant against a prospective employer. As for the discrimination issue, the court pointed out that Croatian Anti-Discrimination Law allows a person who considers that his or her right not to be discriminated against has been violated, to bring a claim, either in regular proceedings, where the court will rule on the violation of that right as the main issue, or in special proceedings where it will rule on it as a side issue. In both cases, the only remedies that the courts can apply are (i) a declaration that the defendant has discriminated against the plaintiff; (ii) an order to stop discriminating; (iii) an award of damages; or (iv) publication of the judgment in the media. The remedy sought by the plaintiff fitted into none of these categories.

The plaintiff did not appeal the Court of Appeal's judgment to the Supreme Court. Instead, she filed an application with the Constitutional Court for violation of her constitutional rights to a fair trial and to her right to work.

Judgment
The Constitutional Court rejected the claim. It found that the civil courts had interpreted and applied Croatian law in a constitutionally acceptable manner and that their reasoning was also constitutionally acceptable.

Commentary
This case was determined on the basis of purely domestic Croatian law. Croatia did not join the EU until 1 July 2013. Although the Constitutional Court's judgment was delivered one year later, the case started in 2010 and was adjudicated on the basis of the Labour Code of 2009, well before Croatia became a Member State. Having said this, it may be noted that Croatia had started to align its domestic employment law, including the provisions on non-discrimination, before 2013, in anticipation of its membership.

The crucial issue in this case is the non-existence of an employment relationship between the plaintiff and the defendant. The Labour Code regulates employment relationships in the Republic of Croatia that are primarily based on the principle of autonomy of will and consent of the parties. The mere participation in a selection procedure is not deemed to establish an employment relationship. This means that a candidate applying for a job does not fall within the scope of the Labour Code with regard to the protection of employees whose rights have been violated.

It is to be noted, however, that prior to the Labour Code, employment relationships were regulated by the Act on Basic Employment Rights (applicable until 1994) which also protected candidates who considered that a procedure for recruiting for a job had been incorrectly carried out in a certain way, including where the selected candidate did not meet the criteria for selection. This approach was not carried forward by the Labour Code of 1994, but it did remain in place as regards certain categories of employees subject to special laws (e.g. civil servants, based on the Law on Civil Servants).

As regards the allegation of discrimination, the plaintiff did not make her claim under the Croatian Anti-Discrimination Law and follow the proper procedure under that law, according to which: *"any person who considers that his or her right has been violated on account of discrimination may request protection of that right in proceedings by designating that right as the main issue".* Since the plaintiff's main claim was for the annulment of the defendant's recruitment selection and related to termination of the employment agreement concluded with the selected candidate, instead of a claim about discrimination, both the lower instance courts and the Constitutional Court correctly rejected the claim. We think the plaintiff might have done better if the claim had been framed as a discrimination claim from the start.

Subject: Gender discrimination, vacancies
Parties: *Maja Babic* – v – *KD Autotrolej d.o.o.*
Court: *Ustavni sud Republike Hrvatske* (Constitutional Court of the Republic of Croatia)
Date: 2 July 2014
Case number: U-III/1680/2014
I**nternet publication:** www.iusinfo.hr → fill in case number in second space next to Trazi po

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2015/44

An age-discriminatory staff policy? (DK)

CONTRIBUTOR MARIANN NORRBOM*

Summary
According to the Danish Anti-Discrimination Act, which is based on the Employment Equality Framework Directive, if an apparently neutral staff policy works to the disadvantage of employees of a certain age compared with other employees, this constitutes indirect discrimination, unless the policy is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

In this case, the Danish Eastern High Court had to consider whether a policy providing for six months' notice to all employees in case of redundancies – regardless of their length of service – was in breach of the Danish Anti-Discrimination Act.

The Danish Salaried Employees Act lays down a minimum notice period for all salaried employees. The notice period is extended when an employee has been employed for a certain number of years. The longer an employee stays employed, the longer the notice period. Similar provisions are provided in most Danish collective agreements.

Facts
The case concerned redundancies affecting 19 employees at the Danish Road Directorate. According to its staff policy, the Directorate would – in the case of redundancies – endeavour to give all employees six months' notice, regardless of their length of service.

The Directorate dismissed all 19 employees at six months' notice – even though seven of them had not served long enough to be entitled to six months' notice under the Danish Salaried Employees Act.

One of the senior employees who was affected by the redundancies was entitled to six months' notice, and she argued that the staff policy and the manner in which it was put into practice amounted to age discrimination because the policy treated her younger colleagues with shorter service more favourably than her. The case ended up before the High Court.

Decision
In its judgment the High Court made reference to the ECJ's judgment in the Austrian case C-132/11 (Tyrolean Airways), according to which differential treatment with regard to length of service did not constitute direct or indirect discrimination on grounds of age.

The High Court cited paragraph 29 of the judgment, which reads as follows:
"However, while a provision such as that set out in paragraph 21 of this judgment is likely to entail a difference in treatment based on the date of recruitment by the employer concerned, such a difference is not, directly or indirectly, based on age or on an event linked to age. It is the experience which may have been acquired by a cabin crew member with another airline in the same group of companies which is not taken into account for grading, irrespective of the age of that cabin crew member at the time of his or her recruitment. That provision is therefore based on a criterion which is neither inextricably (see, a contrario, Case C 499/08 Ingeniørforeningen

i Danmark [2010] ECR I 9343, paragraph 23) nor indirectly linked to the age of employees, even if it is conceivable that a consequence of the application of the criterion at issue may, in some individual cases, be that the time of advancement of the cabin crew members concerned from employment category A to employment category B is at a later age than the time of advancement of staff members who have acquired equivalent experience with Tyrolean Airways."

The High Court ruled in favour of the Directorate, giving weight to the fact that all of the affected employees had been treated equally, notwithstanding their age and length of service. Accordingly, the senior employee had not been treated less favourably than her colleagues.

Commentary

The judgment shows that it does not constitute direct or indirect age discrimination, and is thus not in breach of the principle of non-discrimination on grounds of age under the Danish Anti-Discrimination Act or the Employment Equality Framework Directive, for a staff policy, provision, feature or practice to provide all employees with six months' notice regardless of their length of service.

According to the judgment, the decisive factor was that in order for discrimination to occur, a person must have been treated – either directly or indirectly – less favourably than others. The High Court stated that the Directorate had made a decision that all employees to be made redundant should be given the same notice period, regardless of their age or length of service. The High Court further stated that there was a 20-year age span between the employees who were provided an extended notice period. All the redundant employees were thus given equal status as a consequence of the Directorate's policy. The High Court pointed out that none of the employees had been treated less favourably than others, since no employees had had their notice period shortened.

Further, the High Court stated that the fact that the Directorate's policy gave several employees equal status in terms of notice periods – regardless of their age or length of service – did not mean that the senior employee had been discriminated against as she had simply been treated equally with her colleagues.

It may seem surprising that the High Court refers to the above-mentioned judgment by the ECJ, since the ECJ appears to base its main argument on the fact that the employer would not count length of service accrued in another company in the same group of companies when calculating the notice period. However, the explanation is probably that the High Court – in the same way as the ECJ in case C-132/11 – is of the opinion that the decisive criterion applied was neither directly nor indirectly connected to the employees' age.

In this case, the decisive criterion was simply the employees' employment with the Directorate, since all employees were given a six month notice period. And this neither constitutes direct nor indirect age discrimination.

Comments from other jurisdictions

The Netherlands (Peter Vas Nunes):

1. I agree with the outcome of this judgment, which at first sight seems obvious. How can giving all employees the same notice period be discriminatory? Nevertheless, there is more to be said.
2. Let me begin with the author's comment that the policy at issue did not disfavour older employees, merely favouring others. This is reminiscent of the parable of the workers in the vineyard. I have always sympathised with the poor labourers who had toiled the whole day, and I suspect that many people find it unfair that the landowner paid their colleagues, who had put in no more than an hour of work, the same wages. Be this as it may, the equal legal treatment doctrine does not follow the reasoning in Matthew 20. On the contrary, it is built on what is often referred to as the Aristotelian concept that equals should be treated equally and unequals should be treated unequally in the measure of their inequality. In its ruling of 6 April 2000 in the *Thlimmenos* case (No 34369/97), the ECtHR (to quote but one of many similar passages) held that "The right not to be discriminated against [...] is also violated when States [...] fail to treat differently persons whose situations are significantly different". In its ruling of 13 November 1984 in the *Racke* case (No 283/83) the ECJ (again, to quote but one of many similar passages) held that "as the Court has consistently held, discrimination consists solely in the application of different rules to comparable situations or in the application of the same rule to differing situations".
3. The plaintiff in this case claimed that her younger colleagues were treated more favourably. What she probably meant is that her younger colleagues were not treated less favourably. Would she have had a point had she formulated her claim thus? Surely the situation of an employee who has worked for the same employer for many years (let us say, by way of example, 30 years) is not comparable to that of a recently hired employee, say someone who was hired six months ago. It is not without reason that the ECJ allows senior employees to be paid more than junior employees. See for example *Cadman* (C-17/05): such a pay differential does not need to be individually justified. I would think that the plaintiff in this Danish case could have successfully argued that her situation was incomparable to that of her more junior colleagues.
4. In that case, the next step for her would have been to establish that she had been treated equally to those colleagues "on account of", that is to say in connection with, or, more precisely, despite her difference in, age. Admittedly, this sounds strange, but that is the consequence of applying the Aristotelian doctrine. Such an argument would have to be combined with a claim of indirect age discrimination, because seniority in a company is not the same as age. A young employee can have been employed for a relatively long period and an old employee can have been hired recently. However, on average, senior employees tend to be significantly older than recently hired employees.
5. The Danish court referenced the ECJ's *Tyrolean Airways* case, but I think it could have distinguished from that case. In *Tyrolean Airways*, the ECJ (merely) held that Directive 2000/78 does not preclude a national provision that takes into account only service with the employee's own employer and not also with his service with associated employers. The ECJ did not rule that differential treatment with regard to length of service never constitutes direct or indirect discrimination on grounds of age. Cannot one argue that observing the same notice period regardless of seniority constitutes differential treatment with regard to length of service? Let me illustrate this with an example. Suppose that the employer's policy in this Danish case had been to observe a shorter notice period for senior employees than for recently hired employees. Surely that could have constituted indirect (and probably not justified) age discrimination.

Subject: Age discriminating staff policy
Parties: The Danish Society of Engineers against the Danish Road Directorate
Court: Danish Eastern High Court
Date: 8 July 2015
Case number: B-3983-13
Hard Copy publication: Not yet available
Internet publication: available from info@norrbomvinding.com

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2015/45

Parental part-time employment: no entitlement to lump sum overtime compensation (AT)

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Summary

According to the Austrian Maternity Protection Act and the Paternity Leave Act, employees working part-time are not, in principle, entitled to lump sum overtime compensation. If such employees do work overtime, they are entitled to overtime compensation in accordance with applicable laws and regulations.

Facts

The claimant, a museum manager, entered into an employment relationship with the defendant in November 2005. In 2008, the parties agreed on an annual lump sum for overtime work, regardless of the overtime hours actually worked (as long as they did not exceed a certain annual amount). They also agreed on the right of the defendant to revoke this arrangement at any time without stating reasons.

On 12th March 2013 the defendant returned to work from maternity leave and started to work part-time pursuant to §15h Maternity Protection Act 1979. Paragraph 19d (8) of the Working Time Act provides that employees on parental part-time work are not obliged to work extra hours or overtime, even if they have agreed to do so. Since then, the claimant had not been working overtime at all. The defendant continued paying the agreed lump sum until September 2013 and never explicitly revoked the overtime arrangement[1].

The claimant required payment of the lump sum compensation for the period from October 2013 to January 2014 (when the lawsuit was filed). The *Landesgericht Klagenfurt* as court of first instance decided in favour of the claimant but the *Oberlandesgericht Graz*, as court of appeal, rejected the claim. Subsequently, the claimant appealed to the Supreme Court *(Oberster Gerichtshof)*.

Judgment

The Supreme Court rejected the appeal and upheld the decision of the *Oberlandesgericht Graz.* It found that the entitlement to lump sum overtime compensation was suspended for as long as the employee was on parental part-time work pursuant to the Maternity Protection Act (or the Paternity Leave Act).

The Supreme Court decided first of all, that the defendant had not implicitly revoked the lump sum arrangement when it stopped paying. The mere cessation of payment does not fulfil the strict requirements set out in § 863 Austrian Civil Code (ABGB) for implied declarations (i.e. that there must be no sound reason to doubt that an action or omission could be a specific implied declaration). In a second step, the Supreme Court noted that the arrangement between the parties was incomplete. They had not agreed on how to deal with what happens where an employee who is entitled to lump sum compensation for overtime will almost certainly not do any overtime, as a result of changed circumstances. In general and according to existing case law (e.g. Supreme Court of 1 July 1987, Ref. Nr. 9 ObA 36/87), an employee is still entitled to the full lump sum compensation provided for, even if the actual number of overtime hours does not reach the level the parties may have had in mind when concluding the agreement - or even if the employee does not do any overtime at all. However, this does not apply – and this is the main new development from this decision – when the parties are facing circumstances that are essentially different from those that existed when they made the arrangement.

According to the Supreme Court, when the parties agreed on the lump sum they assumed that the claimant would regularly work overtime. The agreement does not state what should happen when the claimant does not perform any overtime for a long period of time. The Supreme Court could fill this gap in the contract by means of supplementary interpretation, but to do so needed to answer the following question: what would the parties have agreed if they had wanted to provide for what happens if the employee goes onto a parental part-time working arrangement?

The Supreme Court referred to a similar case of a pregnant employee who had been denied lump sum overtime compensation because pregnant women are prohibited to work overtime under Austrian labour law (Supreme Court of 18 August 1995, Ref. Nr. 8 ObA 233/95, § 8 Maternity Protection Act). In terms of the present case however, by § 19d (8) Working Time Act, parents on parental part-time work are not obliged to work overtime even if they have agreed to do so. Therefore, the claimant is not forbidden from working overtime, but simply not obliged to do so. The Court also deduced from the fact that the claimant had not worked overtime since going on maternity leave that she would also not work overtime whilst on a parental part-time working arrangement.

The Supreme Court ruled that, had the parties considered this, they would have agreed that the lump sum compensation should be suspended whilst the claimant was on parental part-time work, but if the claimant did in fact work overtime, she should be entitled to overtime compensation.

Commentary

Overtime compensation arrangements such as the one at issue are commonly used in Austria. The parties usually agree that the employee is expected to put in a certain (maximum) number of overtime hours per annum. The overtime compensation for that amount is paid constantly throughout the year regardless of the amount of overtime work actually done by the employee.

The Supreme Court's line of reasoning is consistent and methodically sound, as the question at issue was not dealt with in the contractual arrangement and the solution presented by the Court reflects the parties' original intentions. The Court's decision deserves to be endorsed because parties acting in good faith would never agree that overtime compensation should be paid for periods during which no overtime work is done.

Problems could occur where payments declared as overtime compensation are actually hidden pay rises. If it is clear from the circumstances that the payments are not really being made as overtime pay, it would be excessive for the court to cancel payment of the full lump sum. In such cases, the court would have to look at the facts to determine the amount that the employee should be entitled to whilst doing parental part-time work.

The Supreme Court's decision is also important for the related issue of employees with so-called 'all-in' contracts doing parental part-time

1 The defendant mistakenly continued to pay the overtime compensation between 12 March and September 2013. It did not demand repayment of the sum mistakenly paid, probably because under Austrian law an employer cannot reclaim sums mistakenly paid to an employee who has received and spent the money in good faith.

work. Such employees are paid a fixed salary above the minimum wage set by law or collective agreements. It is often agreed that the salary covers all services provided by the employee – overtime work as well as any special services that would usually entitle the employee to a specific bonus or allowance. With regard to the present judgment, it seems that in cases of parental part-time work, employers are entitled to cut back the salary of 'all-in employees' by the amount that is intended for overtime compensation. However, it is often not clear from the contract what that amount should be. In legal literature we find different suggestions about how to calculate the deduction. Meanwhile, some argue that no deduction is permissible if the contract does not say what proportion of the salary serves as overtime compensation. A more equitable solution may be to take the number of overtime hours that the employee agreed to provide before starting parental part-time work and multiply that by the minimum wage for one working hour. If the employment contract does not specify the amount of compulsory overtime work, the employer could look at the average number of overtime hours provided during the last twelve months.
From a European point of view the present case is covered by the Parental Leave Directive (2010/18/EU) and thus by the European social partners' Framework Agreement on Parental Leave. The Framework Agreement does not contain provisions concerning the remuneration of employees who take their parental leave on a part-time basis and so the salary decrease can be seen as an indirect result of national legislation, in this case, § 19d (8) Working Time Act. This means the judgment is in line with the applicable secondary law (cf. Clause 5 Nr 2 Framework Agreement). It is worth noting that the Austrian Maternity Protection Act and its § 15h, regulating parental part-time work, predate the Parental Leave Directive and have been deemed sufficient by the Austrian government with respect to the Directive and annexed Framework Agreement.

Comments from other jurisdictions

Germany (Dagmar Hellenkemper): Parental part-time in Germany is possible but limited to 30 hours per work week. Within this frame, overtime is – in theory – possible. If the parties for example agree on a 20-hour-work-week, overtime up to 10 hours per week is legal. If the agreed working time is 30 hours per week, the employee on parental leave cannot work overtime without the risk of losing entitlement to statutory parental allowance.
However, an agreement on a lump-sum payment would only be valid if the employee knew in advance how many hours of overtime were possible under the agreement. This does not seem to be the case here, so a German court would probably have come to the conclusion that the clause was invalid. The employee would therefore have to be compensated for overtime worked. However, as she did not work overtime, there would have been no payment.

Hungary (Gabriella Ormai): This case is very interesting from a Hungarian point of view. Based on the Hungarian Labour Code, the parties may agree that, instead of an overtime allowance based on the actual overtime performed, the employee receives a fixed, agreed monthly lump sum compensation, the amount of which does not depend on the actual hours spent with overtime. However, the Labour Code lists several circumstances in which the employee may not be instructed to put in overtime; for example during pregnancy until the child reaches the age of three.
It is uncertain how a Hungarian court would decide in a similar case, i.e. where the parties have agreed a lump sum compensation instead of overtime allowance, but where, due to changed circumstances, it is prohibited by law to instruct the employee to perform overtime. Since the contractual allowance is also payable, in principle in cases where the employee does not carry out overtime, unless a condition subsequent is provided, we expect that the employer would have to continue to pay the contractual allowance in this case.
The Labour Code also allows incorporating certain allowances (e.g. for night work) in base salary. Since there are circumstances where the employee cannot work at night (e.g. during pregnancy until the child reaches the age of three), it is uncertain what impact it may have on this type of base salary, i.e. whether the employer can unilaterally decide to decrease it. In such a case, the amount of base salary can only be decreased with the parties' mutual consent, unless it was clearly stipulated by the parties originally that in case the employee is not allowed to work at night, the base salary decreases by a certain amount.
These are good examples of how carefully contractual terms and conditions must be phrased to provide flexibility in case of changed circumstances.

Slovenia (Petra Smolnikar): As a general rule, employment relationships in Slovenia should be concluded for an indefinite term, for full-time working hours. Conversely, part-time employment should represent an exception, to be concluded only in a limited number of cases where there is no need to engage the employee full-time. Overtime work in cases of part-time employment is therefore contrary to the purpose and objectives of part-time work. Nonetheless, Slovenian employment law exceptionally allows for the possibility of overtime by part-timers. However, note that the employer may not impose work exceeding the agreed working hours on part-time employees unless otherwise provided in the employment agreement or in cases of natural or other disasters. As elaborated in case law, such overtime work should not be of permanent nature as it would otherwise constitute an abuse of the principle of part-time work.
Any overtime hours (including hours over and above agreed part-time work) must be explicitly requested and paid for in accordance with applicable law and sector-specific collective bargaining agreements. Under Slovenian law, overtime pay is considered an integral part of salary and the rate of pay is set out in sectoral collective bargaining agreements. This would raise the question of how much an employer should pay if not bound by a collective agreement. As overtime is a constituent part of salary, the rate should be set out in the employment agreement. Note that Slovenian employment law does not provide for lump sum payments for overtime.

Subject: Parental part-time, lump sum overtime compensation
Parties: Mag. C***** S***** - v - L*****
Court: *Oberster Gerichtshof* (Supreme Court)
Date: 24June 2015
Case number: 9 Ob A 30/15z
Internetpublication: http://ris.bka.gv.at/Jus→Geschäftszahl→case number

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2015/46

Information and consultation duty exists despite insolvency (RO)

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Summary

The former Romanian Insolvency Act No. 85/2006 provided that the rules normally applicable in the event of a collective redundancy, such as those relating to notice, information and consultation, do not apply during insolvency. Recently, the Constitutional Court held that the relevant provision of the Insolvency Act is invalid and must therefore be deemed not to exist. This means that insolvent companies must apply the rules on information and consultation, even though this make a reorganisation more time-consuming and more costly and makes it harder to save companies in financial difficulties.

Facts

The defendant in this case was a large, formerly State-owned company that went into administration on 20 July 2012. It proceeded to reorganise and dismiss redundant staff. On 7 February 2013, the company dismissed a number of employees, including the plaintiff, collectively. It did so without informing the employees and consulting with them as required by the Labour Code, which transposes Directive 98/59 on collective redundancies. It believed this was lawful, given that section 86(6) of the Romanian Insolvency Act provides that:

"In derogation from the Labour Code's provisions regarding collective dismissals, after initiating insolvency proceedings, the employment agreements of the debtor's employees can be terminated urgently by the liquidator, without following the collective dismissal procedure, simply granting a 15 working day notice period".

The plaintiff was paid severance compensation equal to 18 months' salary in accordance with the relevant collective agreement.

The plaintiff challenged his dismissal, arguing that it was void on account of failure to observe the information and consultation procedure stipulated in the Labour Code. The company based its defence on said section 86(6) of the Insolvency Act.

In a judgment delivered on 6 June 2013, the court of first instance found in favour of the plaintiff. It held that section 86(6) does not apply and that, as the company had failed to observe the rules on information and consultation under the Labour Code, the dismissal was void. The company was therefore ordered to reinstate the employee retroactively and the plaintiff was ordered to pay back the severance compensation he had received.

International readers may be surprised that an employee would want to be reinstated into an insolvent company. This is less surprising when one takes into account that companies frequently carry on doing business for a long time following a declaration of insolvency. In fact, in this case, the company in question had at one point managed to escape insolvency (though it later became insolvent again).

Both parties appealed. The company repeated its position that the rules on information and consultation in the Labour Code had been set aside by the Insolvency Act. The plaintiff argued that he was entitled to keep his severance compensation despite having been reinstated.

On 24 February 2015, while the appeal was ongoing, the Constitutional Court delivered a judgment on the status of section 86(6) of the Insolvency Law in an unconnected other matter (see below).

Judgment

The Court of Appeal upheld the judgment of the court of first instance, holding that section 86(6) of the Insolvency Act is unconstitutional and therefore inapplicable. It did so, based on a ruling of the Constitutional Court a few months previously. In that other case, the Constitutional Court interpreted said section 86(6) in the light of Article 41(2) of the Constitution, which reads, "Employees are entitled to social protection". Although the right to social protection does not expressly include information and consultation of employees during collective dismissals, the Constitutional Court considered that social protection must not be considered restrictively but constantly needs to be aligned to economic reality in society.

The Constitutional Court thus concluded that the information and consultation process was a genuine social protection measure, and more specifically, an inherent element of the constitutional right to social protection, in which the legislator had no margin of appreciation. The Constitutional Court construed this generally-worded provision, inter alia, in accordance with Directive 98/59, as interpreted by the Court of Justice of the EU (ECJ) on 3 March 2011 in the Claes case (C-235/10). That case concerned a provision of Luxembourg law that allowed immediate dismissal of employees of an insolvent employer. The ECJ ruled that Articles 1 to 3 of Directive 98/59 "must be interpreted as applying to a termination of the activities of an employing establishment as a result of a judicial decision ordering its dissolution and winding up on grounds of insolvency, even though, in the event of such a termination, national legislation provides for the termination of employment contracts with immediate effect".

Although the method by which the information and consultation process is conducted may need to be adapted in an insolvency situation, the employees cannot be deprived of their right to be informed and consulted with, whatever method is chosen. By simply overruling the Labour Code, the Insolvency Act deprives the employees of a basic constitutional right. Consequently, section 86(6) of the Insolvency Act is unconstitutional. The Court of Appeal, referencing the Constitutional Court's recent judgment, declared section 86(6) to be inapplicable and, hence, the plaintiff's dismissal to have been invalid.

Commentary

What is interesting in this case is that the Constitutional Court put the employee's interests above those of the company, even though the company was in administration. It seems that for the Constitutional Court, the information and consultation rights of employees were more important than the delicate financial position of the company. Thus, even if a company finds itself in administration, it must still observe all the conditions imposed by the Labour Code in cases of collective dismissal (e.g. consultation, notice periods, notification of the competent authorities and possibly compensation). Not even severe economic difficulties can serve to alleviate this obligation.

The Constitutional Court's decision has an immediate and relevant impact on pending litigation initiated under the former Romanian Insolvency Act No. 85/2006. The courts must find dismissals conducted without following the information and consultation procedures unlawful. Meanwhile a new Romanian Insolvency Act has entered into force, which expressly stipulates that insolvent companies must observe the information and notification procedures imposed by the Labour Code. However the legislator has adapted the information and consultation process to the insolvency situation by reducing the obligations to be observed within the information and notification procedure. The amendments brought by this new Romanian Insolvency Act confirm once again the need for Romanian law to be properly aligned to the legislation and practice of the European Union.

Subject: Collective Dismissals
Parties: S.C. Hidroelectrica S.A.
Court: *Curtea de Apel Bucuresti* (Bucharest Court of Appeal)
Date: 14 May.2015
Case Number: 1698/A
Internet Publication: no

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2015/47

Former employee bound by confidentiality clause for one year unless other duration agreed (LI)

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Summary
The Lithuanian Law on Competition states that persons who, as a result of a contractual relationship with a business, have knowledge of a commercial secret may not use this information for at least one year after termination of that relationship, unless a statutory or contractual provision states otherwise. Until a recent Supreme Court judgment, it was widely held that the Law on Competition, including the one year period during which confidential information could not be used, applied only to enterprises, not to individuals (natural persons). It is now settled case law that, in the absence of an agreement to the contrary, employees are bound by a duty of confidentiality for at least one year following termination of their contract.

Facts
This case involves three Lithuanian statutes: the Labour Code, the Civil Code and the Law on Competition. The Civil Code contains a provision that prohibits employees and former employees *(inter alia)* from disclosing confidential information regarding their (former) employer and entitles that employer to damages in the event this duty of confidentiality is breached. The Labour Code provides that disclosure of state, professional, commercial or technological secrets to a competitor constitutes a gross breach of work duties. Therefore, an employee who discloses such information can be disciplined. However, neither the Civil Code nor the Labour Code specify the duration of the duty of confidentiality (in the absence of any agreement). The Law on Competition, however, does specify the duration of the duty of confidentiality. Section 15(4) provides that a party that gains knowledge of a commercial secret as a result of their work for, or contractual relationship with, an undertaking may not use this information before the expiry of at least one year following the termination of the work or contractual relationship, unless the law or a contract provides otherwise. The issue in this case was whether the Law on Competition applies to a natural person, such as a former employee and, if not, how long a former employee's duty of confidentiality lasts.
The plaintiff in this case was an international cargo transportation company called UAB Big Trans ('Big Trans'). It had employed an individual, 'RK'. The contract of employment between Big Trans and RK included an obligation to keep secret any confidential information he acquired during his employment, both during and after termination of the employment contract. However, the contract was silent on the duration of this obligation. RK left the employment of Big Trans on 17 November 2015 and was hired by one of its competitors, the transportation company UAB Lietvos pervezimo bendrove ('Lietvos'). RK had started to liaise with Lietvos even before he had left the employment of Big Trans. In fact, the employment contract between RK and Lietvos was signed ten days before 17 November 2015.
Big Trans alleged that RK had disclosed confidential information to his new employer and brought a claim for damages against both RK personally and Lietvos as the entity unlawfully competing and profiting from the disclosure. Big Trans based its claim, inasmuch as it related to unfair competition and the duration of RK's duty of confidentiality, directly on said section 15(4) of the Law on Competition.
The defendants contested the claim. One of their arguments was that the Supreme Court in previous cases had held that the Law on Competition does not apply to natural persons such as former employees, but only to undertakings and legal entities. The court of first instance ruled in favour of Big Trans, but on appeal this ruling was overturned. The Court of Appeal, basing its reasoning on Supreme Court precedent, agreed with the defendant, RK, that the Law on Competition does not apply to individuals.

Judgment
The Supreme Court, overturning the Court of Appeal's judgment, found in favour of Big Trans. It held that, unless a provision of law or a contract between the parties provides otherwise, section 15(4) of the Law on Competition can be applied to all persons who have or had a contractual relationship with the undertaking in respect of which they acquired confidential information during that relationship. That relationship can be one of employment, but it can be any other contractual relationship, such as one for the provision of services (e.g. legal, accounting or training).
The court noted that this finding was not contrary to its previous case law, reasoning as follows. The Civil Code prohibits persons, including (former) employees, from disclosing commercial secrets in breach of their employment contract and prohibits the unlawful acquisition of commercial secrets, on pain of owing full compensation to the party whose secret has been disclosed or unlawfully acquired. The defendants' liability is based on this provision of the Civil Code, not on the Law on Competition. However, given that the Civil Code is silent on the duration of the prohibition and that the Labour Code does not regulate it at all, there is a gap *(lacuna)* in the law, which needs to be filled by interpretation. The logical way of dealing with this is to apply section 15(4) of the Law on Competition prohibiting the use of confidential information at least one year after termination of the relationship, in addition to the provisions of the Civil and Labour Codes.

Commentary
Previous case law has been equivocal about the application of the Law on Competition against natural persons, but the case reported above has clarified that it can be applied against individuals. Further, this judgment lays down a firm rule prohibiting employees from using commercial secrets belonging to their former employers for at the least one year after termination of their employment contract.
Nevertheless, the decision is limited in the clarity it provides, as it only covers disputes arising from employment relationships under section 15(4). Neither the Labour Code nor the Civil Code regulate other sensitive issues that may arise in employment relationships, such as, for example, the solicitation of employees. This activity is only recognized explicitly as unfair competition in the Law on Competition, not in the Labour Code or the Civil Code. But, if the provisions about

non-solicitation in the Law on Competition do not apply to individuals, employers will have no legal grounds based on the Law on Competition to claim against employees or former employees for attracting ex-colleagues to work in a competitor's company.
There is, of course, scope for the Supreme Court to consider a generally broader application of the non-solicitation provisions of the Law on Competition, but meanwhile, we recommend employers conclude a separate non-compete contract with employees to protect their interests.

Comments from other jurisdictions
Germany (Dagmar Hellenkemper): In Germany, the Act Against Unfair Competition applies to 'entrepreneurs', i.e. any natural or legal person engaging in commercial practices within the framework of his or her trade, business, craft or profession and anyone acting in the name of, or on behalf of, such a person. This would include any employees of the company. Section 90 of the German Commercial Code provides that sales representatives must not use business or trade secrets entrusted to them or acquired in the course of their work for the employer, even after termination of the contract, insofar as this, under the circumstances, would be contrary to the professional opinion of a prudent businessman. However, this does not apply to any other kind of employee. The protection of trade secrets after the end of the employment relationship can only be guaranteed by an explicit agreement in the employment contract, the severance agreement or any applicable collective bargaining agreement.

Hungary (Gabriella Ormai): Similarly to Lithuania, in Hungary the confidentiality of the employer's business secrets is protected not only by the Labour Code, but also by the Civil Code and the Competition Act. Therefore, even without a contractual obligation, employees are obliged to keep the employer's business secrets confidential both during the employment and after termination.
The Competition Act provides that unfair access to business secrets occurs where access has been obtained by the abuse of a relationship of confidentiality (such as an employment relationship). Consequently, if a competitor solicits the employer's employee so as to gain access to the employer's business secrets, this may be treated as an unfair market practice.
There is no specific time limit on employee confidentiality and therefore this obligation is not limited in time unless the parties agree otherwise (which is rare).

Subject: Duty of confidentiality
Parties: *UAB Big Trans – v - UAB Lietvos pervezimo bendrove* and *RK*
Court: *Lietuvos Aukščiausiasis Teismas* (Supreme Court of Lithuania)
Date: 3 July 2015
Case number: 3K-3-421-695/2015
Internal Publication: www.lat.lt → TEISMO NUTARTYS → Bylos nr.: → 3K-3-421-695/2015

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2015/48

Supreme Court clarifies definition and scope of 'customer protection' clause (FR)

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Summary
A clause preventing a former employee, for a fixed period of time, from dealing directly or indirectly, with his former employer's clients is a non-compete clause and must, therefore, meet certain requirements established by French case law, in order to be valid. A former employee who refrains from competing against his former employer on account of an invalid non-compete obligation, believing it to be valid, is entitled to compensation.

Facts
The French Labour Code is silent on restrictive covenants, i.e. provisions in a contract between an employer and an employee that prevent the latter from competing against his or her (former) employer during or after termination of the employment relationship, or restrict the employee in his freedom to compete. However, the courts have developed a body of judge-made law regulating restrictive covenants. This case law is based on Article L. 1121-1 of the Labour Code. It forms part of a section of the Labour Code headed *"droits et libertés dans l'enterprise"*. Article L.1121-1 provides that no one may restrict the rights of individuals or restrict individual or collective freedoms unless such a restriction is justified by the nature of the task to be carried out and is proportionate to the required purpose. This principle is applied by judges when analysing the provisions of restrictive covenants.
Under the said case law, in order to be valid and enforceable, a non-compete clause must meet certain requirements. One is that the restriction is limited in time and geographically. Another is that the former employee must be paid compensation *(contrepartie)* for the duration of his or her compliance with the non-compete undertaking. There are no hard and fast rules in respect of the amount of compensation, but compensation that may be inadequate in the eyes of the court risks being considered invalid. Compensation equal to 30-35% of the last-earned base salary is typical.
In the case at stake, the employment contract of an employee included a clause entitled "customer protection". It provided that, upon termination of the employment contract and for 24 months thereafter, the employee undertook not to contact directly or indirectly, by any means, any clients of the company with whom he had been in contact while performing his duties. The contract did not make mention of any compensation.
Following termination of his contract, the employee filed an action before the Labour Court, claiming that the so-called "customer protection" clause had to be considered as a non-compete clause and that, as such, he should have been compensated. He claimed damages.
The main issue was whether a clause limiting an employee's right to liaise with clients of his former employer is to be treated as a non-compete clause, in which case the clause should have satisfied the requirements outlined above.
The Labour Court of Annecy held that the customer protection clause was not a non-compete clause and therefore dismissed the employee's claim.
The employee appealed the decision before the Chambéry Court of Appeal. That court ruled that the clause was not a non-compete clause

and that the restriction included in the customer protection clause was strictly limited, since it only prevented the employee from liaising with clients of the company and did not aim to prevent him from performing similar duties at a competitor's. Further, the Court of Appeal recalled that the clause did not provide any geographical restriction and that, accordingly, the employee was free to carry on a similar activity. Therefore, the Court of appeal rejected the employee's claim.
The employee appealed to the Supreme Court.

Judgment

The Supreme Court overturned the Court of appeal's decision. It ruled that a clause preventing a (former) employee from contacting, directly or indirectly, within a certain defined period of time, the clients of his former employer, is a non-compete clause. The Supreme Court recalled that, in order to be valid, such a clause must 1) be necessary for the protection of the company's legitimate interests, 2) be limited in time and in space, 3) take into account the specific nature and peculiarities of the employee's job and 4) provide for financial compensation.

Commentary

Article L.1121-1 of the French Labour Code is extremely broad. Courts rely on it whenever they consider a right or freedom to require protection. It is hardly an exaggeration to say that courts can use Article L.1121-1 to achieve almost any outcome they deem desirable. They strive, on a case-by-case basis, to protect the interests that are at stake in the dispute before them. Article L.1121-1 has been used, for instance, to reach decisions in disputes concerning professional equality, discrimination and employee monitoring.
As of the end of 2014, the French Supreme Court had rendered no fewer than six decisions relating to non-compete clauses. In 2002, it regulated the use of non-compete clauses. According to a series of decisions rendered in July and September of that year, to be valid and enforceable, a non-compete clause must:

- be necessary for the protection of the company's legitimate interests;
- be limited in time;
- be limited in space;
- take into account the specificities of the employee's job;
- provide the former employee with financial compensation[1].

In the event of failure to comply with the above mentioned criteria, the employee - and the employee only - is entitled to claim the non-compete clause to be void. If successful, the clause will not be enforceable against the employee. Moreover, the courts may modify a non-compete clause that is valid, for instance, reducing its duration or scope. However, judges may not 'blue-pencil' the provision in a non-compete clause that specifies the amount of compensation.
An employee who has complied with a non-compete clause, and who has not engaged in any unfair competition[2], can ask for payment of damages. The court will then estimate the loss suffered. Interestingly enough, the Supreme Court considers that having a void non-compete clause in an employment contract necessarily causes prejudice to the employee, even if the employee was hired by a new employer at the point of termination of the former employment contract. In other words, the employee does not have to demonstrate the existence of any specific prejudice in order to be awarded an indemnity. The Supreme Court indemnifies the mere existence of a void non-compete clause. A number of Courts of Appeal have tried to oppose the position of the Supreme Court on this and have rejected employees' claims in cases where the employee has not complied with a non-compete obligation[3] and has not produced evidence of prejudice suffered.[4]
In practice - and in order to avoid application of the above-mentioned regime - employers used to insert a clause in employment contracts preventing them from liaising with clients, without going as far as to prevent them from working for a competitor. This was done on the assumption that this did not qualify as a non-compete clause. They were wrong. In a decision made in 2008[5], the Supreme Court decided that a clause entitled "non-diversion of clientele" in practice prevented the employee from performing an activity consistent with his professional training and experience. The clause was therefore to be considered as a non-compete clause and should have followed the relevant rules.
In 2009[6], the French Supreme Court held that a clause prohibiting the employee against contacting the employer's clients, directly or indirectly, even if it was the clients who made the decision to liaise with the employee, constituted a non-compete clause. Since the clause was neither providing for financial compensation nor was limited in time and space, it had been declared void.
In a decision of 15 October 2014, the French Supreme Court considered that a confidentiality clause does not constitute a restrictive covenant[7]. In this matter, a dismissed employee brought an action before a labour court arguing that the confidentiality clause in his employment contract was a non-compete clause. He claimed compensation. The Supreme Court confirmed the decision of the Court of Appeal, which had ruled that the clause did not prevent the employee from performing an activity and that it was only aimed at protecting the confidential information provided to him in the course of his employment relationship. The clause was not a non-compete clause and, consequently, did not require the payment of financial compensation.
Although the Supreme Court had made it clear that it is not possible to provide different financial compensation depending on the reason for termination, trial judges have sometimes been reluctant to follow this position. In a decision of 9 April 2015[8], the Supreme Court reiterated that a clause in which the amount of compensation depended on the reason for termination was void. Thus, whether the employee was dismissed or resigned, the effect on his or her freedom to work was the same and should be compensated in the same way. Moreover, variable compensation is not sanctioned by the the clause being declared void. In that situation, the employee would be entitled to the maximum compensation specified in the clause.
Case-law recognises the employer's right to unilaterally release the employee from a non-compete obligation. However, this option has been strictly regulated by case law in order to protect both parties' interests. The Supreme Court ruled on 11 March 2015[9] that, unless otherwise agreed by the parties, the employer may not unilaterally waive a non-compete clause before the employment has ended. In the case at hand, a non-compete clause provided that the employer could waive the non-compete obligation provided that it was done by registered letter no later than eight days following notice of termination. On 7 April 2010,

1 French Supreme Court, labour section , 10 July 2002 , n° 99-43.334 ; n° 99-43.336 ; n° 00-45.135 ; n° 00-45.387; French Supreme Court, labor section ,18 September 2002, n° 00-42.904.
2 A former employee who competes against his former employer unfairly (*'concurrence déloyale'*) is liable to pay damages to the former employer, even if the non-compete clause in the contract is void.
3 French Supreme Court, labor section, 24 September 2014, n°13-18090.
4 French Supreme Court, labor section, 7 July 2015, n°14-11580.
5 French Supreme Court, labor section, 2 July 2008, n°07-40618.
6 French Supreme Court, labor section, 27 October 2009, n°08-41501.
7 French Supreme Court, labor section, 15 October 2014, n°13-11524.
8 French Supreme Court, labor section , 9 April 2015, n°13-25847.
9 French Supreme Court, labor section , 11 March 2015, n°13-22257.

the employer released the employee from the non-compete obligation. On 28 June 2010, the employee was dismissed. The court of appeal had ruled that a requirement to waive no later than eight days following notice of termination implies that the employer may waive any time before termination. The Supreme Court quashed this decision, as it considered that the clause provided for a withdrawal period starting ont the date of termination. This meant that the employer could not withdraw the non-compete obligation during the course of the employment contract, except where expressly otherwise provided.

Another issue is to work out when an employer should waive a non-compete clause if it decides to release the employee from the notice period. The Supreme Court decided, in a decision dated 21 January 2015[10], that the starting date of the non-compete obligation is the date of actual departure of the employee from the company. The effect of this is that the employer should waive the non-compete clause at the point when it informs the employee of exemption from the notice period.

In practice, the decisions of the Supreme Court illustrate the difficulties in dealing with restrictive covenants. Identifying a non-compete clause is not straightforward and the wording of these clauses may not be clear. With the decision reported above, the French Supreme Court continues to clarify the definition and the scope of these clauses.

Today, employers have a tendency to include non-solicitation of clients in non-compete clauses in order to avoid issues about how it should be treated. When will the Supreme Court provide clear and reliable guidance on the appropriate amount of financial compensation in such cases?

Comments from other jurisdictions

Germany (Dagmar Hellenkemper): In Germany, 'client protection clauses' are regularly seen as non-competition clauses and are handled as such. Statutory provisions limit the time frame to two years following the employment and apply to both independent and dependent competing activities. Any further restraint would interfere with the employee's occupational freedom, as guaranteed by the Constitution. Further, the employer can within reason choose the geographical scope of the prohibition. An employee bound by a non-compete clause must be compensated at a rate of least 50% of his or her former salary including bonuses and other benefits. The employer cannot argue it has no obligation to pay the compensation because the clause is invalid. It can inform the employee that it does not uphold the non-compete clause, but this only exempts it from paying compensation, at the earliest, one year after the waiver. The only other way to avoid a non-compete clause – and the resulting obligation to pay - is to mutually agree to waive it.

Romania (Andreea Suciu): Non-compete clauses are expressly regulated in the Romanian Labour Code. The parties may negotiate and include a non-compete clause into the employment contract that expressly states that the employee is required not to compete against his or her employer for a maximum of two years following termination of the employment contract. In return for this obligation, the employer must pay the employee monthly compensation of least 50% of the average gross salary throughout the non-compete period. Moreover, a non-competition clause is not effective unless, *inter alia*, it expressly describes the activities prohibited to the employee. This may include prohibiting the former employee from liaising, directly or indirectly, with former clients for a gvien period of time.

In the case of breach of a non-compete clause, the employee may be obliged to reimburse the compensation and, where appropriate, pay damages for loss incurred to the employer. However, the employer must prove that it suffered harm as a result of the actions of the employee in breach of the clause. If such evidence cannot be provided, the employer may only claim reimbursement of the non-compete compensation in court. The parties may not agree a clause saying that the employee is required to pay a sum of money in the event of non-compliance.

In cases of breach of a non-compete clause, a former employee could also be sanctioned - or could be criminally liable - for competing with a former employer under Competition Law no. 11/1991 on combating unfair competition.

Depending on the seriousness of the offence, the provisions of Competition Law no. 21/1996 may be used in conjunction with the Criminal Code to the effect that the perpetrator may be liable for crimes such as breach of professional secrecy, negligence at work etc.

Although, non-compete clauses might appear to have limited practical value for employers, in that the effect of breach is simply that the employee has to pay back the compensation, in practice, they tend to act as a useful deterrent.

Subject: Non-competition
Parties: employee – v – *Ufifrance patrimoine*
Court: *Cour de cassation, chambre sociale* (social chamber of the French Supreme Court)
Date: 9 June 2015
Case number: 13-19327
Internet publication: www.legifrance.gouv.fr ->jurisprudence judiciaire->nom de la juridiction = cour de cassation->numéro d'affaire=13-19327.

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10 French Supreme Court, labor section , 21st January 2015, n°13-24471

2015/49

Non-compete clause may limit cross-border activity (LU)

CONTRIBUTOR MICHEL MOLITOR*

Summary

For a non-competition clause in an employment contract to be valid under Luxembourg law, it cannot, inter alia, apply beyond national territory and it can only prohibit an independent activity identical or similar to that of the former employer. However, in a recent decision the Court of Appeal validated a non-competition clause that extended the prohibition against competing into France and prohibited an employed activity for a company competing with the former employer's company.

Facts

The plaintiff had brought a claim against his former employer for a payment for his having respected the non-competition clause included in his employment contract. According to the plaintiff's labour contract, he agreed to refrain, following the termination of his employment contract, from carrying out any employed activity on behalf of a company competing with the activities of his former employer. In compensation for respecting this non-competition clause, the former employee would receive a payment equal to 25% of his last basic monthly salary.

The prohibition against competing lasted for one year and applied not only to the Grand Duchy of Luxembourg but also to several regions of France.

The employer claimed the non-competition clause was invalid because it went beyond Luxembourg's legal restrictions and therefore no compensation for complying with it was due.

Judgment

The Luxembourg Court of Appeal *(Cour d'appel)*, confirming the judgment of the first instance court, the Labour Tribunal *(tribunal du travail)*, stated that the non-competition clause was valid and consequently that the plaintiff could claim the payment. However, it reduced the geographical area originally covered by the clause, while accepting that it should still extend beyond Luxembourg and into Alsace-Lorraine.

The Court of Appeal pointed out that in order to maintain the validity of a non-competition clause and to balance the interests of the company and the freedom to work of the employee, the judge may correct imperfections and any undesirable effects of a non-competition clause. It also underlined that a non-competition clause would be abusive if it excessively restricted the freedom to work.

In this particular case the Court considered that the freedom to work was not excessively restricted because first, the employee was allowed to work within non-competing companies; secondly, the prohibition was limited in time; and thirdly, the prohibition was compensated for by a payment. Further, the Court reduced the geographic scope of the non-competition clause, whilst expressly retaining Alsace-Lorraine. In the Court's view, this did not restrict the employee's freedom to work excessively.

Consequently, the Court considered that a cross-border non-competition clause may be valid, provided the employee's freedom to work is preserved as far as possible, and the parties' mutual interests are sufficiently balanced.

Commentary

In terms of both Luxembourg's legislation and established case law, this judgment of the Luxembourg Court of Appeal is both extraordinary and rather surprising. It is interesting from various angles: first, from an internal point of view, because it is not in line with established Luxembourg case law; second, in comparison with other EU Member States; and third, from the point of view of EU law (in that non-competition clauses can be incompatible with EU law).

In Luxembourg, non-competition clauses included in employment contracts are governed by Article L. 125-8 of the Luxembourg Labour Code. According to this provision, an employment contract may contain a non-competition clause by virtue of which the employee agrees that after leaving the company, he will refrain from setting up any independent business similar to that of his employer in order not to infringe the employer's interests. In other words, the law is silent on non-compete clauses that prohibit a former employee from working as an employee.

The same provision states that, in order to be valid, a non-competition clause must fulfil the following conditions: first, the clause must be in writing; second, it must refer to a specified professional sector and to activities similar to those of the employer; third, it must be limited to a period of time not exceeding 12 months from the end of the employment contract; and fourth, it must be restricted geographically to the territory of Luxembourg.

Further, the non-competition clause is only enforceable if the employee is earning a gross annual salary of at least EUR 52,843.89 or EUR 4,403.66 per month on the day he or she leaves the company.

Luxembourg non-competition clauses are therefore different from those of other countries (e.g. France and Belgium). In Luxembourg, non-competition clauses are only enforceable against employees taking up an independent activity or starting up their own business. Closely linked to this is the fact that Luxembourg law does not make financial compensation a condition for the validity of a non-competition clause, although Luxembourg non-competition clauses often include payments. Until this judgment, the Luxembourg courts used to rule that non-competition clauses prohibiting employees from taking up similar activities, directly or indirectly, as employees of a competitor were void. The decision of the Court of Appeal derogates from this established case law as the non-competition clause in this case prohibited working for a competing company and not an independent business. The geographic area covered by the limitation, however, was considered too broad, so the Court chose to limit it. Nevertheless, it accepted that the geographical scope could go beyond national territory, which is clearly contrary to the wording of the law.

For the moment, we cannot tell whether the Court of Appeal's decision is a one-off or a turning point. We cannot predict whether the Luxembourg courts will from now on automatically declare non-competition clauses that are too broad void or reduce their scope, to make them more proportionate. In this case, the Court of Appeal wanted to protect the employee. If it had declared the clause invalid, the employee would have been unable to claim the financial contribution. In another situation, of course, the Court of Appeal may have decided differently.

Only time will tell whether the Luxembourg courts will start to consider financial compensation a necessary condition for the validity of a non-competition clause as, for example, the French and Belgian courts do.

Another topic worth considering is that a non-competition clause may, under certain circumstances, be incompatible with EU law, in particular given that free movement of workers is enshrined in Article 45 of the Treaty on the Functioning of the European Union and private employers are obliged to respect this.

A non-competition clause that is not limited to national territory is not purely internal, but could have an effect in other Member States. In the Bosman case, the ECJ ruled that a restriction preventing or detering a national of a Member State from leaving his or her country of origin in order to exercise freedom of movement constitutes an obstacle to that freedom even if applied without regard to the nationality of the worker concerned (*Bosman*, C-415/93, point 96).

In this case, it seems that Article 45 of Treaty was not infringed, as the restriction was limited to a very precise region (Alsace-Lorraine). The restriction could be justified, for example, by the necessary protection of business secrets, and could be considered proportionate.

Comments from other jurisdictions

Austria (Martin Risak/Johanna Pinczolits): In Austria employees are only restricted in taking up a new job or in establishing their own business if their contracts include a non-competition clause. These clauses are subject to a number of statutory restrictions (i.e. §36 Act on White Collar Workers, §2c Act on the Adaption of Contractual Labour Law, *Arbeitsvertragsrechtsanpassungsgesetz*). For example, non-compete clauses may only be concluded for one year after termination and are only binding if the employee earned more than € 2,635 Euro per month (2015). Additionally, a non-competition clause may not unfairly impair the career prospects of an employee. On the other hand, under Austrian law the employee does not need to be compensated during the operation of the clause if the contract was terminated by the employee or if the employee was subject to summary dismissal.

In a similar case to the one at hand, the Austrian courts would most likely have considered the clause valid and enforceable.

Germany (Dagmar Hellenkemper): In Germany, the decision reported above would not even have raised an eyebrow. An agreement between an employer and employee, limiting the trading activities of the latter

following termination of the employment relationship is binding on the employee insofar as the restrictions imposed as to time, place, and the nature of trade do not inequitably restrict the professional career of the employee. Statutory provisions limit the timeframe to two years following termination and apply both to independent and dependent competing activities. Further, the employer can within reason choose the geographical scope of the prohibition. This might - depending on the field the former employee has been working in – involve regions of Germany, Germany as a whole, or additional countries. A worldwide ban on competition is possible but rarely applied. The employer would have to show in such a case that the market was very limited and any other kind of ban would be ineffective. An employee bound by a restraint of trade must be compensated at a rate of at least 50% of the former salary, including bonuses and other benefits. The rules for managing directors differ in theory but more often than not are the same in practice.

The Netherlands (Zef Even): In the Netherlands, non-competition clauses may both prevent the employee from entering into the service of a competitor, as well as from starting a competitive business himself. There are no statutory rules as to the duration and geographical limitations of a non-competition clause. Having said this, statute allows the court to limit and even nullify a non-competition clause, should it, balanced against the reasonable interests of the former employer, unreasonably hinder the employee following the termination of his employment agreement (a 'reasonableness test'). In practice, non-competition clauses often have a duration of up to 12 months, and a limited geographical scope. This geographical scope may expand to regions or countries outside the Netherlands, should this be necessary to protect the reasonable business interests of the employer.
I am not convinced that an employee can easily invoke article 45 of the Treaty when challenging the geographical scope of a non-competition clause. To my knowledge, this does not happen in the Netherlands, perhaps because the reasonableness test is broader and therefore more protective for an employee than having recourse to Article 45 of the Treaty.
Although Article 45 of the Treaty surely has horizontal effect vis-à-vis an individual employer (ECJ 6 June 2000, C-281/98, *Angonese*), it is as yet undecided whether that horizontal effect applies beyond the scope of discrimination on the grounds of nationality. In my view, it is therefore not certain whether the above-mentioned Bosman case could be applied to an individual employer. If so, such a hindrance could be permitted, applying the rule of reason. If the employer can substantiate legitimate interests in concluding and enforcing such a non-competition clause, such as the reasonable protection of his business (which in essence is the aim of a non-competition clause), I would suppose such a clause to be enforceable under EU law.

Subject: Non-competition
Parties: unknown
Court: *Cour d'appel*
Date: 13 November 2014
Case number: 39706

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2015/50

Alcohol tests require approval by works council (AT)

CONTRIBUTOR ANDREAS TINHOFER *

Summary
The Austrian federal railways introduced breathalyser testing on their employees in order to monitor compliance with their zero-alcohol policy. However, as such a measure was held to impact on the employees' "human dignity", it was subject to the works council's approval. As that approval had not been given, the measure was unlawful.

Facts
In July 2013, the Austrian federal railways (ÖBB) sent a circular letter to all employees informing them that drinking alcohol was forbidden for all employees on duty. The letter specified that the new standard to be complied with was zero alcohol in the blood. Only a few months later a train driver was found to be seriously intoxicated during working time. The employee was subjected to disciplinary proceedings.
In April 2014, the ÖBB conducted alcohol tests on all employees present on that day on two different sites, including clerical staff. The test was conducted using a breathalyser *(Alkomat)*. No alcohol was detected. The employees had not been informed in advance. The chairman of the works council had been informed the day before and had objected to the alcohol testing.
Some days later, the works council asked the ÖBB to formally declare that they would not continue conducting alcohol tests on employees. Since the company refused to issue such a declaration, the works council sued the ÖBB. They sought an order, in the form of an interim injunction, on ÖBB to refrain from conducting general alcohol testing unless there was a specific suspicion that an employee had consumed alcohol. The works council based its request for an interim injunction on two arguments. The first was that random alcohol tests infringe employees' rights as human beings and therefore are unlawful. The second argument referred to the works council's statutory right to be asked permission by the employer before it takes any employee monitoring measures that have the potential to infringe the employees' human dignity *(Menschenwürde)*.
The court of first instance rejected the claim, ruling that alcohol monitoring was a legitimate and proportionate means to implement the ban on alcohol in the workplace. The Court of Appeal *(Oberlandesgericht Wien)* confirmed the ruling. The plaintiff appealed this decision to the Supreme Court *(Oberster Gerichtshof)*.

Judgment
The Supreme Court overturned the Court of Appeal's judgment and found in favour of the works council. First, the Court set out the legal basis for the works council's right. Article 96(1)(3) of the Collective Regulatory Act *(Arbeitsverfassungsgesetz, ArbVG)* provides that the introduction of technical systems or measures to monitor employees requires the prior approval of the works council if they impact on employees' human dignity. In the case at hand, it was common ground that the alcohol tests were a measure used to monitor the employees.
Turning to the issue of whether the alcohol tests affected the employees' 'human dignity', the Supreme Court held that Article 96(1)(3) ArbVG is primarily aimed at the employees' physical integrity and their right to privacy. An individual's private life is protected by Section 16 of the Austrian Civil Code and by fundamental human rights, such as the right

to respect for private and family life (Article 8 ECHR) and the right to data privacy (Section 1 Data Protection Act). The statutory requirement to ask the works council for its prior approval was designed to avoid employees' private lives being affected by technical systems or measures that are not justified by a legitimate purpose and/or are not proportionate to that purpose.
In the case at hand, the Supreme Court acknowledged the employer's legitimate interest in implementing a ban on alcohol and in monitoring compliance with that policy. However, the Court listed several reasons why the measure in question was disproportionate to its objective. First, the employees were subjected to breathalyser tests without any indication that they had violated the non-alcohol policy. Second, the tests were conducted without asking the employees for their consent. Third, the employer did not restrict the testing to those employees who could endanger others whilst intoxicated (e.g. train drivers). Fourth, because of the sensitivity of the breathalyser, which detects alcohol even if the employee has simply eaten a meal prepared with a few splashes of alcohol, the result may have no bearing on the employee's capacity to work. Fifth, subjecting an employee to a breath test, implies an allegation against the employee, even if the employee has done no wrong.
As a result, the employer was ordered to refrain from conducting alcohol tests either on all employees or on those against whom there was no suspicion of violation of the non-alcohol policy.

Commentary
This is a rare case where the Supreme Court has had to decide whether a specific monitoring measure infringed employees' "human dignity" within the meaning of Article 96(1)(3) ArbVG, thereby triggering the works council's right to veto that measure. In the 'fingerscan case' (9 ObA 109/06d), the employees of a hospital were required to have their fingers scanned at a terminal so as to record their working time. As there was no agreement with the works council to this technical system, the works council sued the employer. Applying the same approach as in the alcohol test case, the Supreme Court acknowledged the employer's interest in recording employees' working time, which employers are required under the Working Time Act to do. However, the Court did not accept that an employer should process biometric data for such a "trivial purpose" as the recording of working time.
In both cases, the Supreme Court made clear that the use of biometric data or the imposition of medical tests on employees affects their rights to physical integrity and privacy at the workplace. Therefore, such measures are only lawful if they are based on an agreement with the works council.

Comments from other jurisdictions
Belgium (Isabel Plets): There is no case law in Belgium on the use or conditions of alcohol tests in the workplace, but alcohol tests for employees using breathalysers are strictly regulated in National Collective Labour Agreement n°100 on preventative alcohol and drugs policies in companies. The use of breathalysers in the workplace must be covered in the work rules and the consent of the works council is therefore required.
Breathalyser tests should meet very strict requirements, for example:

- the test can only be used as a preventative measure, to verify whether an employee can either start or continue work;
- the results of the test alone cannot be used to justify a sanction and can therefore only serve as one element of a global assessment of the employee;
- the test must be proportionate;
- testing requires the employee's consent; and
- the results of the test must be processed in line with privacy legislation.

Czech Republic (Natasa Randlová): In the Czech Republic, a person (specified by position) able to give instructions to conduct an alcohol monitoring test must be identified in the employer's work rules in advance of any monitoring taking place. In addition, the employer can ask to conduct an alcohol test only where there is a suspicion that the employee is under the influence. Conducting general alcohol tests without any specific suspicion is not permitted under Czech law. However, this rule is frequently breached, particularly in factories where zero alcohol tolerance is absolutely necessary for safety reasons.

Germany (Dagmar Hellenkemper): The German Courts have, in the past, only dealt with cases of dismissals on grounds of alcohol consumption or alcohol testing during general pre-employment medical check-ups. Based on the groundwork laid in these cases, it seems likely that a similar case in Germany would have a similar outcome. Alcohol and drug test are only allowed where operational safety is at stake. Increasingly, companies in Germany enter into works agreements with the works council in order to implement a ban on drugs and alcohol. A general breathalyser test however, without any suspicion or evidence of alcohol consumption, would be considered a violation of the employees' "human dignity" and general right of personality, just as in our neighbouring country.

Hungary (Gabriella Ormai): In Hungary the Act on Health and Safety requires employees to carry out work whilst in a condition fit for work. The Labour Code also stipulates that employees must appear at work in a condition fit for work and must remain in such a condition during working time. Therefore, the employee cannot be under the influence of alcohol and there is a presumption that alcohol consumption is not permitted.
Based on the interpretation of the Curia (previously the Supreme Court), since the employer is obliged to provide healthy and safe working conditions, it can test whether the employee is in a condition fit for work, including whether he or she is under the influence of alcohol. The testing cannot breach the employee's personality rights and cannot be degrading or excessive. Consequently, the employee must cooperate.
Testing for alcohol consumption would constitute an abuse of the employee's rights, for example, if the employer repeated the test several times a day for several days without any actual indication of alcohol consumption. In one case, the court found that summary dismissal based on the employee's refusal to take an alcohol test was unfair. The employer had wanted to check whether the employee was under the influence of alcohol even though there was no sign of such influence. The employer asked the employee's supervisor and the chair of the trade union to be present at the testing and later also called the police. The employee also indicated that he was willing to undergo a blood test.

Lithuania (Inga Klimasauskiene): In the Austrian case reported above the issue seems to be whether an employer may check if an employee has come to work intoxicated, when he or she is refusing voluntarily to be tested by a breathalyzer, in order to reduce the risks caused by inebriated employees.
Under the Lithuanian Labour Code, if an employee comes to work intoxicated with alcohol, narcotics or other toxic substances, the employer has the right to bar him or her from coming into work on that day (or shift) and to suspend his or her wages. Further, being under the influence of alcohol, narcotics or toxic substances is considered a gross breach of work duties, giving the employer the right to dismiss the

employee without notice.
The Lithuanian Labour Code does not specify how to establish whether an employee is inebriated. According to case law, this can be determined by any means or procedure available to the employer that is within the law. Unfortunately, the law is silent on how far the employer can go. Evidence that an employee was under the influence of alcohol, narcotic or toxic substances during working time can be based on both medical findings and reports made on the day, as well as on any other records, such as photographs or videos showing drunken behaviour. However, if an employee refuses to be tested by a breathalyzer, the employer does not have the right to compel the employee to do so, as that would constitute an infringement of the employee's right to privacy.
In order to mitigate the risk of intoxication on the job, an employer has the right to suspend an employee from his work duties without pay in the event there is an indication that he is inebriated. In order to do this lawfully, the employer might need to draw up a document, signed by a number of employees (an ad hoc committee), stating that the employee has come to work intoxicated with alcohol, narcotic or toxic substances. Lithuanian law does not require that such a statement should be approved or coordinated with employee representatives (trade union delegates or the works council).
In such cases, however, the employer is taking a risk, because the employee could then present a medical certificate refuting the employer's position. This is recognized as valid counter-evidence provided the medical test on which it is based was done without delay..
In this case the employer may be obliged to compensate for the damage caused to the employee by the suspension. Notwithstanding, this seems to be a lesser risk than to allow a likely intoxicated employee to pursue his or her work duties.
Admittedly, suspension may not be very practical, especially where, as with the railways, a large number of employees need to be checked at the same time, but it is one way to mitigate the risks.

Slovak Republic (Gabriel Havrilla): The situation in the Slovak republic is very different. Not only is the employer entitled to test whether the employee is under the influence of alcohol, but the Act on the Protection of the Health of Employees obliges the employer to check systematically whether employees are under the influence of alcohol, drugs or other psychotropic substances during working time. Moreover, no prior or later approval from the working council is required. Further, the Act on the Protection of the Health of Employees stipulates that employees must submit to alcohol tests. Refusal to undergo such a test is deemed a violation of work rules and under certain circumstances specified in the Labour Code, could lead to summary dismissal. This approach is supported by case law from the lower courts (Rc 4Cdo 64/95) which says that an employee may only refuse to take alcohol breath tests if he or she can produce a medical certificate to show there is a genuine medical difficulty in breathing continuously into a breathalyser (e.g. severe asthma).

Subject: Privacy; information and constitution
Parties: *Zentralbetriebsrat der ÖBB GmbH* – v – *ÖBB GmbH*
Court: *Oberster Gerichtshof* Supreme Court)
Date: 20 March 2015
Case number: 9 ObA 23/15w
Internet-publication: http://www.ris.bka.gv.at/Jus/

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2015/51

An order to perform other work can constitute harassment, even if the work falls within job description (CZ)

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Summary
The employer is authorised to assign work that is within the agreed type of work set out in the employment contract to employees, in accordance with the employer's needs. However, at the same time, the exercise of this right must not be used to intimidate the employee in 'revenge' for the employee having defended his or her rights previously.

Facts
The plaintiff in this case was employed by a state high school, the defendant in the case. His contract described his position as 'high school teacher' without specifying the subjects he was to teach. In practice, he was only assigned to teach English. In August 2010, the school dismissed him (for the first time). He challenged the dismissal in court and was successful. The court held that the dismissal was void. Accordingly, the plaintiff returned to school to teach again. However, the defendant assigned him to teach engineering subjects, physical education and civic education. Since the plaintiff did not have the teaching qualifications for any of these subjects, he refused to teach them and stopped going to work when these classes took place. This resulted in a second dismissal in October 2011, for serious breach of his work obligations.
The plaintiff claimed the notice of termination was void, arguing that the defendant had refused to respect the previous court decision and that he had been asked to teach subjects in which he had no qualifications.
The court of first instance upheld the action, holding that the defendant had breached its obligations by requiring the plaintiff to teach engineering, physical education and civic education instead of English, which was the subject he had taught before his first dismissal. The court considered the school's behaviour to have been biased and to constitute harassment.
On appeal, the appellate court reversed the first instance court's judgment. It held that the plaintiff was obliged to perform work within the agreed type of work, i.e. all types of work falling within the job description of 'high school teacher'. By refusing to teach technical subjects, the plaintiff was in serious breach of his obligations.
Disagreeing with the appellate court's decision, the plaintiff filed an extraordinary appeal to the Supreme Court. He argued that the appellate court had failed to address the finding of the first instance court that the decision to assign technical classes to him was biased and harassing. He also argued that the right of a school to assign work to a teacher within the agreed job description (in this case 'high school teacher') must always be limited by the individual's professional qualifications in the subjects to be taught. The defendant thus could not authorise the plaintiff to perform an educational activity other than teaching English.

Judgment
The Supreme Court reversed the judgment of the appellate court, nullifying its decision and returning the case back for further proceedings. It justified its decision as follows:

- Given that the plaintiff had agreed to the type of work described as a 'high school teacher', the defendant had the right to assign to him

all work corresponding to this definition – i.e. not only English, but also technical subjects.
- On the other hand, if the defendant penalised the plaintiff for seeking judicial protection of his rights following his initial dismissal in 2010, its decision to assign technical classes to him would be considered harassment and contra bonos mores. Therefore, if the defendant's decision to dismiss the plaintiff a second time was based on objectives other than those mentioned (i.e. his refusal to teach technical classes), the dismissal would be void.

Commentary

Although the agreed type of work was 'high school teacher', the plaintiff only used to teach English. Out of the blue, however, the defendant started asking him to teach engineering, physical education and civic education, in which the plaintiff had no professional qualifications. Even though this newly assigned work was formally included in the plaintiff's job description, it is notable that the defendant did not ask him to do this kind of work until after he had successfully claimed voidance of his first notice of termination. Therefore, the defendant's actions could be considered as harassment and the appellate court is required to address this. If the defendant's actions were meant to penalise the plaintiff, the new work schedule would be invalid and the plaintiff would not be in breach of his obligations by failing to attend his classes.

Although employers are authorised to assign work to their employees within the agreed scope, they are not permitted to exercise this right in a way which harasses the employee or which abuses their authority to assign work.

Comments from other jurisdictions

Germany (Dagmar Hellenkemper): In Germany, Section 612a of the Civil Code provides that the employer may not discriminate against an employee in an agreement or by means of a measure, on the basis that the employee has exercised his rights in a permissible way. This prohibition against victimisation would cover the above case. However, the applicable scope ends if the Court determines that the employer had a legal right to take the measure in question. In the case at hand, the Court would only have found the employer at fault if the instruction to teach engineering and physical education was the unlawful exercise of a right. This would depend on the details of the case which – unfortunately – were not given. If the teacher was not qualified at all (in terms of formal qualifications) to teach these subjects, the assignment would be unlawful and might even have serious consequences for the school, quite apart from the fact that the teacher would not have to obey the instructions. If, on the other hand, the teacher was qualified to teach these subjects, but had only taught English for the past few years (simply as a matter of convenience), assigning those subjects to him might be considered the lawful exercise of the employer's right.

The Netherlands (Peter Vas Nunes): Implicitly, the Czech courts seem to take the view that a teacher who has been hired as a "high school teacher" and who has for many years taught exclusively one subject in which (s)he is qualified, may perfectly well be required to teach totally different subjects for which (s)he is unqualified, if the instruction to do so is not tainted, for example by harassment. I doubt whether a Dutch court would take such a strict approach.

Subject: Harassment
Parties: Ing. I. J. (employee) – v – *Střední odborná škola lesnická a strojírenská Šternberk, príspevková organizace*
Court: *Nejvyšší soud Ceské republiky* (Supreme Court of the Czech Republic)
Date: 21 January 2015
Case number: 21 Cdo 815/2013
Hard copy publication: -
Internet publication: www.nsoud.cz → fill in case number in boxes under the heading Spisová (senátní) znacka

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2015/52

Protection of pregnant employees – In-vitro fertilisation (GE)

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Summary

An employee can benefit from special protection against dismissal from the moment an embryo is trans-ferred into her body *in-vitro.*

Facts

The plaintiff, born in 1975, had been employed by the defendant, an insurance agency with two employ-ees, since February 2012. There had never been any complaints about the plaintiff or her performance on the job. On January 14 or 15 of 2013, the plaintiff told the defendant that she wanted to have a child and was set to undergo another round of in-vitro fertility treatment (IVF). An embryo transfer took place on 24 January. The defendant issued notice of dismissal dated 31 January, which the plaintiff received the same day. An official approval by the competent authority for the dismissal had not been issued. During the notice period (until 28 February), the plaintiff was put on garden leave. The defendant subsequently replaced the plaintiff with an older female employee. On 13 February, the plaintiff notified the defendant of her pregnancy and claimed her dismissal was invalid. The plaintiff gave birth to her child on 1 October 2014.

The plaintiff argued that she had already been pregnant upon receipt of the notice of dismissal. According to her, the dismissal was also discriminatory and had only been issued because she had said she was going to undergo IVF.

The defendant argued that the plaintiff had not proven that she was already pregnant upon receipt of the notice of dismissal. According to him, only proof of implantation ("nidation") of the embryo would establish a pregnancy. He also argued that the dismissal had solely been based on the fact that he had not been satisfied with the plaintiffs' performance.

Both the Labour Court and the Regional Labour Court decided in favour of the plaintiff. The defendant then appealed to the Federal Labour Court (BAG).

Judgment

The Federal Labour Court (BAG) also decided in favour of the plaintiff. The Court established that the plaintiff was protected against dismissal in accordance with section 9 of the Maternity Protection Act. Section 9 provides that the dismissal of a woman during pregnancy and in the first

four months following delivery is unlawful if the employer was aware of the pregnancy at the time he gave notice of dismissal or is informed of this within two weeks after the notice of dismissal was served. The State authority responsible for protection of employees may in special cases declare a dismissal to be permissible.

According to the BAG, the plaintiff was pregnant at the time of the dismissal. It determined that in the case of an in-vitro fertilisation, the pregnancy does not begin with the fertilisation of the ovum outside the body but with the transfer of the embryo into the female body. Whether or not the embryo successfully 'nidates' following this transfer, is irrelevant[1]. In other words if one were to follow the reasoning of the court, even if the embryo fails to nidate, the woman would still be considered to have been pregnant for the short period between the transfer of the embryo into her womb and the failure to nidate. This failure could be likened to a miscarriage.

In the case of ordinary pregnancies, the beginning of the pregnancy is calculated backwards 280 days from the due date. In the case of an IVF, neither this method of calculation nor the date of fertilisation outside the body determines the beginning of the pregnancy. In accordance with the ECJ's judgment in *Mayr* (C-506/06), pregnancy does not begin with fertilisation of the ovum outside the woman's' body, otherwise, in theory, a woman would be able to claim pregnancy protection for years, given that fertilised ova can be frozen. The BAG ruled that the date of the embryo transfer is a reliable date for pregnancy to be deemed to commence in cases of IVF. In its reasoning, the BAG referred to section 218 of the Penal Code[2] which places the beginning of the pregnancy at the moment of nidation. However, the Court did not consider an analogy with this provision to be appropriate for the purpose of determining the beginning of pregnancy protection, given that the protected object of Section 218 is the embryo, whereas section 9 of the Maternity Protection Act protects the future mother.

The BAG further determined that the dismissal constituted discrimination against the employee on grounds of her gender. Again, the ECJ had ruled in *Mayr* that there could be direct discrimination on grounds of gender if notice of dismissal is issued on the basis that the employee is undergoing IVF. The BAG held that it was more than likely that the notice of dismissal had been issued because of the em-ployee's announcement that she was about to undergo a round of in-vitro fertilisation and the possible future pregnancy that might result. The fact that the defendant had later filled the vacancy with a much older female employee did nothing to contradict this assumption. The Court also held that the previous instance courts had correctly presumed that it was very unlikely the dismissal was based on the plaintiffs' job performance, as there had been no previous issues with her performance.

Commentary

Following the ECJ's judgment in *Mayr*, this decision of the BAG does not come as any great surprise. The ECJ had already laid out the groundwork for this decision. However, the BAG has now determined a method of calculating (or rather, determining) the beginning of pregnancy in the case of in-vitro fertilisa-tion – and this differs from the statutory beginning of pregnancy provided in the German Penal Code. The BAG's role was to decide whether the dismissal was valid. The plaintiff could have claimed damages for discrimination under section 15 of the Equal Treatment Act, but it appears that such a claim was not filed. It is not clear whether that was intentional or an oversight.

Comments from other jurisdictions

Belgium (Isabel Plets): Belgian case law is similar. As long as the employer is not informed about the pregnancy, the employee undergoing IVF treatment is not entitled to claim protection as a pregnant employee. This specific protection implies that the employer can only dismiss an employee for reasons that are not linked to her pregnancy (article 40 Working Time Act). If there is a link, the employee is entitled to compensation equal to six months' salary.

As soon as the employer is informed about the IVF treatment at an advanced stage and the dismissal is essentially based on the fact that the employee has undergone such treatment, there could possibly be direct gender discrimination. The employee will in that case be entitled to compensation equal to six months' salary.

Czech Republic (Natasa Randlová): In the Czech Republic we do not yet have a court decision on the beginning of a pregnancy, including pregnancy by IVF. However, a female employee is protected against dismissal from the moment of becoming pregnant even if she does not yet know about her pregnancy at the moment of notice of dismissal. However, confirmation from the employees' gynecologist is usually sufficient proof. In cases where the exact date of pregnancy is at issue, an expert will be called by the court and will taking into consideration the woman's menstruation. In the Czech Republic, we do not calculate backwards from 280 days. In my view, in the Czech Republic, a female employee would be pregnant from the moment of transfer of embryo into the female body. Whether or not the embryo successfully 'nidates' following this transfer, is irrelevant. If the embryo fails to nidate, the woman would still be considered to have been pregnant for the short period between the transfer of the embryo into her womb and the failure to nidate. During this period, the female employee would be considered pregnant and therefore protected against dismissal. I am of the opinion that Czech courts would rule in the same way as the BAG.

Denmark (Mariann Norrbom): Danish and German law differ in the extent of the protection given. According to the case report, section 9 of the German Maternity Protection Act provides that the dismissal of a woman *during* pregnancy is prohibited. In contrast, the Danish Act on Equal Treatment of Men and Women prohibits dismissal *on grounds of* pregnancy. According to a judgment of the Danish Supreme Court in 2003, dismissal on grounds of fertility treatment is considered a dismissal reason so closely related to pregnancy that it is covered by the provisions on pregnancy under Danish Law.

As mentioned in the Dutch comment below, the Danish Supreme Court decided a case in 2012 about an employee who was dismissed when she was about to undergo fertility treatment with the purpose of be-coming pregnant. The decisive factor in that case turned out to be whether the employee had in fact initiated the fertility treatment and whether the employee could thus claim to be protected under section 9 of the Danish Act on Equal Treatment of Men and Women. The Danish Supreme Court found that the employee, who was undergoing initial check-ups at her own doctor before starting the fertility treatment, was not protected by the prohibition against dismissal on grounds of pregnancy, because she had not yet undergone the fertility treatment. In its judgment, the Danish Supreme Court emphasised the importance of whether or not there was "an actual possibility" of becoming pregnant.

Even though employees are protected against dismissal on grounds of fertility treatment under the same section of the Danish Act on Equal Treatment of Men and Women, there is a significant difference

1 "Nidation" is the process whereby a fertilised ovum attaches itself to, and imbeds itself in, the uterus.

2 Section 218 of German Penal Code: Whosoever terminates a pregnancy shall be liable to imprisonment not exceeding three years or a fine. Acts, the effects of which occur before the conclusion of nidation, shall not be deemed to be an abortion within the meaning of this Code.

as regards the burden of proof. Under Danish law, the burden of proof is reversed if an employee is dismissed during pregnancy or absence due to maternity, paternity or parental leave. If an employee who is under-going fertility treatment is dismissed, a shared burden of proof applies. Accordingly, if the employee could establish a presumption of discrimination on grounds of fertility treatment, it would be for the employer to disprove discrimination. An employee is thus not covered by the reversed burden of proof until she is in fact pregnant.
In a case from 2011, the Danish Western High Court stated that in order for an employee to be covered by the reversed burden of proof, it must be possible to ascertain the existence of a pregnancy at the time of dismissal. In the judgment the court found it was not possible to determine that pregnancy existed until approximately 14 days after an embryo was transferred into the uterus. The employee had an embryo inserted in her uterus three days before she was dismissed and the High Court therefore found, that it was not yet possible to determine the existence of the pregnancy and so she was not covered by the re-versed burden of proof. The High Court did, however, find a presumption of discrimination to be established, due to the connection in time between the treatment and the dismissal.

Hungary (Gabriella Ormai): Under Hungarian employment law an employee would be under dismissal protection during her pregnancy and for the first six months of fertility treatment. In other words, the fertility treatment itself creates protected status for the first six months of the treatment.
When the new Labour Code came into force on 1 July 2012, the employee could rely on this dismissal protection only if she informed the employer about it before the dismissal notice was given to her. However, since a 2014 decision of the Hungarian Constitutional Court, employees are no longer required to inform employers of the circumstances before notice is communicated and therefore, if the employee informs the employer that she has had fertility treatment after receiving notice (and she is still in the first six months of the treatment), the notice is unfair. It was initially unclear how an employer should react in this situation, but based on a draft amendment of the Labour Code which, if accepted by the Hungarian Parliament, should come into force on 1 January 2016, the employer will be entitled to withdraw the notice unilaterally within 15 days if it learns of the employee's protected status.

The Netherlands (Peter Vas Nunes): In this case, the issue of which party bears the burden of proof in respect of the date on which pregnancy began was circumvented. The date on which the fertilised egg was introduced into the employee's womb was not in dispute and that, in the BAG's view, is the relevant date. In the more common situation in which pregnancy does not commence following an *in vitro* proce-dure, the issue of who needs to prove what can be more difficult. In 1990, the Dutch Supreme Court was called upon to render judgment in the following case. An employee was dismissed on 31 March. On 22 April her union sent the employer a letter claiming that she was pregnant on the date of her dismissal and that the dismissal was therefore void. The employer asked for proof. The employee complied by sending the employer a note, drawn up by her physician. The note stated "LM 15 February *a terme* 22 December", meaning that the first day of the employee's last monthly period was 15 February and that she was antic-ipated to deliver the baby on 22 December. If "LM 15 February" reflected the truth, that meant that the employee must have been pregnant on 31 March. However, the statement was not based on any opinion by the physician but merely reflected what the employee had told her physician, i.e. it was effectively a statement by the employee herself. The employee delivered her baby on 24 December. The Supreme Court held that the burden of proof as to the date on which a pregnancy began rests with the employee in principle. However, where (i) it is established that the employee was pregnant 'shortly' after dismissal and (ii) the facts (in particular, the date of birth) indicate that the employee's statement may be truthful, there is a presumption of truthfulness and it is up to the employer to disprove the statement. The Supreme Court did not explain how an employer is to prove that an employee was not yet pregnant on a certain date.
See EELC 20012/20 for a Danish judgment regarding the issue of whether an employee undergoing IVF can claim pregnancy protection.

Subject: Sex discrimination - termination
Parties: unknown
Court: *Bundesarbeitsgericht* (Federal Labour Court)
Date: 26 March 2015
Case number: 2 AZR 237/14
Hardcopy publication: NZA-RR 2015, p. 734
Internet-publication: www.bundesarbeitsgericht.de→ Entscheidungen→type case number in "Aktenzeichen"

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2015/53

Genuine or false self-employed substitutes? (NL)

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Summary
In the terminoligy of the ECJ decision in the case *FNV/Staat der Nederlanden* (C-413/13), self-employed substitutes must, according to the Court of Appeal, be regarded as 'false self-employed'. For that reason, the collective labour agreement relating to musicians substituting for members of an orchestra setting out minimum fees for self-employed substitutes is excluded from the scope of national and EU competition law.

Facts
Before setting out the facts of this case it is useful to make some preliminary observations. The first is that Dutch law allows collective labour agreements to include provisions that are not directly related to terms of employment. Secondly, it is not only employees who can join a union. Self-employed individuals may also become a member of a union. A collective labour agreement may include terms for such self-employed workers. Thirdly, ECJ case law holds that the EU anti-trust rules (embodied principally in Article 101 TFEU) do not apply to collective agreements between employers' associations and employees' associations that contribute directly to improving workers' employment and working conditions. This case law began in 1999 with the ECJ's ruling in the *Albany* case (C-430/99), for which reason the doctrine exempting collective agreements from the scope of Article 101 TFEU is sometimes referred to as the 'Albany doctrine'. Article 101 TFEU (formerly Article 81 EC) prohibits anti-competitive agreements and behaviour, including the fixing of 'selling prices'. Agreements prohibited by Article 101(1) TFEU "shall be automatically void".
This case concerns a collective agreement (the 'Collective Agreement') entered into between, on the one hand, an artists' union affiliated with the

largest Dutch union FNV and, on the other, an association whose name is abbreviated as 'VSR'. This association represents organisations that hire out 'orchestra substitutes'. An orchestra substitute is a musician who stands in whenever a regular member of an orchestra is unable to attend a rehearsal or performance. A substitute may be an employee of the organisation that rents him or her out to an orchestra or a self-employed individual. The Collective Agreement included a provision (the 'Contested Provision') according to which the fee to be paid to a self-employed substitute for attending a rehearsal or performance must be no less than that paid to an employed substitute plus 16%. In December 2007, the *Nederlandse Mededingingsautoriteit* (the Netherlands Competition Authority, the 'NMa') took the position that the contested provision was not covered by the Albany doctrine and was therefore void. According to the NMa, a collective labour agreement which governs contracts for professional services by non-employees is "altered in its legal nature" (i.e. ceases to be a real collective labour agreement) and acquires the characteristics of an inter-professional agreement, in that it is negotiated on the trade union side by an organisation which acts in that respect, not as an employees' association, but rather as an association for self-employed workers. The trade union FNV, in effect being the contracting party of the collective agreement, disputed the position taken by the NMa. It brought a court action against the Dutch State, seeking a declaratory judgment that the contested provision was not in violation of competition law. It argued that the prohibition of agreements restricting competition does not apply to a provision of a collective labour agreement setting minimum fees for self-employed service providers performing the same activity for an employer as that employer's employed workers.

The Court of Appeal of The Hague referred questions to the Court of Justice ('ECJ'). In essence it asked whether, under EU law, a provision of a collective labour agreement, setting minimum fees for self-employed service providers who, under a contract for professional services, perform for an employer the same activity as that employer's employed workers, falls within the scope of Article 101(1) TFEU.

In its decision of 4 December 2014 (C-413/13), summarised in EELC 2014-4, the ECJ recalled that, although some competition restrictions are inherent in collective agreements between organisations representing employers and employees, the social policy objectives pursued by such agreements would be seriously compromised if the contracting parties were subject to Article 101(1) TFEU when seeking jointly to adopt measures to improve conditions of work and employment. Agreements concluded in this collective bargaining process between employers and employees and intended to improve employment and working conditions, given their nature and purpose, do not fall within the ambit of that Article.

In the underlying matter, however, the collective agreement was concluded between an employers' organisation and employees' organisations of mixed composition, which negotiated not only for employed substitutes but also for affiliated self-employed substitutes. Therefore, the ECJ needed to examine whether the nature and purpose of this specific agreement enabled it to be included in collective negotiations between employers and employees and to justify its exclusion, with regard to minimum fees for self-employed substitutes, from the scope of Article 101(1) TFEU. In that analysis, the ECJ made a distinction between, briefly put, 'genuine self-employed substitutes' and 'false self-employed substitutes'.

Genuine self-employed substitutes that perform the same activities as employees are 'undertakings' within the meaning of Article 101(1) TFEU. Organisations representing these genuine self-employed substitutes do not act as trade union associations and therefore as a social partner, but in fact as associations of undertakings. The TFEU does not encourage genuine self-employed service providers to conclude collective agreements with a view to improving their terms of employment and work. Therefore, the contested provision concluded by an employees' organisation in its capacity as a body acting on behalf of genuine self-employed services providers who are its members, does not constitute the result of a collective negotiation between employers and employees. In such a case, it cannot be excluded from the scope of Article 101(1) TFEU.

If, however, the contested provision relates to 'false self-employed', things are different. False self-employed service providers are service providers in a situation comparable to that of employees. False self-employed contractors cannot be regarded as 'undertakings'. They lose their status of independent traders (undertakings) if they do not determine independently their own conduct on the market, but are entirely dependent on their principal, because they do not bear financial or commercial risks arising out of the principal's activity and operate as auxiliaries within the principal's undertaking. The term 'employee' must for the purpose of EU law be defined according to objective criteria. The essential feature of the employment relationship is that for a certain period of time one person performs services for and under the direction of another in return for which he or she receives remuneration. In that regard, the ECJ has already held that the classification of a 'self-employed person' under national law does not prevent that person being classified as an employee within the meaning of EU law if his or her independence is merely notional, thereby disguising an employment relationship. A 'worker' is an employee according to EU law, regardless of the national treatment of that person, as long as that worker acts under the direction of the employer as regards, in particular, the freedom to choose the time, place and content of the work, he or she does not share in the employer's commercial risks, and, for the duration of the relationship, forms an integral part of the employer's undertaking, so forming an economic unit with that undertaking.

The ECJ made clear that it was up to the national court to decide whether the workers were genuine or false self-employed substitutes. Thus, it is for that court to ascertain whether, on the facts, the substitutes found themselves in the circumstances set out above and, in particular, whether their relationship with the orchestra was one of subordination during the contractual relationship, or whether they enjoyed more independence and flexibility than employees who performed the same activity, as regards determining working hours and the place and manner of performing the tasks assigned.

If the substitutes are false self-employed substitutes, the minimum fees scheme should be regarded as contributing directly to the improvement of the employment and working conditions of those substitutes. In that case, the contested provision cannot, by reason of its nature and purpose, be subject to the scope of Article 101(1) TFEU.

Judgment

The Court of Appeal of The Hague, to which the case returned following the ECJ's judgment, holds that the self-employed substitutes are musicians who fill in for one or more orchestras and, with the exception of a soloist substitute, perform the same work as the musicians that are employed by these orchestras. It therefore happens that a self-employed substitute works at the same worktable as an employee (or an employee substitute), playing exactly the same music. Self-employed substitutes, just like the employees of the orchestra, must attend work according to a fixed time schedule during concert rehearsals. They must, just like the employees, follow directions from the orchestra conductor. The quality of an orchestra production depends on continuity in the musicians. It is difficult to catch up with rehearsals at a later date. Self-employed substitutes may not be replaced by any other person appointed by them;

if necessary the orchestra itself will arrange a replacement that meets the standards set by the orchestra itself. Self-employed replacements can, and usually do, earn income by performing this work, but also by acting as a music teacher. The self-employed substitutes must, according to the Court of Appeal, be regarded as 'false self-employed'. Contrary to genuine businesses, self-employed substitutes are in a subordinate relationship during the contractual term. They must not only follow the directions of the conductor, but should also be present at rehearsals and concerts, just like musicians employed by the orchestra. There is no flexibility or independence with respect to time schedules, place of work or how the work is performed.

The fact that self-employed substitutes are free to decide whether or not they enter into a contract, does not alter this analysis. The same applies to employee substitutes. Further, the position of a self-employed substitute should be considered during the contractual term, as this is the appropriate timeframe once the substitute has accepted the contract.

For these reasons, the self-employed substitutes had to be regarded as false self-employed substitutes, and the Collective Agreement setting out minimum fees did not fall within the ambit of competition law.

Commentary

The decision of the ECJ adds a third category to the existing categories of employees and self-employed service providers. The position of this newly introduced category of 'false self-employed service providers' falls somewhere between an employee and a genuinely self-employed service provider. The false employed service provider may, according to the ECJ, be offered protection in a collective labour agreement without the interference of competition law, but may be treated in the same way as genuinely self-employed service providers in all other respects.

In the Netherlands, the position of self-employed workers often raises questions. There are sometimes discussions about whether a self-employed worker is in fact an employee. The Dutch Civil Code even has legal assumptions in that regard: if a worker performs work for pay over three consecutives months on a weekly basis or for at least 20 hours per month, that worker is presumed to perform this work on the basis of an employment agreement. But even if the agreement proves to be a proper service contract, as opposed to an employment agreement, the position of these self-employed workers is not free from concern. It is argued, in particular by the trade unions, that these workers are open to exploitation by the stronger party and that they should be offered an additional level of protection.

At the same time, the trade unions wish to try to prevent a situation in which cheaper self-employed workers effectively push out more expensive employees (who might be members of that trade union). The solution for these problems is often sought in collective labour agreements. Dutch law, after all, allows collective labour agreements to cover service contracts. But this solution will be much harder to achieve following the ECJ's decision, as the only part of the agreement exempt from competition law is the minimum fee clause for false self-employed workers.

Certain self-employed workers may be false self-employed, as in the matter at hand, but this is not always the case. Only recently, the District Court Zeeland-West Brabant ruled that certain clauses of the collective labour agreement for public transport (buses) (relating to pay and restrictions on hiring self-employed workers instead of employees) applied to false self-employed bus drivers, but not to genuinely self-employed bus drivers - but without explaining which bus drivers fall into which category (11 February 2015; ECLI:NL:RBZWB:2015:813).

Since the ECJ's ruling in this matter, the term 'false self-employed' has not only been applied for the purpose of assessing collective labour agreements, but also for examining the right to strike. Recently, the Court Mid-Netherlands had to decide whether a strike by self-employed workers was lawful (20 July 2015; ECLI:NL:RBMNE:2015:5373). The court ruled that if the strikers were genuinely self-employed, the strike was unlawful. If, however, the strikers were 'false self-employed' individuals, the answer to whether the strike was lawful should be answered in the same way as it would have been if the workers had been employees. A strike will, in such cases, normally be considered lawful (although not in the case at hand).

In the meantime, the introduction of this third category of false self-employed workers does not make the law any tidier. As of today, it is still uncertain exactly what rights and entitlements they have.

Comments from other jurisdictions

Austria (Martin Risak/Johanna Pinczolits): Austrian labour law generally does not provide for collective agreements to cover independent service providers. Therefore the question touched on in the ECJ decision in the case of *FNV/Staat der Nederlanden* (C-413/13) is mostly interesting from a social policy point of view, i.e. to what extent collective bargaining may be extended beyond employees, whilst not being in conflict with EU anti-trust-provisions. The ruling is in our view ambivalent, as it does not clear up what "false self-employment" actually means: Does it cover economically weak self-employed persons who do not decide on their own conduct in the market independently and lack bargaining power vis-à-vis their contractual partners? Or is the organisational integration the relevant criterion, i.e. that a person lacks the freedom to choose the time, place and content of the work? The decision of the Court of Appeal of The Hague seems to point in the second direction. If this is the case, "falsely self-employed persons" are, from an Austrian point of view, actually employees ("bogus self-employment") and there is no need for an intermediate category or an extension of the concept of employee.

Austria does in fact have an intermediary category between workers and independent service providers, so-called "employee-like persons" *(arbeitnehmerähnliche Personen)*, who are covered by some labour legislation (but not the minimum wage). They are defined as economically dependent but personally independent. They would only be considered "falsely self-employed" if this notion was recognised and interpreted widely, based on both organisational criteria and other economic criteria.

In Austria there are certain niche areas in which collectively agreed minimum wages for formally independent service providers are possible: one of these concerns homeworkers *(Heimarbeiter)*, a legacy of the cottage industries that grew up at the beginning of industrialisation, which have no practical importance today. Another case is collectively agreed minimum wages for permanently freelance journalists *(ständige freie Mitarbeiter)* that are concluded by the trade unions and the employer associations of the media companies. They are of practical importance and may be challenged in the light of the ECJ ruling. There are good arguments as to why these journalists may not be considered "falsely self-employed" if they work differently from and are more loosely connected to the media company than journalists under employment contracts.

Germany (Paul Schreiner) Section 12a TVG (Tarifvertragsgesetz, the Act on Collective Bargaining Agreements) allows the conclusion and application of collective bargaining agreements for certain self-employed individuals. The criteria for deciding which employees can be included in a CBA are in line with the Dutch decision, as they relate to "employee-like persons" who are economically dependent on the customer/employer but equally dependent on social protection as employees. In fact, the few CBAs that apply to people in this situation

involve public service broadcasting.
Besides this special situation in which a CBA adresses self employed people, it is also possible that a contractual relationship that the parties have treated as self employment is considered to be employment by the courts (i.e. bogus self-employment). In such a situation, the court will typically also have to determine the amount of remuneration owed for the services rendered and to do so, it may apply a collective bargaining agreement.

Subject: Collective labour law and competition
Parties: FNV Kunsten Informatie en Media – v - State of the Netherlands
Court: *Gerechtshof Den Haag* (Court of Appeal The Hague)
Date: 1 September 2015
Case number: 200.082.997/01
Hardcopy publication: JAR 2015/242
Internet publication: www.rechtspraak → zoeken in uitspraken → ECLI:NL:GHDHA: 2015:2305

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2015/54

From which date does interest start to run on wages owed following invalid dismissal? (SK)

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Summary
The Slovak Labour Code is silent on interest for late payment of wage compensation in the event an employment contract is terminated invalidly. The Civil Code provides that interest is owed in the event of late payment, but whether the relevant provisions of Civil Code apply to employment relationships is disputed. This has led to heated debate amongst Slovak scholars and to contrasting judgments (including between the Supreme Court and the Constitutional Court) on the date from which to calculate interest. Does the interest accumulate from the end of each month on which salary should have been paid or does it not begin to accumulate until the court has ordered the employer to pay compensation? The answer depends on whether the court order is seen as "declaratory" or "constitutive".

Slovak law
An employee dismissed with immediate effect may apply to the court to have the dismissal nullified on the grounds that the employer had no valid legal reason to dismiss him or her. If the court nullifies the dismissal, the employment relationship is deemed not to have been terminated validly and it therefore continues into the future (unless the court determines otherwise). In such a case, the court will order the employer to pay the employee 'wage compensation'[1] covering the period between (i) the date on which the employee protests, claims further employment and demands continued payment of salary and (ii) the date of the court judgment. It has been common ground that the employer owes interest on the amount it is ordered to pay based on application (by analogy) of the Civil Code by Slovak courts. However, this approach has recently been challenged by legal scholars, who believe the courts err in applying the Civil Code rules for interest on late payment. Moreover, the law is unclear on when this interest would start to accumulate. Is it from the date each month's salary should have been paid or from the date of the court order? The difference can be substantial, as illustrated by the following hypothetical example.
Let us suppose that employee X is dismissed invalidly on 1 January 2014, that he protests and demands continued payment that same day, that his monthly salary of 100 was due on the last day of each month, that on 1 January 2015 the employer is ordered to pay him wage compensation for the year 2014 and that the employer complies with that order that same day. At present, the statutory interest for late payment in this type of case is 5.05% per year. Under the "declaratory" doctrine (see below), the employer would need to pay a principal sum of 12 x 100 plus the following interest:

- 100 x 5.05% x 11 months (interest on January salary, February - December);
- 100 x 5.05% x 10 months (interest on February salary, March - December);
- 100 x 5.05% x 9 months (interest on March salary, April - December);
- 100 x 5.05% x 8 months, etc.

The total amount of interest is approximately € 28. In comparison with the principal sum of € 1,200 this may not seem much, but the period between dismissal and judgment can be much longer than one year and in the recent past the interest was much higher: up to 15%.
Under the "constitutive" doctrine, the employer in this example would not need to pay any interest.

Facts
The plaintiff was dismissed with immediate effect. He protested and demanded continued employment and continued payment of salary. As the employer did not comply, the plaintiff began court proceedings. He asked the court to order the defendant to pay him an amount equal to (i) the salary he would have been paid each month had he not been dismissed; plus (ii) interest calculated as per the "declaratory" doctrine, i.e. to be provided with interest accumulated from the end of each month on which salary should have been paid. This case report does not deal with the dismissal aspect of the case.
The court of first instance, adopting a declaratory approach, ruled in favour of the plaintiff. The appellate court, favouring the constitutive theory, overturned the judgment. It held that wage compensation in the event of an invalid dismissal is distinct from salary. Salary is owed in consideration of work performed, whereas wage compensation serves two purposes: it is a sanction imposed on the employer for dismissing someone without good reason and it compensates the employee for this breach of contract. Therefore, the right to the compensation (and, consequently, interest) does not come into being until the court has ordered the employer to pay it. The court order, as it were, creates (constitutes) the right to the compensation. In legal terms, the order is constitutive.
The plaintiff took the matter to the Supreme Court.

Judgment
The Supreme Court began by establishing that the basis for the claim was the invalidity of the dismissal. To be able to claim wage compensation, the employee must inform the employer that he or she insists on continued payment of salary. Provided the court declares

1 The court order is not to pay 'wages' but 'wage compensation', because the compensation is technically not salary, given that no work has been performed, but in terms of the amount owed, there is no difference.

the dismissal invalid, it is this notice that creates the entitlement to wage compensation. All the court's judgment does is to declare that the entitlement exists, hence the term 'declaratory'. Thus, the plaintiff prevailed in the end.

In its judgment, the Supreme Court referenced EU law in general, observing that its decision is in full accordance with generally binding EU legislation as published in the Official Journal of the European Union. The court may have had Directive 2011/7 on combatting late payment in commercial transactions in mind. This directive was transposed into Slovak civil law and the court used this civil law regulation by analogy in this case. The directive provides that "the creditor is entitled to interest for late payment from the day following the date or end of the period for payment fixed in the contract".

The Supreme Court went on to instruct the lower courts to see its judgment as a binding precedent, even though the case in question was decided under the old Labour Code, which was replaced on 1 April 2002.

Commentary

The issue of interest on late payment of wage compensation may appear to be a simple legal question, but it is more than that. It is highly questionable whether general civil law may be applied to labour relationships by analogy. Slovak law is not specific enough to ensure employees are provided with interest on late payment when it comes to wage compensation. However, in practice the courts grant them wage compensation including interest on late payment in any event.

Yet even following this Supreme Court ruling the legal basis for this practice is not solid. On the one hand, there is this judgment of Supreme Court stating that interest must be granted to employees. On the other, the Constitutional Court in other cases has been more hesitant. It has held that the purpose of wage compensation in cases of invalid termination of the employment contract is to satisfy the needs of the employee and to sanction the employer. In the Constitutional Court's view, the amount of wage compensation is created de facto from the wage compensation itself, plus interest on late payment of that compensation. Even though the claims for wage compensation and interest are seen as separate claims, altogether they constitute one remedy for the employee. In the Constitutional Court's reasoning, the main role of the courts when deciding these cases is to evaluate all the subjective and objective circumstances of the case. After assessing the evidence submitted by the parties, the court must impose a sanction on the employer that is equitable, justifiable and fair, at the same time as being a fair remedy for the employee.

In our opinion, the principal issue in this case is the difference between the declarative and constitutive approaches of the courts. The declarative approach punishes the employer more harshly than the constitutive approach. Some court proceedings concerning claims of unfair dismissal last more than four years. That means that the amount of interest on late payment can become excessive. If the court grants the employee wage compensation for four years of employment plus four years' interest on late payment, this would be a harsh outcome for the employer. Yet, just such a situation arises in many cases, as the courts prefer to take this approach.

In our view, the court´s judgment has a constitutive effect. The court considers the employment termination and determines whether it is valid or invalid. This means that the court 'creates' the employee's claim. In cases where court proceedings take many years, the employer may be obliged to pay an excessive amount of interest. Obviously cases that last a long time are also detrimental to the employee, who has to wait several years to get justice, during which time he or she is not paid salary. The employee also loses the advantage of a long-term employment relationship, including bonuses and the possibility of promotion and salary increases. Normally, there is no option but to look for another job. In the end, however, the sanction against the employer should be equitable, justifiable and fair. Therefore, we think that the interest on late payment should be calculated from the date of the court´s decision.

Comments from other jurisdictions

The Netherlands (Peter Vas Nunes): If I understand the authors of this case report correctly, their argument is that the declaratory doctrine is harsh on employers because courts are slow and that, in combination with a high interest rate, this leads to excessive interest awards. If this is indeed seen to be unfair, why is the interest rate so much higher than the going market rate? Is the reason, perhaps, that the legislator wishes to compensate invalidly dismissed employees and employees who do not get paid on time for the serious hardship this can cause them to suffer? An employee who has been dismissed invalidly has no income for as long as the court has not ruled on the (in)validity. At present, the inflation rate is low, but suppose it goes back up to 10%. Then if the employee gets his salary four years later, he will have lost over 40% of his salary. Actually more, because if he had not been dismissed he would probably have received wage increases and maybe promotion, etc.

How different the situation in Slovakia is from that in The Netherlands. There, if a dismissal is held to be invalid, the employer must not only retain the employee but also pay him (i) salary and benefits for the intervening period, (ii) a penalty of up to 50% on top of the arrears in salary and (iii) statutory interest (currently 3%) on the total (as well as compensation for the employee's legal expenses). On the other hand, courts do not take four years to adjudicate a dismissal dispute, more like four months (or 3-4 weeks if the employee applies for temporary relief).

Subject: Interest on late wage payment
Parties: P.P. – v – T.U
Court: *Najvyšší súd Slovenskej republiky* (Supreme Court of the Slovak Republic)
Date: 30 April 2012
Case number: 6 Cdo 246/2010
Internet publication: www.supcourt.gov.sk → Rozhodnutia → Spisová znacka → case number

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2015/55

Provisional decision to close school triggers collective redundancy consultation obligations (UK)

CONTRIBUTOR FLORENCE CHAN*

Summary

This case involved the closure of a private school by its owner, a registered charitable trust. In February 2013 the school governors decided they would close the school if pupil numbers did not increase. Subsequently in April 2013, they decided to close the school and all the teachers were given notice that their employment would end in July

2013. The claimants subsequently brought a claim alleging that the school had breached its collective redundancy consultation obligations. The Employment Appeal Tribunal (EAT) upheld the Employment Tribunal's (ET) decision that the duty to consult was triggered in February, not April.

Background law

Where an employer proposes to make large scale redundancies of 20 or more employees at one establishment within a period of 90 days or less (collective redundancies), it must consult on its proposal with representatives of the affected employees (either a recognised union or elected employee representatives). Consultation must be with a view to reaching agreement on avoiding the need for dismissals, reducing the number of employees to be dismissed, and mitigating the consequences of the dismissals (section 188, Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA)). Section 188 implements the UK's obligations under the Collective Redundancies Directive (98/59/EC).

There is a limited exception to the duty to consult where 'special circumstances' render it not reasonably practicable to comply with the obligation.

Where the duty to collectively consult has been breached, a tribunal may make a protective award. The maximum protective award is up to 90 days' actual gross pay for each dismissed employee. The award is punitive and is not based on loss of earnings.

Facts

The case concerned the closure of the Peterborough and St Margaret's school, operated by the E Ivor Hughes Educational Foundation (the Foundation). The number of pupils at the school had been declining for several years and the projected figures for the 2013/14 academic year indicated that there would be a sizeable deficit.

A meeting of the school governors was called in February 2013, at which the projected number of pupils was discussed and options for keeping the school open were considered. The school governors decided that it would have to close the school at year's end if pupil numbers had not increased by April 2013.

In April 2013, the number of pupils for the forthcoming academic year was confirmed as being lower than predicted. A further meeting of the governors took place and they decided that the school would close at the end of the summer term in 2013. The governors gave staff notice of dismissal on 29 April 2013, four days after the decision to close the school had been taken. The employees were entitled to one term's notice of termination and accordingly notice expired on 31 August 2013. No collective consultation was carried out. It appears that the governors had no knowledge of the legal obligations they were under. The employees brought claims for breach of section 188.

ET decision

The ET held that the duty to collectively consult had been triggered at the February meeting, when the governors had decided that the school would be closed unless pupil numbers improved.

There is conflicting UK and ECJ case law on what triggers the duty to consult. In *UK Coal Mining Ltd - v - National Union of Mineworkers [2008] IRLR 4,* the EAT held that in the context of business closure, consultation must begin sufficiently early to include consultation about the business reasons for making the redundancies, which may be before the strategic decision is made. However, in *Akavan Erityisalojen Keskusliitto AEK ry - v - Fujitsu Siemens Computers Oy [2009] IRLR 944*, the ECJ decided that the duty to consult under the Directive is triggered only once a strategic or commercial decision has been taken that will foreseeably or inevitably lead to collective redundancies. The Court of Appeal recently declined to overturn *UK Coal Mining* in the light of *Fujitsu*, saying that the ECJ decision was not clear enough to warrant this *(United States of America - v - Nolan [2010] EWCA Civ 1223).*

The ET considered both tests, holding on the facts, that on the basis of either test, the duty to consult arose on 27 February 2013.

The Foundation argued that there were special circumstances rendering it not reasonably practicable to consult. It claimed that had consultation commenced in February 2013, the possible closure of the school would have been leaked, resulting in parents removing their children, which would have sealed the school's fate; waiting until April 2013 gave the best chance of the school's survival. The tribunal considered that any such potential leaks could have been avoided by making clear to employees that the proposal was confidential and by specifying that any breach of confidentiality would constitute gross misconduct. As to the Foundation's assertion that there was a need to give notice in April in order to avoid tripping a further term's notice which would entitle employees to be paid up until 31 December 2013, this was also rejected by the tribunal. The tribunal held that contractual obligations (in this case the employees' notice period) were not capable of amounting to special circumstances.

The tribunal concluded that there were no mitigating features and, as no consultation whatsoever had taken place, it ordered a 90 day protective award for each of the employees.

The Foundation appealed.

EAT decision

The EAT agreed that the ET's approach was appropriate. It noted that the decision in February to close the school unless numbers increased was either a "fixed, clear, albeit provisional intention" to close the school or amounted to a "strategic decision on changes ... compelling the employer to contemplate or plan for collective redundancies". On either analysis, the duty to consult arose on that date. The EAT did not find it necessary to decide which test applied.

The EAT also rejected a ground of appeal that special circumstances excused a failure to consult because of the need to keep the closure plans secret for fear of confidence in the school being lost. The problem for the employer was that it had not even considered the possibility of consultation at the time – that an employer which had not thought about consultation might, with hindsight, see problems with the practicalities of consultation is not a special circumstance excusing the duty to consult.

Commentary

The case illustrates how difficult it can be for an employer to pinpoint exactly when they are required to initiate a collective redundancy consultation. On the facts of this case it appears that the employer did not realise that it had a duty to consult but even if it had recognised this duty it may have thought that the obligation would not be triggered until a firm decision to close had been made.

Further difficulties can arise around issues of morale and the risk that the consultation process may itself trigger a decline in the business and premature staff departures.

The protective award should focus on the seriousness of the employer's default. Where there has been no consultation at all, it is appropriate for the tribunal to start with the maximum award of 90 days' pay, then examine whether there were any mitigating circumstances.

In this case, the EAT commented that the school's decision not to take legal advice was "reckless" and it is possible that the protective award imposed was a way of punishing the school for its indifference to its legal obligations. The EAT may have been more inclined to find that the duty to consult was not triggered until April 2013, if the school had at

least given collective consultation some thought before it dismissed its employees. In particular, the EAT was not prepared to find that "special circumstances" prevented the school from consulting unless the school had those special circumstances in mind at the time.
This case has not done anything towards resolving the conflicting case law on when the duty to consult arises. It would be helpful if a higher court could provide further clarification on this issue. It is possible that the matter might be resolved by the Court of Appeal in *Nolan* which will be reconsidering the issue if the Supreme Court declines an appeal by the USA against the Court of Appeal's decision that TULCRA does apply to the closure of a military base by the USA.

Subject: Collective redundancy
Parties: E Ivor Hughes Educational Foundation - v - Morris
Court: Employment Appeal Tribunal
Date: 19 June 2015
Case number: UKEAT/0023/15/LA
Hard copy publication:
Internet publication:

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2015/56

Legislation regulating and standardising unfair dismissal damages unconstitutional (FR)

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Summary
On 10 July 2015, following over 400 hours of debate in Parliament, France adopted far-reaching legislation commonly known as the *loi Macron*, named after the Minister of Finance Emmanuel Macron. The law, which was highly controversial, was adopted without a vote in Parliament on the basis of a rarely used prerogative of the government (thereby risking a vote of no confidence) . A group of over 60 members of Parliament applied to the *Conseil constitutionel* to have a host of provisions of the law declared unconstitutional. Although the vast majority of the *loi Macron* passed the constitutionality test, some provisions were declared unconstitutional. They therefore did not enter into force. One was Article 266, which would have brought more predictability for employers in respect of the amount of compensation they need to pay unfairly dismissed employees. The government is now preparing a new effort to achieve predictability.

Facts
Under French law, in the event of termination, an employee with a permanent contract is entitled to (i) a notice period *(préavis)*, (ii) a transition award *(indemnité de licenciement)* and, in the event of dismissal in the absence of a real and serious reason *(sans cause réelle et sérieuse)* (iii) compensation for unfair dismissal.
Compensation for unfair dismissal is designed to compensate the employee for the entire loss he or she suffers as a result of the unfair dismissal. Employment tribunals assess damages mostly on the basis of the employee's length of service, age and the duration of his period of unemployment after dismissal. They also take his health and family situation into consideration. Some judges, even if they do not state this openly, also take into consideration the size of the company. Damages are commonly calculated in months of salary. The statutory minimum is six months of salary for an employee with at least two years of service in a company of at least 11 employees[1]. In exceptional cases, damages can be as high as 30 months[2]. Although the exact amount of damages is unpredictable, it is generally possible to assess them within a certain range.
Article 266 of the *loi Macron* was to have regulated the amounts of damages awarded by the courts in the event of unfair dismissal. However, on 5 August 2015, the Constitutional Court declared Article 266 unconstitutional.
Article 266 provided for a range of damages depending on the length of service. Within a given range, judges would have determined damages by taking into account the usual factors (age, period of unemployment, health, family situation), with three important changes:

- the minimum of 6 months was to have been reduced in some cases;
- creation of a maximum;
- the company's headcount was to have become a factor.

The following table shows what would have applied had Article 266 not been declared unconstitutional:

Damages for unfair dismissal in months of salary			
Headcount	Less than 20 employees	20 to 299 employees	300 employees and more
Less than 2 years of service			
Maximum	3	4	4
From 2 to 10 years of service			
Minimum	2	4	6
Maximum	6	10	12
More than 10 years of service			
Minimum	2	4	6
Maximum	12	20	27

The judge would have been allowed to overstep the maximum amounts in the event of:

- sexual or moral harassment;
- discrimination;
- violation of a specific protection (maternity, occupational accident);
- violation of the right to go on strike;
- violation of a fundamental liberty.

The mechanism that Article 266 would have introduced was simple and fairly easy to use, although the calculation of headcount would probably have been challenged in some cases.

1 Articles L. 1235-3 and L. 1235-5 of the labour code.
2 Usually, an employee aged at least 55, with a length of service of more than 20 years, with health issues and little chance of finding another job.

Judgment

More than 60 members of parliament challenged the *loi Macron* before the Constitutional Court[3]. They claimed that making the amount of damages depend on headcount was an unjustified breach of equality between employees, given that unfairly dismissed employees suffer the same losses regardless of headcount. The government defended Article 266 by pointing out that its goal was to bring more predictability to employers and therefore foster employment. Moreover, the government considered that bigger companies are more able to deal with unfair dismissal consequences than smaller ones. In particular, in smaller companies, one single large award of damages can jeopardize the continuity of the business, whereas a bigger company can withstand it[4].

The Constitutional Court examined the constitutionality of Article 266 in the light of two basic constitutional provisions: the right to claim full compensation of the loss suffered from a wrongful act and equality before the law.

Article 4 of the *Déclaration des Droits de l'Homme et du Citoyen* of 1789 (the year of the French revolution) provides that the author of any action that causes a loss is obliged to compensate that loss.[5] However, as full compensation is not a constitutional principle, the law can set limitations to damages in order to achieve common good. Therefore, the law can limit compensation if it serves the common good of society. Article 6 of the *Déclaration des Droits de l'Homme et du citoyen* provides that all citizens are equal before the law. This means that, when legislating with the object of promoting the common good, the legislator must comply with the principle of equality. The law complies with the principle of equality when it provides for different rules applicable in different situations.

As starting point, the Constitutional Court held that damages for unfair dismissal can be limited on the basis of the length of service. However, as argued by the members of parliament, damages for unfair dismissal cannot be differentiated on the basis of headcount, as that would breach the principle of equality between employees. Although the Constitutional Court recognized that the government acted in the common good in its attempt to bring more predictability to employers, it decided that the factors used to limit damages must be related to losses suffered by unfairly dismissed employees. As employees suffer identical losses regardless of headcount, limiting damages on the basis of headcount breaches equality.

Commentary

The Constitutional Court's decision is not consistent with at least three key provisions of the labour and social security codes that limit employees' loss compensation or mitigation in order to foster employment in smaller companies:

First, unfairly dismissed employees in companies with less than 11 employees are not entitled to the minimum damages of six months' salary. If headcount is not a factor to be taken into account, perhaps this limitation is also unconstitutional.

Secondly, the law exempts companies with less than 50 employees or where less than 10 employees are made redundant from the obligation to implement a social plan. The purpose of a social plan is to avoid redundancies or to speed up redeployment outside the company, in order to mitigate employees' losses. The social plan plays a very significant role in compensating/mitigating the employees' losses. However, it is compulsory only where at least 10 employees are made redundant in companies of at least 50 employees[6]. Applying the Constitutional Court's decision would mean that these provisions breach equality, as employees made redundant in companies employing less than 50 employees suffer the same losses as employees in companies of at least 50. Likewise, whether less than 10 or at least 10 employees are made redundant is irrelevant to the employees' losses.

Thirdly, there is the issue of exemption from social charges. The total amount of the transition award and damages for unfair dismissal is exempted from social charges up to €76,080[7]. However, if this total amount exceeds €380,400, it is fully subjected to social charges. Based on the Constitutional Court's decision, this is also a breach of equality, as the limitation of the net amount of damages is not related to the employee's loss. Under the draft social security finance legislation currently discussed in parliament, this €380,400 ceiling is being decreased to €190,200.

This further limitation will impact the older employees with the greater length of service.

Right after the decision of the Constitutional Court, Mr. Macron announced that his team would work to make the scale compliant with the constitution. New legislation is therefore expected in the next few months. As a first step, the compulsory scale of damages is supposed to be replaced in March 2016 by guidelines to be set by decree, taking into account the employee's length of service, age and other factors. The objective is that judges will follow these guidelines, which will thus become useful to employers and employees when assessing the opportunity to settle or go to court.

Article 266 would have been quite beneficial to companies of less than 20 employees in France, as the maximum awards would have resulted in lower awards than under current practice. However, it would not have had a significant impact on companies employing at least 20 employees, as:

- from 2 to 10 years of service, the scale (6-12 months) was consistent with what an employment tribunal would usually award anyway;
- the range as from 10 years (6-27 months) was too wide to bring predictability. An additional range, as from 20 years would have been useful.

Subject: General equality
Parties: over 60 members of Parliament
Court: *Conseil constitutionel* (Constitutional Court)
Date: 5 August 2015
Case number: 2015-715
Publication: http://www.conseil-constitutionnel.fr/decision-n-2015-715-dc-du-05-aout-2015.144229.html

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3 Paradoxically, the claimants are center-right members of parliament

4 The same 12-month salary damages represent 41 % of payroll in a three-employee company and 0.1% in a 1,000-employee company (observations of the government before the Constitutional Court).

5 Article 4 of the *Déclaration des Droits de l'Homme et du Citoyen* of 1789.

6 In 2013, 97 % of companies in France had less than 50 employees (Insee).

7 In 2015.

2015/57

August 2015 reforms of French employment law

CONTRIBUTOR SÉBASTIEN LE COEUR *

In August 2015, two new laws were enacted in order to simplify labour and employment law in France. Several decrees to be published before the end of 2015 will complete these two laws.

The law of 6 August 2015 fostering growth and business activity[1]

This law, commonly known as the *Loi Macron,* has stirred intense debate. Its principal features are the following.

Extension of Sunday and night work in the retail sector

- mayors can authorise employees to work during 12 Sundays per year, instead of five;
- the geographical areas in which Sunday work can be organised in shifts have been significantly extended;
- employees in upmarket Paris shopping districts are now able to work from 9pm to midnight, on a voluntary basis, subject to a collective agreement. Some clothing companies have already taken advantage of this extension of the permitted opening hours.

Simplification of the redeployment obligation in the case of redundancy

Employers used to be obliged to look for redeployment opportunities in companies within the group worldwide. Now, employers only have to look in France, unless employees expressly ask to receive redeployment offers in group companies abroad.

A fixed-term contract can now be renewed twice instead of once

The maximum length of a fixed-term contract stays as it is (at 18 or 24 months, depending on the reason for hiring the employee).

Employers cannot terminate fixed-term contracts prematurely, except for gross misconduct. Therefore, as a fixed-term contract can now be renewed twice, it is likely that the first one will be shorter than before and be used as a trial period.

Guidelines for unfair dismissal damages

Unfortunately, the Constitutional Court has expunged the much-anticipated compulsory scale of damages that was meant to cap damages for unfair dismissal and therefore bring more predictability for employers. The scale was based on the employee's length of service and the company's headcount in France. See the case report on this judgment in this issue of EELC.

The compulsory scale of damages is scheduled to be replaced in March 2016 by guidelines to be set by decree, taking into account the employee's length of service, age and probability of finding a new job quickly. If judges follow these guidelines, they will be useful to employers and employees when assessing the opportunity to settle or go to court.

Fine for hindering the works council's prerogatives or operation

The law of 6 August 2015 removed the possibility of a one-year jail sentence for the employer. Although the jail sentence was seldom used, the new law sends a positive message to the business community. Meanwhile however, the maximum fine has been increased from € 3,750 to € 7,500.

The law of 17 August 2015 regarding social dialogue[2]

Annual consultations with the works council streamlined

As of 1 January 2016, the 17 annual consultations with the works council have been reorganised into just three annual consultations (although the volume of information remains the same):

- i. annual consultation regarding the strategy of the company;
- ii. annual consultation regarding its financial situation;
- iii. annual consultation regarding training, working conditions and employment.

As a result, consultations will become more coherent and useful. Each one of the three will also require more preparation than before.

Works council's ordinary meeting once every two months in organisations with fewer than 300 employees

Until the law of 17 August 2015, in principle, a meeting took place of the ordinary works council once a month. This could be reduced to two months only in organisations employing fewer than 150 employees, providing they did not have a Unified Council (see below).

Ordinary meetings of the works council can now occur every two months in organisations employing fewer than 300 employees in France, regardless of whether or not they have a Unified Council.

Unified Council is enlarged and extended to more organisations

In a Unified Council, staff delegates and members of the works council are the same individuals.

Previously, only organisations employing fewer than 200 employees in France could have a Unified Council. The law of 17 August 2015 enlarges the Unified Council to include the functions of the health & safety council. Therefore, as from the next elections, staff delegates, members of the works council and members of the health & safety council will be the same individuals. In addition, the Council's threshold has been raised to organisations with fewer than 300 employees.

The law of 17 August 2015 also makes possible for companies of 300 and above to have a Unified Council, provided a company collective bargaining agreement has been concluded.

Video conferences for meetings with works council and the health & safety council

Foreign managers responsible for chairing council meetings often find it hard to travel to France for these meetings. The law of 17 August 2015 confirms that council meetings can be held by video conference, with the council's agreement.

It goes one step further by allowing the employer to decide unilaterally that, three times a year, a proportion of council meetings can be held via video conference. These can be meetings of the following kind:

- annual ordinary meetings of the health & safety council (of which there are four);
- annual ordinary meetings of the works council or the Unified Council in a company with less than 300 employees in France (of which there are six); and
- annual ordinary meetings of the works council in a company with at least 300 employees in France (of which there are 12).

1 Law # 2015-990 of 6 August 2015 *pour la croissance, l'activité et l'égalité des chances économiques,* entering into force on 8 August 2015

2 Law # 2015-994 of 17 August 2015 *relative au dialogue social et à l'emploi*, entering into force on 19 August 2015

The law of 17 August 2015 is a further step in making employee representatives in France more professional. Their role has become more demanding:

- the three streamlined annual consultations will require a lot of preparation and work;
- meetings will be less numerous, but more intense and will need to be straight to the point;
- by taking over the health & safety council's work, full responsibility for representing the staff will now rest with the works council, bearing in mind that in organisations employing fewer than 300 employees, the works council's members are often also trade union delegates.

To do it right, employees' representatives will need to step up their training efforts and get more used to dealing with complex issues in their entirety.

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ECJ COURT WATCH

SUMMARIES BY PETER VAS NUNES

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Pending cases

Case number	Name	Country	Subject	EELC	Opinion
C-12/14	Comm. v Malta	MA	Social security	2014-4	12.11.15
C-25/14	UNIS	FR	Freedom of services	2014-4	19.3.15
C-26/14	Beaudout	FR	Freedom of services	-	-
C-180/14	Comm. v Greece	GR	Working time	2014-4	-
C-258/14	Florescu	RO	Pensions	2014-4	-
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	3.9.15
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	12.11.15
C-460/14	Massar	NL	Legal insurance	2014-4	-
C-515/14	Comm. v Cyprus	CY	Free movement	2015-1	-
C-596/14	De Diego Porras	SP	Temp. employment	2015-1	-
C-5/15	Büyüktipi	NL	Legal insurance	2015-3	-

C-16/15	Pérez Lopéz	SP	Fixed-term contracts	2015-3	-
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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	Relig. discrimination	2015-3	-
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C-184/15	Martínez Andrés	SP	Fixed-term employm.	2015-3	-
C-188/15	Bougnaoui	FR	Relig. discrimination	2015-3	-
C-197/15	Castrejana López	SP	Fixed-term employm.	2015-3	-
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C-284/15	ONEm	BE	Social security	2015-4	-
C-335/15	Ornano	IT	Paid leave	2015-4	-
C-336/15	Unionen	SW	Transfer of undertak.	2015-4	-
C-341/15	Mascheck	AT	Paid leave	2015-4	-
C-343/15	Klinkenberg	NL	Working time	2015-4	-
C-356/15	Comm. v Belgium	BE	Social security	2015-4	-
C-395/15	Daouidi	SP	Disability discrimin.	2015-4	-
C-401/15	Depesme	LU	Social security	2015-4	-
C-406/15	Milkova	BU	Disability discrimin.	2015-4	-
C-423/15	Kratzer	GE	Discrimination	2015-4	-
C-430/15	Tolley	Tolley	Social security	2015-4	-
C-443/15	Parris	IR	Sex. orientation discr.	2015-4	-

* referring judgment reported in EELC 2015/25.

RULINGS

ECJ 28 January 2015, case C-688/13 *(Gimnasio Deportivo San Andrés SL, in liquidation - v - Tesorería General de la Seguridad Social (TGGS) and Fondo de Garantía Salarial)* **("Gimnasio Deportivo San Andrés")**, Spanish case (TRANSFER OF UNDERTAKINGS)

Facts

activity of Gimnasio and take over its employment contracts.

The award was made subject to a number of conditions. One was that the transferee would not be liable for any employment-related debts of the transferor, including social security debts, that existed before the date of the transfer.

National proceedings

The social security authority TGSS and a group of former employees challenged the award order on the ground that it infringed Article 44 of the Workers' Statute, which is in the Spanish transposition of Directive 2001/23 on transfer of undertakings.

The court before which the claimants challenged the award order referred seven questions to the ECJ. Essentially, the court asked whether Directive 2001/23 must be interpreted as precluding a rule of national law which, where there is a transfer of undertakings and the transferor is the subject of insolvency proceedings, provides or permits that the transferee be authorised not to bear the charges payable by the transferor in respect of contracts of employment or employment relationships, including charges relating to the statutory social security system, provided that those debts arose before the date of the transfer of the production unit. The referring court also asked whether the fact that the employment relationship ended before that date has any bearing in that regard.

ECJ's findings

1. Directive 2001/23 lists exhaustively the provisions from which Member States may derogate. Those derogations must be interpreted strictly. One of the derogations is Article 5 (1). It provides that Articles 3 and 4 of the directive do not, as a general rule, apply to the transfer of an undertaking where the transferor is the subject of bankruptcy proceedings or any analogous insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor and are under the supervision of a competent public authority. However, Member States are permitted to apply Articles 3 and 4 to the transfer of an undertaking where the transferor is the subject of insolvency proceedings which are under the supervision of a competent public authority. Where a Member State exercises that option, it is nevertheless permitted, under certain conditions, not to apply certain guarantees referred to in Articles 3 and 4 of Directive 2001/23 provided that insolvency proceedings have been opened and that such proceedings are under the supervision of a competent public authority (§ 37-48)
2. Thus, by way of derogation from Article 3(1) of Directive 2001/23, a Member State may provide (i) that the transferor's debts arising from any contracts of employment or employment relationships and payable before the transfer or before the opening of the insolvency proceedings are not to be transferred to the transferee, provided that such proceedings ensure, under the law of that Member State, protection at least equivalent to that guaranteed by Directive 80/987 on the protection of employees in Gimnasio is a commercial company whose main activity consisted in the management of the Escuela Laia, a secondary school with over 150 pupils. By order of 2 September 2013, Gimnasio was, on its own application, declared insolvent. By order of 15 October 2013, the competent judicial authority approved the award of the Escuela Laia to the Institució Pedagógica Sant Andreu SL, a company formed by a group of teachers at the school which submitted the sole purchase offer. The Institució Pedagógica Sant Andreu undertook to maintain the the event of insolvency of their employer, and/or (ii) that, in so far as current law or practice permits, alterations to the employees' terms and conditions of employment may be agreed with a view to safeguarding employment opportunities by ensuring the survival of the undertaking (§ 49).
3. Article 5(4) provides that Member States must take appropriate measures with a view to preventing misuse of insolvency proceedings in such a way as to deprive employees of the rights conferred by Directive 2001/23 (§ 50).
4. Article 8 provides that the directive does not affect the right of Member States to apply or introduce a scheme which is more favourable to employees (§ 51).
5. It follows from the foregoing that, first, Directive 2001/23 establishes the principle that the transferee is bound by the rights and obligations arising from a contract of employment or an employment relationship existing between the employee and the transferor on the date of the transfer of the undertaking. The transfer, to the transferee, of charges that are payable, at the time of the transfer of the undertaking, by the transferor on account of the fact that it is an employer, encompasses all the rights of employees provided that they are not covered by an exception expressly provided for by the directive itself. Therefore, just as wages and other emoluments payable to employees of the undertaking in question are an integral part of those charges, so are contributions to the statutory social security scheme payable by the transferor, since those charges arise from contract of employment binding the latter (§ 52-53).
6. Secondly, under Article 5(1) of Directive 2001/23, that principle does not apply where, as in the main proceedings, the transferor is the subject of insolvency proceedings and is under the supervision of a competent public authority of the Member State concerned. In such circumstances, the payment of debts arising from the relationship between the employees and the insolvent employer is guaranteed under Directive 80/987 (§ 54).
7. Thirdly, despite that derogation provided for in Directive 2001/23, Article 5(1) permits each Member State to apply, inter alia, Article 3 of that directive to the transfer of an undertaking where the transferor is the subject of insolvency proceedings. Article 5(2)(a) provides that, where a Member State exercises that option, it is entitled to derogate from Article 3(1) of Directive 2001/23 so that charges arising from contracts of employment or employment relationships and payable by the transferor as at the date of the transfer or the opening of the insolvency proceedings are not transferred to the transferee, provided, however, that that Member State ensures a level of protection at least equivalent to that resulting from Directive 80/987, which requires the establishment of a mechanism that guarantees the payment of claims payable to employees under contracts of employment or employment relationships concluded with the insolvent transferor. That optional derogation does not only guarantee the payment of the wages of the employees concerned, but also safeguards employment opportunities by ensuring the survival of the undertaking in difficulty (§ 55).

8. Fourthly, under Article 8 of Directive 2001/23, it is open to Member States to adopt and implement any alternative scheme in relation to transfers of undertakings, provided that it is more favourable to employees than the scheme established by that directive. That approach is consistent with the objective pursued by Directive 2001/23, as set out in paragraph 34 above. Thus, a Member State is not deprived of the option of applying Article 3(1) of that directive, even in the case where an operator takes over an undertaking that is insolvent (§ 56).
9. Fifthly, it is apparent from both the wording of Directive 2001/23 and the scheme established by that directive that, apart from the obligation imposed on Member States to protect employees no longer employed in the transferor's business on the date of the transfer as regards rights conferring on them immediate or prospective entitlement to the benefits referred to in Article 3(4)(b) of Directive 2001/23, the EU legislature has not laid down rules regarding the charges payable by the transferor as a result of contracts of employment or employment relationships terminated before the date on which the transfer takes place. Nevertheless, for the same reasons as those set out in the previous paragraph, a Member State is not precluded from providing that such charges are to be transferred to the transferee (§ 57).

Ruling (order)

Council Directive 2001/23/EC [.....] must be interpreted as meaning that:

- in a situation where, in the context of the transfer of an undertaking, the transferor is the subject of insolvency proceedings which are under the supervision of a competent public authority and where the Member State concerned has chosen to make use of Article 5(2) of Directive 2001/23, the directive does not prevent that Member State from providing or permitting that charges payable by the transferor as at the date of the transfer or the opening of the insolvency proceedings as a result of contracts of employment or employment relationships — including charges relating to the statutory social security system — are not to be transferred to the transferee, provided that such proceedings ensure a level of protection for employees which is at least equivalent to that resulting from Directive 80/987/EEC. Nevertheless, that Member State is not precluded from requiring such charges to be borne by the transferee, even where the transferor is insolvent,
- subject to the provisions laid down in Article 3(4)(b), Directive 2001/23 does not lay down any obligations so far as concerns the charges payable by the transferor as a result of contracts of employment or employment relationships terminated before the date of transfer, but it does not preclude legislation of the Member States which permits such charges to be transferred to the transferee.

ECJ 18 June 2015, case C-9/14 *(Staatssecretaris van Financien - v - D.G. Kieback)* **("Kieback")**, Dutch case, (FREEDOM OF MOVEMENT-TAX)

Facts

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

National proceedings

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

ECJ's findings

1. Freedom of movement for workers is to entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment. In particular, the Court has held that 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 (see, inter alia, judgments in *Schumacker*, C 279/93. That being said, discrimination can arise only through the application of different rules to comparable situations or the application of the same rule to different situations (§ 20-21).
2. 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. Consequently, in paragraph 34 of *Schumacker*, the Court held that the fact that a Member State does not grant to a non-resident certain tax advantages which it grants to a resident is not, as a rule, discriminatory, having regard to the objective differences between the situations of residents and non-residents, from the point of view both of the source of their income and of their personal ability to pay tax or their personal and family circumstances (§ 22-23).
3. 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 the taking into account of 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).

4. In *Lakebrink* (C 182/06), the Court stated that the scope of the case-law arising from the judgment in Schumacker extends to all the tax advantages connected with the non-resident's ability to pay tax which are granted neither in the State of residence nor in the State of employment. Thus, in relation to such tax advantages connected with a particular taxpayer's ability to pay tax, the mere fact that a non-resident has received, in the State of employment, income in the same circumstances as a resident of that State does not suffice to make his situation objectively comparable to that of a resident. It is additionally necessary, in order to establish that such situations are objectively comparable, that, due to that non-resident's receiving the major part of his income in the Member State of employment, the Member State of residence is not in a position to grant him the advantages which follow from taking into account his aggregate income and his personal and family circumstances (§ 27-28).
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. It could be otherwise only if it were the case that the interested party had received, in the Member State of employment that he left during the course of the year, the major part of his income and almost all his family income for the same year, since that State would then be in the best position to grant him the advantages determined by reference to his aggregate income and his personal and family circumstances. In order to establish whether that is the case, all of the necessary information must be at hand for assessing a taxpayer's ability to pay tax in the aggregate, having regard to the source of his income and his personal and family circumstances. In order for such an assessment to be sufficiently relevant in that regard, the situation which must be taken into consideration must relate to the financial year in question in its entirety, since that period is generally accepted, in the majority of the Member States, as forming the basis for charging income tax, which is indeed the case in the Netherlands (§ 29-31).
6. It follows that a non-resident taxpayer who has not received, in the State of employment, all or almost all his 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 require 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 of 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 September 2015, case C-20/13 *(Daniel Unland - v - Land Berlin)* **("Unland")**, German case (AGE DISCRIMINATION)

Facts

Before 1 August 2011, federal civil servants were paid according to age groups. Under the law as it stood at that time ("the old law"), pay increased with age. This was age discriminatory. As from 1 August 2011, in order to comply with the rules on age discrimination, the pay system was changed. A federal civil servant hired on or after that was placed on the relevant salary scale according to his relevant experience and then promoted according to experience. The new system is not age discriminatory. Judges in the Berlin area who were already in post on 1 August 2011 ("existing judges") were reclassified, benefitting from a transition arrangement. Basically, this arrangement provided that existing judges were placed on the new salary scale on the step most closely corresponding to the salary they had immediately preceding the reclassification. This perpetuated the age discrimination existing before 1 August 2011. However, in its 2014 judgment in the Specht case (C-501/12), the ECJ found the transitional rules to be objectively justified.

Whereas Specht was a regular civil servant, Mr Unland was a judge. He was appointed a judge at age 29 and was 35 on 1 August 2011. He claimed that the special transitional rules for judges in the Berlin area discriminated on the basis of age. The facts of the matter are complicated, the ECJ's ruling does not make clear what exactly the facts were and the ECJ ruled without the benefit of an opinion by an Advocate-General. It would seem that the following was the case.

Under the pay scale rules for Berlin judges ("the new law"), an individual who is appointed as a judge without relevant previous experience is placed on step 1 of the pay scale. After three years, under normal circumstances, he is promoted to step 2. Two years later he moves up to step 3 and after two more years he reaches step 4. Moving up to step 5 takes three years and as from step 9 it takes 4 years to climb to the next step on the scale. In other words, judges in the early stages of their career (steps 2 and 3) progress faster in their career than judges further on in their career (from step 4) or at the very start of their career (step 1). Mr Unland did not challenge the new law as such.

The transitional rules for Berlin judges seem to provide that judges who were on step 2 or 3 on 1 August 2011, and who were as a rule aged between 31 and 39, benefit less from the new pay system than judges who were already on step 4 or above, and who were therefore older.
Mr Unland applied to the Berlin provincial government to be remunerated at a higher level than he was paid.

National proceedings

When his application was turned down, Mr Unland brought proceedings. They were unsuccessful in two instances. He appealed to the *Verwaltungsgericht* Berlin. It referred eleven questions to the

ECJ. As most of those questions were already answered in Specht, this summary is limited to questions 9 and 10. They are, essentially, whether Articles 2 and 6(1) of Directive 2000/78 preclude transitional rules such as those outlined above.

ECJ's findings

1. The new law, which benefits judges aged between 31 and 39, was intended to make the position of judge more attractive than previously, by ensuring inter alia that income increases more rapidly at the beginning of a judge's career, whilst ensuring that no existing judge suffered a drop in salary, either in the immediate short term or in his career as a whole. The idea behind this is twofold. First, it reflects the fact that professional experience increases fastest during the early career. Secondly, it addresses the fact that the financial needs of judges in this age group are greatest (§50-61).
2. The transitional rules at issue compensate for the effect that the new law would have on existing judges. Without those rules, judges aged 31-39 would advance rapidly in their career even though they were already protected by the general transitional provision. Conversely, older judges would suffer reduced career advancement. The complexity of the system derives from the fact that the legislature was concerned to ensure that no category of judges should be placed in an advantageous, or excessively disadvantageous, position as a result of the reclassification. In the light of the broad discretion enjoyed by Member States in their choice, not only to pursue a particular aim in the field of social and employment policy, but also in the means to achieve such an aim, it does not appear unreasonable for the Berlin legislature to have adopted the transitional rules at issue (§62).

Ruling (judgment)

1. Article 3(1)(c) of Council Directive 2000/78/EC must be interpreted as meaning that pay conditions for judges fall within the scope of that directive.
2. Articles 2 and 6(1) of Directive 2000/78 must be interpreted as precluding a provision of national law, such as that at issue in the main proceedings, under which the basic pay of a judge is determined at the time of his appointment solely according to the judge's age.
3. Articles 2 and 6(1) of Directive 2000/78 must be interpreted as not precluding a provision of national law, such as that at issue in the main proceedings, establishing the detailed rules governing the reclassification of existing judges within a new remuneration system under which the pay step that they are now to be allocated is determined solely on the basis of the amount received by way of basic pay under the old remuneration system, notwithstanding the fact that that system was founded on discrimination based on the judge's age, provided the different treatment to which that law gives rise may be justified by the aim of protecting acquired rights.
4. Articles 2 and 6(1) of Directive 2000/78 must be interpreted as not precluding a provision of national law, such as that at issue in the main proceedings, laying down detailed rules for the career progression of judges already in post before the entry into force of that law within a new remuneration system and securing faster pay progression from a certain pay step onwards for such judges who had reached a certain age at the time of transition to the new system than for such judges who were younger on the transition date, provided the different treatment to which that law gives rise may be justified in the light of Article 6(1) of that directive.
5. In circumstances such as those of the case before the referring court, EU law does not require judges who have been discriminated against to be retrospectively granted an amount equal to the difference between the pay actually received and that corresponding to the highest step in their grade. It is for the referring court to ascertain whether all the conditions laid down by the case-law of the Court are met for Germany to have incurred liability under EU law.
6. EU law must be interpreted as not precluding a national rule, such as the rule at issue in the main proceedings, which requires national judges to take steps, within relatively narrow time-limits — that is to say, before the end of the financial year then in course — to assert a claim to financial payments that do not arise directly from the law, where that rule does not conflict with the principle of equivalence or the principle of effectiveness. It is for the referring court to determine whether those conditions are satisfied in the main proceedings.

E**CJ 9 September 2015, case C-160/14** *(Joao Filipe Ferreira da Silva e Brito and others - v - Estado português)*, Portuguese case (TRANSFER OF UNDERTAKINGS, MEMBER STATE LIABILITY) **("Da Silva e Brito")**

Facts

The airline company AIA wound up on 19 February 1993. From 1 May 1993, its main shareholder TAP, also an airline company, began to operate some of the flights which AIA had contracted to provide. It took over the leases on four of AIA's airplanes and its office equipment. TAP also took on a number of AIA's former employees.

The plaintiffs were former AIA employees who were not taken on by TAP. They sought reinstatement within TAP and payment of wages. In 2007, the court of first instance found in their favour, holding that there had been a transfer of (part of) AIA's undertaking. This judgment was overturned on appeal in 2008 and in 2009 the Supreme Court upheld the Court of Appeal's judgment. Applying the ECJ's case-law, the Supreme Court reasoned that the mere fact of carrying on activities which another undertaking had hitherto undertaken does not justify the conclusion that there has been a transfer of undertaking, since an entity cannot be reduced to the activity entrusted to it. The Supreme Court turned down a request by the plaintiffs to ask the ECJ for a preliminary ruling. In the light of the EU law on transfer of undertakings, the ECJ's interpretation of those rules and the features of the case "there can be no material doubt as to the interpretation which would make a reference for a preliminary ruling necessary", so the court held. The concepts set out in the relevant directive "are now so clear in terms of their interpretation in case -law (both Community and national) that there is no need, in the present case, for prior consultation of the Court of Justice", the Supreme Court continued.

National proceedings

The plaintiffs then brought an action against the Portuguese State, seeking an order for the latter to compensate them for the loss they had sustained. The court referred three questions to the ECJ. The first question related to the interpretation of Directive 2001/23. The second was whether the Supreme Court had an obligation to apply to the ECJ for a preliminary ruling. The third question concerned the compatibility with EU law of the provision of Portuguese law that a claim for damages against the State is conditional upon the decision that caused loss having first been set aside.

ECJ's findings

1. In the air transport sector, the fact that tangible assets are

transferred must be regarded as a key factor for the purpose of determining whether there is a transfer of a business within the meaning of Directive 2001/23. In this case, the fact that TAP took over the lease of, and then proceeded to use AIA's aircraft, also taking over office equipment, in combination with other circumstances (replacing AIA in ongoing charter flights and thereby taking over AIA's customers, taking on some of AIA's staff, etc.), gives a strong indication that there was a transfer of undertaking. The fact that the entity whose assets and a part of whose staff were taken over was integrated into TAP's structure, without that entity retaining an autonomous organisational structure, is irrelevant, since a link was preserved between, on the one hand, the assets and staff transferred to TAP and, on the other, the pursuit of activities previously carried on by AIA. It follows from *Klarenberg* (C-466/07) that what is relevant for the purpose of finding that the identity of the transferred entity has been preserved is not the retention of the specific organisation imposed by the undertaking on the various elements of production which are transferred, but rather the retention of the functional link of interdependence and complementarity between those elements. Thus, the retention of a functional link of that kind between the various elements transferred allows the transferee to use them — even if they are integrated, after the transfer, in a new and different organisational structure — to pursue an identical or analogous economic activity (§23-35).

2. When there is no judicial remedy under national law against the decision of a court or tribunal of a Member State, that court or tribunal is, in principle, obliged to bring the matter before the Court of Justice under the third paragraph of Article 267 TFEU, where a question relating to the interpretation of EU law is raised before it. A court or tribunal against whose decisions there is no judicial remedy under national law is obliged, where a question of EU law is raised before it, to comply with its obligation to bring the matter before the Court of Justice, unless it has established that the question raised is irrelevant or that the provision of EU law concerned has already been interpreted by the Court or that the correct application of EU law is so obvious as to leave no scope for any reasonable doubt. It is true that the national court or tribunal has sole responsibility for determining whether the correct application of EU law is so obvious as to leave no scope for any reasonable doubt and for deciding, as a result, to refrain from referring the matter to the Court. However, so far as the area under consideration in the present case is concerned, the question as to how the concept of a 'transfer of a business' should be interpreted has given rise to a great deal of uncertainty on the part of many national courts and tribunals which, as a consequence, have found it necessary to make a reference to the Court of Justice. That uncertainty shows not only that there are difficulties of interpretation, but also that there is a risk of divergences in judicial decisions within the EU. It follows that, in circumstances such as those of the case before the referring court, which are characterised both by conflicting lines of case-law at national level regarding the concept of 'transfer of a business' within the meaning of Directive 2001/23 and by the fact that that concept frequently gives rise to difficulties of interpretation in the various Member States, a national court or tribunal against whose decisions there is no judicial remedy under national law must comply with its obligation to make a reference to the Court, in order to avert the risk of an incorrect interpretation of EU law (§36-45).

3. In view of the essential role played by the judiciary in the protection of the rights derived by individuals from the rules of EU law, the full effectiveness of those rules would be called in question and the protection of those rights would be weakened if individuals were precluded from being able, under certain conditions, to obtain reparation when their rights are prejudiced by an infringement of EU law attributable to a decision of a court or tribunal of a Member State adjudicating at last instance. The principle of State liability for a decision of a court adjudicating at last instance does not in itself have the consequence of calling in question that decision as *res judicata*. Proceedings seeking to render the State liable do not have the same purpose and do not necessarily involve the same parties as the proceedings resulting in the decision which has acquired the status of *res judicata*. In an action brought to establish the liability of the State the applicant will, if successful, secure an order against it for reparation of the damage incurred but will not necessarily obtain a declaration invalidating the status of *res judicata* of the judicial decision responsible for that damage. In any event, the principle of State liability inherent in the EU legal order requires such reparation, but not revision of the judicial decision responsible for the damage. As regards the argument concerning infringement of the principle of legal certainty, even if this principle may be taken into account in a legal situation such as that at issue in the main proceedings, it cannot frustrate the principle that the State should be liable for loss and damage caused to individuals as a result of infringements of EU law which are attributable to it. To take account of the principle of legal certainty would mean that, where a decision given by a court adjudicating at last instance is based on an interpretation of EU law that is manifestly incorrect, an individual would be prevented from asserting the rights that he may derive from the EU legal order and, in particular, those that stem from the principle of State liability. Accordingly, a significant obstacle, such as that resulting from the rule of national law at issue in the main proceedings, to the effective application of EU law and, in particular, a principle as fundamental as that of State liability for infringement of EU law cannot be justified either by the principle of *res judicata* or by the principle of legal certainty (§46-60).

Ruling (judgment)

1. Article 1(1) of Council Directive 2001/23/EC [.....] must be interpreted as meaning that the concept of a 'transfer of a business' encompasses a situation in which an undertaking active on the charter flights market is wound up by its majority shareholder, which is itself an air transport undertaking, and the latter undertaking then takes the place of the undertaking that has been wound up by taking over aircraft leasing contracts and ongoing charter flight contracts, carries on activities previously carried on by the undertaking that has been wound up, reinstates some employees that have hitherto been seconded to that undertaking, assigning them tasks identical to those previously performed, and takes over small items of equipment from the undertaking that has been wound up.
2. In circumstances such as those of the case in the main proceedings, which are characterised both by the fact that there are conflicting decisions of lower courts or tribunals regarding the interpretation of the concept of a 'transfer of a business' within the meaning of Article 1(1) of Directive 2001/23 and by the fact that that concept frequently gives rise to difficulties of interpretation in the various Member States, the third paragraph of Article 267 TFEU must be construed as meaning that a court

or tribunal against whose decisions there is no judicial remedy under national law is obliged to make a reference to the Court for a preliminary ruling concerning the interpretation of that concept.

3. EU law and, in particular, the principles laid down by the Court with regard to State liability for loss or damage caused to individuals as a result of an infringement of EU law by a court or tribunal against whose decisions there is no judicial remedy under national law must be interpreted as precluding a provision of national law which requires, as a precondition, the setting aside of the decision given by that court or tribunal which caused the loss or damage, when such setting aside is, in practice, impossible.

ECJ 10 September 2015, case C-47/14 *(Holterman Ferho Exploitatie BV, Ferho Bewehrungsstahl GmbH, Ferho Vechta GmbH and Ferho Frankfurt GmbH - v - Friedrich Leopold Freiherr Spies von Büllesheim)* **("Spies von Büllesheim")**, German case (APPLICABLE LAW)

Facts

Holterman Ferho Exploitatie ("Ferho Exploitatie") is a Dutch holding company. It has three German subsidiaries.

Mr Spies von Büllesheim is a German national living in Germany. He was a minority shareholder in Ferho Exploitatie.

In April 2001, the shareholders' meeting of Ferho Exploitatie appointed Spies von Büllesheim as a director. In May 2001, Ferho Exploitatie and Spies von Büllesheim entered into an agreement, drafted in German, confirming his appointment as director *("Geschäftsführer")* and setting out his rights and obligations in that respect. In July 2001, Spies von Büllesheim became manager of Ferho Exploitatie. From then on, he acted in two capacities: director and manager.

In 2006 the contract between Spies von Büllesheim and Ferho Exploitatie was terminated.

Ferho Exploitatie and its subsidiaries brought legal proceedings against Spies von Büllesheim before a Dutch court. They contended that he was liable for serious misconduct, arguing primarily (i) that he had performed his duties as a manager improperly and (ii) that his misconduct constituted breach of the May 2001 contract and, in the alternative, that it qualified as a tort against the subsidiaries.

National proceedings

The court of first instance and, on appeal, the appellate court held that it lacked jurisdiction to hear the action. With regard to the alleged mismanagement of Ferho Exploitatie, the Court of Appeal reasoned that, as Regulation 44/2001 (known as "Brussels I", hereunder: the "Regulation") *[now replaced by Regulation 1215/2012, Editor]* does not designate any particular forum, the main rule of Article 2(1)applies. Article 2(1) provides, as the default rule where no exception applies, that persons shall be sued only in the courts of the country in which they are domiciled. Therefore, Spies von Büllesheim could only be sued in the German courts. With regard to the alleged poor performance of the contract of May 2001, the court considered that that contract was one of "individual employment" for the purposes of the Regulation and that therefore only the courts in the country of residence (in this case, Germany) have jurisdiction. With regard to the alternative claim based on tort, the court reasoned that, as the Regulation contains special rules in respect of employment, an action based on tort that is linked to employment is subject to the forum rules in respect of employment cases.

The claimants appealed to the Supreme Court and it referred questions to the ECJ. They related, in particular, to Articles 5, 18 and 20 of the Regulation. Article 5 provides that a person domiciled in a Member State may be sued in another Member State:

1. In matters relating to contract, in the courts of "the place of performance of the obligation in question", which, in the case of the provision of services, is the place where the services were or should have been provided;
2. [....]
3. In matters relating to tort, delict or quasi-delict, in the courts of "the place where the harmful event occurred or may occur".

Articles 18 and 20 (which form part of Chapter II, Section 5 of the Regulation) provide that in matters relating to individual contracts of employment, the employee may only be sued in the Member State where he is domiciled.

ECJ's findings

1. By its first question, the referring court asks, in essence, whether the provisions of Chapter II, Section 5 of the Regulation must be interpreted as meaning that where a company sues a person, who has performed the duties of director and manager of that company, in order to establish misconduct, they preclude the application of Article 5 (§33).
2. The classification of the legal relationship between the parties cannot be decided on the basis of national law. The concept of "individual contract of employment" must be interpreted autonomously. The essential feature of an employment relationship is that for a certain period of time one person performs services for and under the direction of another in return for which he receives remuneration. It presupposes a relationship of subordination. If Spies von Büllesheim, as a minority shareholder, was able to influence the will of Ferho Exploitatie significantly, there was no subordination and the rules of Chapter II, Section 5 would not apply. If, on the other hand, there was someone who had the authority to issue him with instructions and to monitor their implementation, those rules must be applied (§34-49).
3. By its second question, the referring court asks, in essence, whether Article 5(1) of the Regulation must be interpreted as meaning that an action brought by a company against its former manager on the basis of an alleged breach of his obligations under company law comes within the concept of "matters relating to a contract" and, if so, whether the place where the obligation that is the basis for the claim was performed or ought to have been performed corresponds to the place where the company is domiciled (§50).
4. In the absence of any derogating stipulation in the articles of association of Ferho Exploitatie, or in any other document, it is for the referring court to determine the place where Spies von Büllesheim actually carried out his activities in performance of the contract, taking into consideration, in particular, the time spent in the various places and the importance of those activities (§51-65).
5. By its third question, the referring court asks, in essence, whether Article 5(3) of the Regulation must be interpreted as meaning that, inasmuch as the applicable national law makes it possible to commence legal proceedings simultaneously on the basis of a contractual relationship and of tort, 'delict' or 'quasi-delict', that provision covers a situation such as that at issue in the main proceedings in which a company is suing a person both in his capacity as manager of that company and on

the basis of wrongful conduct. If the answer is in the affirmative, the referring court wishes to know whether the place where the harmful event occurred or may occur corresponds to the place where the company is domiciled (§66).

6. Inasmuch as national law makes it possible to base a claim by the company against its former manager on allegedly wrongful conduct, such a claim may come under 'tort, delict or quasi-delict' for the purposes of the jurisdiction rule set out in Article 5(3) of the Regulation only if it does not concern the legal relationship of a contractual nature between the company and the manager. If the conduct complained of may be considered a breach of the manager's contract, that being a matter for the referring court to determine, it must be concluded that the court which has jurisdiction to rule on that conduct is the one specified in Article 5(1) of the Regulation. If not, the jurisdiction rule set out in Article 5(3) of that regulation applies (§67-71).
7. The term "place where the harmful event occurred" must be interpreted strictly (§72-79).

Ruling (judgment)

1. The provisions of Chapter II, Section 5 (Articles 18 to 21) of Regulation (EC) No 44/2001 [.....], in a situation such as that at issue in the main proceedings in which a company sues a person, who performed the duties of director and manager of that company in order to establish misconduct on the part of that person in the performance of his duties and to obtain redress from him, must be interpreted as meaning that they preclude the application of Article 5(1) and (3) of that regulation, provided that that person, in his capacity as director and manager, for a certain period of time performed services for and under the direction of that company in return for which he received remuneration, that being a matter for the referring court to determine.
2. Article 5(1) of Regulation No 44/2001 must be interpreted as meaning that an action brought by a company against its former manager on the basis of an alleged breach of his obligations under company law comes within the concept of 'matters relating to a contract'. In the absence of any derogating stipulation in the articles of association of the company, or in any other document, it is for the referring court to determine the place where the manager in fact, for the most part, carried out his activities in the performance of the contract, provided that the provision of services in that place is not contrary to the parties' intentions as indicated by what was agreed.
3. In circumstances such as those at issue in the main proceedings in which a company is suing its former manager on the basis of allegedly wrongful conduct, Article 5(3) of Regulation No 44/2001 must be interpreted as meaning that that action is a matter relating to tort or delict where the conduct complained of may not be considered to be a breach of the manager's obligations under company law, that being a matter for the referring court to verify. It is for the referring court to identify, on the basis of the facts of the case, the closest linking factor between the place of the event giving rise to the damage and the place where the damage occurred.

ECJ 10 September 2015, 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 Services 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.

ECJ's findings

1. Directive 2003/88 defines the concept of 'working time' as any period during which the worker is (i) at work, (ii) at the employer's disposal and (iii) carrying out his activity or duties. That concept is placed in opposition to the concept of 'rest periods'. The two concepts are mutually exclusive and there is no intermediate category between working time and rest periods. Both concepts must be interpreted autonomously and by reference to the scheme and purpose of the directive (§25-27).
2. Before Tyco abolished its regional offices, it regarded the time spent travelling from those offices to the first customer and from the last customer back to those offices as working time. The nature of those journeys did not change after the regional offices were abolished. Only the departure point changed. Thus, Tyco's workers must be regarded as carrying out their activity or duties during the time spent travelling between home and customers (§29-34).
3. It is true that the workers are free to manage their travelling time to the first and from the last customer as they wish and to choose any route they wish. However, during that travelling time, they are not able to use their time freely or pursue their own interests. Consequently, they are at their employer's disposal (§35-39).
4. It is true that the workers could conduct personal business at the beginning and end of the day and that it would not be reasonable if the employer had to pay for the time spent conducting such

personal business. This fact, however, cannot affect the legal classification of journey time. Moreover, it is possible for the employer to put in place monitoring procedures to avoid abuse. Also, in the previous situation where Tyco had regional offices, a similar potential for abuse existed (§40-42).

5. Given that travelling is an integral part of being a worker without a fixed or habitual place of work, the place of work cannot be reduced to the physical areas of their work on the premises of their employer's customers. It follows that when the workers in question make their journeys to the first and from the last customer, they must be regarded as 'working' within the meaning of the directive (§43-46).
6. It is true that this conclusion can lead to an increase in costs for Tyco, but it remains free to determine the remuneration for the time spent travelling between home and customers (§47).

Ruling (judgment)

Point (1) of Article 2 of Directive 2003/88/EC [.....] must be interpreted as meaning that, in circumstances such as those at issue in the main proceedings, in which workers do not have a fixed or habitual place of work, the time spent by those workers travelling each day between their homes and the premises of the first and last customers designated by their employer constitutes 'working time', within the meaning of that provision.

ECJ 15 September 2015, case C-67/14 *(Jobcenter Berlin Neukölln –v- Nazifa Alimanovic and her children)* **("Alimanovic")**, German case (FREE MOVEMENT – SOCIAL INSURANCE)

Facts

Regulation 883/2004 covers social security, not social assistance. However, there is a hybrid category of benefits that have characteristics both of the social security legislation covered by the Regulation and of social assistance. Article 70 deals with these "special non-contributory cash benefits", to which residents are entitled in accordance with the legislation of the country of residence. The German "benefits to cover subsistence costs under the basic provision for jobseekers" are such benefits.

Directive 2004/38 enshrines the right of EU citizens and their family members to move and reside freely within the EU. Article 7(1) provides, *inter alia,* that workers have the right to reside in any EU country for longer than three months. Article 7(3) provides that a citizen who is no longer employed shall retain the status of worker for at least six months if, *inter alia*, he is involuntarily unemployed after having been employed for over one year or after having completed a fixed-term contract of less than one year. Article 24 (1) provides that all EU citizens residing in a Member Stat on the basis if the directive, as well as their family members, shall enjoy equal treatment with the nationals of that Member State. However, Article 24(2) allows the Member States to deny social assistance during the first three months of residence.

Ms Alimanovic and her four children are Swedish nationals. The moved to Germany in June 2010. They were given the right of permanent residence. After working in temporary jobs for about six months, Ms Alimanovic and her eldest daughter became unemployed. They received subsistence allowance within the meaning of Article 70 of Regulation 883/2004 until 1 June 2012, when the authority responsible for awarding that allowance, the *Jobcenter*, stopped paying the allowance.

National proceedings

Ms Alimanovic challenged the Jobcenter's decision, at first with success, but the Jobcenter appealed to *Bundessozialgericht*. It initially referred three questions to the ECJ, but later withdrew the first question.

ECJ's findings

1. The ECJ sees no need to answer the third question because, although the benefits at issue qualify as "special non-contributory cash benefits" within the meaning of Article 70 of Regulation 2004/883, they also qualify as "social assistance" within the meaning of Directive 2004/38, as construed by the ECJ in its judgment in Dano (case C-333/13), and the predominant function of the benefits is to cover the minimum subsistence costs necessary to lead a life in keeping with human dignity. Therefore, the benefits cannot be characterised as benefits of a financial nature which are intended to facilitate access to the labour market, but must be characterised as 'social assistance' (§43-47).
2. The question remaining is whether the provisions in Regulation 883/2004 and Directive 2004/38 on equal treatment preclude national legislation under which nationals of other Member States who are job-seekers in the host Member State are excluded from entitlement to certain "special non-contributory cash benefits" which also constitute "social assistance", although those benefits are granted to nationals of the Member State concerned who are in the same situation (§48).
3. To accept that persons who do not have a right of residence under Directive 2004/38 may claim entitlement to social assistance under the same conditions as those applicable to nationals of the host Member State would run counter to an objective of the directive, set out in recital 10 in its preamble, namely preventing Union citizens who are nationals of other Member States from becoming an unreasonable burden on the social assistance system of the host Member State (§50).
4. 4It is not disputed that Ms Alimanovic and her daughter, who retained the status of workers for at least six months after their last employment had ended, no longer enjoyed that status when they were refused entitlement to the benefits at issue (§55).
5. Article 14(4)(b) of Directive 2004/38 stipulates that Union citizens who have entered the territory of the host Member State in order to seek employment may not be expelled for as long as they can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged. Although, according to the referring court, Ms Alimanovic and her daughter may rely on that provision to establish a right of residence even after the expiry of the period referred to in Article 7(3)(c) of Directive 2004/38, for a period, covered by Article 14(4)(b) thereof, which entitles them to equal treatment with the nationals of the host Member State so far as access to social assistance is concerned, it must nevertheless be observed that, in such a case, the host Member State may rely on the derogation in Article 24(2) of that directive in order not to grant that citizen the social assistance sought. It follows from the express reference in Article 24(2) of Directive 2004/38 to Article 14(4)(b) that the host Member State may refuse to grant social assistance to an EU citizen whose right of residence is based solely on that latter provision. (§56-57).

Ruling (judgment)

Article 24 of Directive 2004/38 [....] and Article 4 of Regulation (EC) No 883/2004 [....] must be interpreted as not precluding legislation of a Member State under which nationals of other Member States who are

in a situation such as that referred to in Article 14(4)(b) of that directive are excluded from entitlement to certain 'special non-contributory cash benefits' within the meaning of Article 70(2) of Regulation No 883/2004, which also constitute 'social assistance' within the meaning of Article 24(2) of Directive 2004/38, although those benefits are granted to nationals of the Member State concerned who are in the same situation.

ECJ 1 October 2015, case C-432/14 *(O - v - Bio Philippe Auguste SARL)* **("O")**, French case (AGE DISCRIMINATION)

Facts

On 21 December 2010, Mr O, while he was a student, was recruited by Bio Philippe Auguste SARL under a fixed-term employment contract for the period from 21 December 2010 to 24 December 2010, during his university vacation. On the expiry of his contract, he was not paid an end-of-contract payment. This was pursuant to Article L.1243-10 of the French Code du travail. Section 8 of Article L.1243 entitles a fixed-termer whose contract is not converted into a permanent contract to an end-of-contract payment. Section 10 excludes certain categories from this right. One of these is "where the contract is entered into with a young person for a period falling within the school holidays or university vacations".

O brought an action before the Labour Tribunal *(Conseil de prud'hommes)*, arguing that Article L.1243-10 is contrary to the constitutional principle of equal treatment on grounds of age. He claimed an end-of-contract payment of € 23.21, reclassification of his fixed-term contract as a permanent contract and compensation for unfair dismissal.

National proceedings

The Labour Tribunal asked the Supreme Court whether Article L.1243-10 is unconstitutional. The Supreme Court passed the question on to the Constitutional Court. The latter concluded that students employed under a fixed-term employment contract for a period during their school holidays or university vacations are not in the same position as either students who work in the same time as pursuing their studies or other employees on fixed-term employment contracts, and that, therefore, the legislature established a difference in treatment based on a difference in situation in line with the purpose of the law.

Despite this conclusion, the Labour Tribunal referred a question to the ECJ. It wanted to know whether Article L.1243-10 is precluded by "the general principle of non-discrimination on grounds of age".

ECJ's findings

1. There is no evidence that the dispute between O and Bio Philippe is fictitious (§15-20).
2. It is for the referring court to assess whether O's employment contract is such as to enable him to claim the status of "worker" within the meaning of EU law (§22-27).
3. The requirement as to the comparable nature of the situations for the purposes of determining whether there is an infringement of the principle of equal treatment must be assessed in the light of all the factors characterising those situations. It must also be stated that, on the one hand, it is required not that the situations be identical, but only that they be comparable and, on the other hand, the assessment of that comparability must be carried out not in a global and abstract manner, but in a specific and concrete manner in the light of the benefit concerned. Therefore, the Court must examine whether the situation of a student such as the applicant in the main proceedings, employed under a fixed-term employment contract during his university holidays, is objectively comparable, having regard to the aim pursued by Article L. 1243-8 of the Code du Travail, to that of workers who are entitled to the end-of-contract payment under that provision (§31-32).
4. The end-of-contract payment, which must be paid on the expiry of a fixed-term employment contract, is intended to compensate for the insecurity of the employee's situation where the contractual relationship is not continued in the form of a contract for an indefinite period. Article L. 1243-10 expressly excludes young persons who have concluded a fixed-term employment contract for a period during their school holidays or university vacation from entitlement to that payment. The national legislature thus, by necessary implication, considered that those young persons are not, on the expiry of their contract, in a situation of job insecurity. Employment carried out on the basis of a fixed-term contract by a pupil or student during his school holidays or university vacation is characterised by being both temporary and ancillary, since that pupil or student intends to continue his studies at the end of that holiday or vacation. It follows that, by holding that the situation of young people who have concluded a fixed-term employment contract for a period during their school holidays or university vacation is not comparable to that of other categories of workers eligible for the end-of-contract payment, the national legislature in no way exceeded the bounds of its discretion in the field of social policy (§34-37).

Ruling (judgment)

The principle of non-discrimination on grounds of age, enshrined in Article 21 of the Charter of Fundamental Rights of the European Union and given specific expression by Council Directive 2000/78 [.....] must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, under which an end-of-contract payment, paid in addition to an employee's salary on the expiry of a fixed-term employment contract where the contractual relationship is not continued in the form of a contract for an indefinite period, is not payable in the event that the contract is concluded with a young person for a period during his school holidays or university vacation.

ECJ 11 November 2015, case C-219/14 *(Kathleen Greenfield - v - The Care Bureau Ltd)* **("Greenfield")**, UK case (PAID LEAVE)

Facts

Ms Greenfield was employed by Care Bureau from 15 June 2009. She worked under a contract of employment in which it was stipulated that working hours and days differed from week to week. The remuneration payable for any week varied according to the number of days or hours of work performed. Under both UK law and the contract of employment, Ms Greenfield was entitled to 5.6 weeks of leave per year. The leave year began on 15 June. Ms Greenfield left Care Bureau on 28 May 2013. It is not disputed that she took 7 days of paid leave during the final leave year. She worked for a total of 1,729.5 hours and took a total of 62.84 hours of paid leave. Ms Greenfield took those 7 days of paid leave in July 2012. During the 12-week period immediately preceding that holiday, her work pattern was 1 day per week. From August 2012 Ms Greenfield began working a pattern of 12 days on and 2 days off taken as alternate weekends. That pattern amounted to an average of 41.4 hours of work per week. It was specified by Care Bureau that all Ms Greenfield's hours, including any overtime, would be used in the calculation of her entitlement to paid annual leave. In November 2012 Ms Greenfield requested a week of paid leave. Care Bureau informed her that, as a result of the holiday taken in June and July 2012, she

had exhausted her entitlement to paid annual leave. The entitlement to paid leave was calculated at the date on which leave was taken, based on the working pattern for the 12-week period prior to the leave. Since Ms Greenfield had taken her leave at a time when her work pattern was one day per week, she had taken the equivalent of 7 weeks of paid leave, and accordingly exhausted her entitlement to paid annual leave. Taking the view that she was entitled to an allowance in lieu of paid leave not taken, Ms Greenfield brought proceedings against her employer in the Birmingham Employment Tribunal, which allowed her claim.

National proceedings

Before the Birmingham Employment Tribunal, Ms Greenfield argued that national law, read in conjunction with EU law, requires that leave already accrued and taken should be retroactively recalculated and adjusted following an increase in working hours, for example, following a move from part-time to full-time work, so as to be proportional to the new number of working hours and not the hours worked at the time leave was taken. Care Bureau maintains that EU law does not provide for a new calculation and that, therefore, Member States are not required to make such an adjustment under national law. Having doubts as to the interpretation of EU law in the case before it, the Birmingham Employment Tribunal decided to stay the proceedings and to refer questions to the Court for a preliminary ruling.

ECJ's findings

1. The entitlement to minimum paid annual leave, within the meaning of Directive 2003/88, must be calculated by reference to the days, hours and/or fractions of days or hours worked and specified in the contract of employment (§ 32).
2. As for the period of work to which the right to paid annual leave relates, and the possible consequences that an alteration in the work pattern, in relation to the number of hours worked, can or must have on the total leave rights already accumulated and on the exercise of those rights over time, it should be noted that, according to the Court's settled case-law, the taking of annual leave in a period after the period during which the entitlement to leave has been accumulated has no connection to the time worked by the worker during that later period (see *Zentralbetriebsrat der Landeskrankenhäuser Tirols*, C 486/08 (§ 33).
3. The Court has also previously held that a change and, in particular, a reduction in working hours when moving from full-time to part-time employment cannot reduce the right to annual leave that the worker has accumulated during the period of full-time employment. It follows that, as regards the accrual of entitlement to paid annual leave, it is necessary to distinguish periods during which the worker worked according to different work patterns, the number of units of annual leave accumulated in relation to the number of units worked to be calculated for each period separately (§ 34-35).
4. That conclusion is not affected by the application of the *pro rata temporis* principle laid down in clause 4.2 of the Framework Agreement on part-time work. While it is the case that the application of that principle is appropriate for the grant of annual leave for a period of part-time employment, since for such a period the reduction of the right to annual leave, in comparison to that granted for a period of full-time employment, is justified on objective grounds, the fact remains that that principle cannot be applied ex post to a right to annual leave accumulated during a period of full-time work (§ 36-37).
5. As for the period to which the new calculation of the right to paid annual leave must relate, where the worker, after accumulating rights to paid annual leave during a period of part-time work, increases the number of hours worked and moves to full-time work, it should be noted that the number of units of annual leave accumulated in relation to the number of hours worked must be calculated separately for each period. In a situation such as that at issue in the main proceedings, EU law therefore requires a new calculation of rights to paid annual leave to be performed only for the period of work during which the worker increased the number of hours worked. The units of paid annual leave already taken during the period of part-time work which exceeded the right to paid annual leave accumulated during that period must be deducted from the rights newly accumulated during the period of work in which the worker increased the number of hours worked (§ 42-43).
6. Whether the calculation of entitlement to paid annual leave is to be performed during the employment relationship or after it has ended has no effect on the way in which the calculation is performed. Therefore, the calculation of the allowance in lieu of annual leave not taken must be carried out according to the same method as that used for the calculation of normal remuneration, the time when that calculation takes place being, in principle, irrelevant (§ 46-52).

Ruling (judgment)

1. Clause 4.2 of the Framework Agreement on part-time work [.....] must be interpreted as meaning that, in the event of an increase in the number of hours of work performed by a worker, the Member States are not obliged to provide that the entitlement to paid annual leave already accrued, and possibly taken, must be recalculated retroactively according to that worker's new work pattern. A new calculation must, however, be performed for the period during which working time increased.
2. Clause 4.2 of the Framework Agreement and Article 7 of Directive 2003/88 must be interpreted as meaning that the calculation of the entitlement to paid annual leave is to be performed according to the same principles, whether what is being determined is the allowance in lieu of paid annual leave not taken where the employment relationship is terminated, or the outstanding annual leave entitlement where the employment relationship continues.

ECJ 11 November 2015, case C-422/14 *(Christian Pujante Rivera - v - Gestora Clubs Dir, SL. and Fondo de Garantía Salarial)* **("Pujante Rivera")**, Spanish case (COLLECTIVE REDUNDANCIES)

Facts

The defendants in the main proceeding was a company called Gestora. As at 3 September 2013, it had 126 employees, of whom 114 were employed on a permanent basis and 12 on fixed-term contracts. Between 16 and 26 September 2013, Gestora terminated the contracts of 10 of its employees on objective grounds. One of the persons dismissed was Mr Pujante Rivera, who, on 17 September 2013, received notification that his contract was to be terminated for economic and production reasons. During the 90-day period preceding that last of those redundancies on objective grounds, which took place on 26 September 2013, the following contracts were terminated:

- 17 on the ground that the agreed contract term had expired (contract of less than 4 weeks' duration);
- 1 on the ground that the task forming the subject of the services contract had been completed;
- 2 voluntary redundancies;

- 1 dismissal for disciplinary reasons, recognised as 'unfair' for the purpose of ET and made the subject of an award of damages; and
- 1 contract terminated at the worker's request under Article 50 of the *Ley del Estatuto de los Trabajadores* (the Spanish Workers' Statute), which provides that substantial adverse changes in working conditions imposed unilaterally by the employer allow the employee to resign with compensation.

The worker who requested that her contract be terminated received notification on 15 September 2013 of a change to her working conditions, namely a 25% reduction of her salary, on the same objective grounds as those relied on in the various other terminations that occurred between 16 and 26 September 2013. Five days later, the worker concerned agreed to enter into a contract terminating the employment relationship. However, in a subsequent administrative conciliation procedure, Gestora recognised that the change to her employment contract, of which the employee had been given notification, exceeded the statutory limits and agreed to termination of that contract on the basis of Article 50 ET, with compensation being payable.

During the 90-day period following the last of those redundancies on objective grounds, there were five further contract terminations in consequence of the expiry of fixed-term contracts of less than four weeks' duration and three voluntary redundancies.

National proceedings

Mr Pujante Rivera brought proceedings against Gestora and the Employees Guarantee Fund before the referring Court, the Juzgado de lo Social No 33 de Barcelona (Labour Court No 33, Barcelona). He challenged his redundancy on objective grounds, claiming that it is invalid because Gestora should have applied the collective redundancy procedure under Article 51 ET. According to Mr Pujante Rivera, if account is taken of the number of contract terminations which occurred in the 90-day periods before and after his own redundancy, the numerical threshold set out in Article 51(1)(b) ET was reached, given that, apart from the five voluntary redundancies, all the other employment contract terminations constitute redundancies or contract terminations that may be equated to redundancies.

ECJ's findings

1. Article 1 (1)(a) of the collective redundancies Directive 98/59 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 at least ....." a certain number, depending on how many workers the establishment in question "normally" employs. The first question is whether this means that workers employed under a contract concluded for a fixed term or a specific task must be regarded as forming part of the workers 'normally' employed, within the meaning of that provision, at the establishment concerned (§ 24).
2. In its judgment in Rabal Cañas (C 392/13, summarised in EELC 2015-3), the Court held that 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 the date on which the task was completed. It follows that workers whose contracts are terminated on the lawful ground that they are temporary are not to be taken into account in determining whether there is a 'collective redundancy' within the meaning of Directive 98/59 (§ 25-26).
3. The issue here is not whether non-extension of a fixed-term contract counts for the purpose of determining the number of redundancies but whether fixed-term employees count for the purpose of determining the number of workers "normally employed" in an establishment (§ 27).
4. Directive 98/59 cannot be interpreted as meaning that the methods of calculating thresholds, and therefore the thresholds themselves, are within the discretion of the Member States, as such an interpretation would allow the latter to alter the scope of that directive and thus to deprive it of its full effect (§ 31).
5. As it refers to 'establishments normally employing' a given number of workers, the first subparagraph of Article 1(1)(a) of Directive 98/59 does not make any distinction on the basis of the length of time for which such workers are employed. Thus, it cannot be concluded at the outset that persons employed under a contract concluded for a fixed term or a specific task cannot be regarded as workers 'normally' employed by the establishment concerned (§ 32-33).
6. Any interpretation to the effect that workers employed under a contract concluded for a fixed term or a specific task are not workers 'normally' employed by the establishment concerned is liable to deprive all the workers employed by that establishment of the rights conferred on them by the directive and thus undermine its effectiveness. Accordingly, in the main proceedings, the 17 workers whose contracts expired in July 2013 must be regarded as 'normally' employed at the establishment concerned since, as the referring court observed, those workers had been employed each year for a specific task (§ 35-36).
7. It should also be added that this conclusion is not called into question by the argument that it would be contradictory if workers whose contracts have been terminated on the lawful ground that those contracts are temporary were not afforded the protection guaranteed by Directive 98/59 and, at the same time, those workers were taken into account for the purpose of determining the number of staff 'normally' employed by an establishment. The reason for that difference is to be found in the different purposes pursued by the EU legislature. Thus, first, the EU legislature considered that persons employed under a contract concluded for fixed term and whose contracts end in due course with the expiry of the fixed period do not need the same protection as that enjoyed by permanent employees. Second, by making the application of the rights conferred on workers by the first subparagraph of Article 1(1)(a) of Directive 98/59 subject to quantitative criteria, the EU legislature intended to take account of the overall number of employees of the establishments in question in order to avoid imposing an excessive burden on employers that is disproportionate to the size of their establishment. However, for the purpose of calculating the number of employees of an establishment as regards the application of Directive 98/59, the nature of the employment relationship is irrelevant (§ 37-40).
8. By its second question, the referring court seeks to ascertain, in essence, whether, in order to establish whether there is a 'collective redundancy', within the meaning of the first subparagraph of Article 1(1)(a) of Directive 98/59, thus giving rise to the application of the directive, the condition laid down in the second subparagraph of that provision that 'there [be] at least five redundancies' must be interpreted as relating solely to redundancies or as covering terminations of employment

contracts that may be assimilated to redundancies (§ 42).

9. It is clear from the wording of Article 1(1) of Directive 98/59 that the conditions laid down in the second subparagraph of that provision concerns only 'redundancies', not contract terminations which may be assimilated to redundancies. As the second subparagraph Article 1(1) of Directive 98/59 sets out the method of calculating 'redundancies' as defined in the first subparagraph of Article 1(1)(a) and the latter provision establishes the 'redundancy' thresholds below which the directive is not applicable, any other reading which has the effect of extending or restricting the scope of the directive would deprive the condition in question, namely that 'there [be] at least five redundancies', of any effectiveness (§ 43-44).
10. By its third question, the referring court seeks to ascertain, in essence, whether Directive 98/59 must be interpreted as meaning that the fact that an employer — unilaterally and to the detriment of the employee — makes significant changes to essential elements of his employment contract, for reasons not related to the individual employee concerned, falls within the definition of 'redundancy' in the first subparagraph of Article 1(1)(a) of the directive or constitutes the termination of an employment contract that may be assimilated to such a redundancy for the purpose of the second subparagraph of Article 1(1) of the directive (§ 47).
11. 1Directive 98/59 does not give an express definition of the concept of 'redundancy'. None the less, in the light of the aim pursued by the directive and the context of the first subparagraph of Article 1(1)(a) thereof, it must be regarded as a concept of EU law which cannot be defined by reference to the laws of the Member States. In the present case, that concept must be interpreted as encompassing any termination of an employment contract not sought by the worker, and therefore without his consent (§ 48).
12. With regard to the main proceedings, given that it is the worker who sought the termination of her employment contract on the basis of Article 50 ET, she may, prima facie, be regarded as having consented to the termination. However, the fact none the less remains that the termination of that employment relationship arises from the change made unilaterally by her employer to an essential element of the employment contract for reasons not related to that individual worker. First, having regard to the objective of Directive 98/59, which is, inter alia, to afford greater protection to workers in the event of collective redundancies, a narrow definition cannot be given to the concepts that define the scope of that directive, including the concept of 'redundancy'. It is clear from the order for reference that the remuneration of the worker in question was reduced unilaterally by the employer for economic and production reasons and, as the person concerned did not accept the reduction, that resulted in the termination of the employment contract and the payment of damages calculated on the same basis as damages awarded in the case of unfair dismissal. Second, according to the Court's case-law, by harmonising the rules applicable to collective redundancies, the EU legislature intended both to ensure comparable protection for employees' rights in the different Member States and to harmonise the costs which such protective rules entail for EU undertakings. It follows that concept of 'redundancy' directly determines the scope of the protection and the rights conferred on workers under that directive. That concept therefore has an immediate bearing on the costs which such protection entails. Accordingly, any national legislative provision or any interpretation of that concept to the effect that, in a situation such as that in the main proceedings, the termination of an employment contract is not a 'redundancy' for the purpose of Directive 98/59 would alter the scope of the directive and thus to deprive it of its full effect (§ 50-54).

Ruling (judgment)

1. The first subparagraph of Article 1(1)(a) of Council Directive 98/59/EC [.....] must be interpreted as meaning that workers employed under a contract concluded for a fixed term or a specific task must be regarded as forming part of the workers 'normally' employed, within the meaning of that provision, at the establishment concerned.
2. In order to establish whether there is a 'collective redundancy', within the meaning of the first subparagraph of Article 1(1)(a) of Directive 98/59, thus giving rise to the application of the directive, the condition laid down in the second subparagraph of that provision that 'there [be] at least five redundancies' must be interpreted as relating not to terminations of employment contracts that may be assimilated to redundancies but only to redundancies sensu stricto.
3. Directive 98/59 must be interpreted as meaning that the fact that an employer — unilaterally and to the detriment of the employee — makes significant changes to essential elements of his employment contract for reasons not related to the individual employee concerned falls within the definition of 'redundancy' for the purpose of the first subparagraph of Article 1(1)(a) of the directive.

ECJ 26 November 2015, case C-509/14 *(Administrador de Infraestructuras Ferroviarias (ADIF) - v - Luis Aira Pascual and others)* **("Aira Pascual")**, Spanish case (TRANSFER OF UNDERTAKINGS).

Facts

ADIF is a public undertaking responsible for handling containers in the port of Bilbao. In 2008 it outsourced the management of the container terminal to Algeposa, which performed a service in ADIF's facilities, using cranes belonging to ADIF. In 2013, ADIF terminated its agreement with Algeposa and proceeded to provide the service with its own staff, as before 2008. Algeposa dismissed its employees including Mr Aira Pascual.

National proceedings

Taking the position that the insourcing of the service in 2013 constituted a transfer of undertaking, Mr Aira Pascual brought proceedings against ADIF (and others). He claimed that his dismissal should be annulled and that ADIF should be ordered to reinstate him, with compensation. The court of first instance found in his favour. ADIF appealed. The Court of Appeal considered that the ECJ had not yet ruled on whether the concept of a transfer of undertaking within the meaning of Directive 2001/23 encompasses cases in which an undertaking responsible for providing a public service resumes the direct management of that service, where (i) that undertaking decides to perform that service using its own staff, without taking on the staff employed by the subcontractor to which it had previously entrusted the management of that service and (ii) the material resources used, essential to the provision of that service, belonged at all times to that undertaking, which stipulated their use by the subcontractor. Accordingly, the Court of Appeal referred a question to the ECJ.

ECJ's ruling

1. The ECJ recalls (i) that the fact that a transferee is a public body

does not place the transfer outside the scope of the directive; (ii) that the directive applies wherever, in the context of contractual relations, there is a change in the legal or natural person who is responsible for carrying on the undertaking and who by virtue of that fact incurs the obligations of an employer vis-à-vis the employees of the undertaking, regardless of whether or not ownership of the tangible assets is transferred; (iil) that the directive applies to 'insourcing' situations; and (iv) that, in order for the directive to apply, the transfer must concern an economic entity which retains its identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether that activity is central or ancillary (§ 25-31).

2. In order to determine whether an economic entity has retained its identity, it is necessary to consider all the 'Spijkers' criteria. The degree of importance to be attached to each criterion for determining whether or not there has been a transfer within the meaning of Directive 2001/23 will necessarily vary according to the activity carried on, or indeed the production or operating methods employed in the relevant undertaking (§ 32-34).
3. The ECJ has held that, in a sector where the activity is based essentially on manpower, the identity of an economic entity cannot be retained if the majority of its employees are not taken on by the alleged transferee. However, handling containers cannot be regarded as an activity based essentially on manpower, since it requires significant amounts of equipment. ADIF put cranes and facilities — which appear to be essential to the activity at issue in the main proceedings — at Algeposa's disposal. That activity is therefore based essentially on equipment. As already noted, the fact that the tangible assets essential to the performance of the activity at issue belonged at all times to ADIF is not relevant (see Abler, C-340/01). (§ 35-40).
4. Failure of the new contractor to take over, in terms of numbers and skills, an essential part of the staff which its predecessor employed to perform the same activity is not sufficient to preclude the existence of a transfer of an entity which retains its identity within the meaning of Directive 2001/23 in a sector, such as that at issue in the main proceedings, where the activity is based essentially on equipment. Any other conclusion would run counter to the principal objective of Directive 2001/23, which is to ensure the continuity, even against the wishes of the transferee, of the employment contracts of the employees of the transferor (§ 41-42).

Ruling (judgment)

Directive 2001/23 of 12 March 2001 must be interpreted as meaning that the scope of that directive covers a situation in which a public undertaking, responsible for the economic activity of handling intermodal transport units, entrusts, by a public service operating agreement, the performance of that activity to another undertaking, providing to the latter undertaking the necessary facilities and equipment, which it owns, and subsequently decides to terminate that agreement without taking over the employees of the latter undertaking, on the ground that it will henceforth perform that activity itself with its own staff.

PENDING CASES

Case C-159/15 *(Lesar - v - Vorstand der Telekom Austria AG eingerichtetes Personalamt)* **("Lesar")** reference lodged by the German Verwaltungsgerichtshof on 7 April 2015.

Are Articles 2(1), 2(2)(a) and 6(1) of Council Directive 2000/78/EC to be interpreted as meaning that they are not compatible with a national provision under which periods of apprenticeship and periods of employment as a contract agent with the Federal Government for which contributions to the compulsory pension insurance scheme were to be paid for the purposes of obtaining a civil servants' pension are:

E. to be credited as pensionable periods prior to entry into service if they are completed after the 18th birthday, whereby the Federal Government in this case receives an agreed transferred contribution in accordance with the provisions of social security law for crediting these periods from the social security agency; or, alternatively
F. not to be credited as pensionable periods prior to entry into service, if they are completed before the 18th birthday, whereby there is no agreed transfer to the Federal Government for such periods if they are not credited, and the insured party is reimbursed for any contributions made to the pension insurance scheme, especially considering that, in the event that these periods are subsequently required to be credited under EU law, there would be a possible claim for the refund of the sums reimbursed by the social security organisation from the civil servant as well as the subsequent creation of an obligation on the part of the social security organisation to pay an agreed contribution to the Federal Government.

Case C-199/15 *(Ciclat Soc. Coop - v - Consip SpA Autorità per la Vigalanza sui Contratti pubblici di lavori, sevizi e furniture)* **("Ciclat")**, reference lodged by the Italian Consiglio di Stato on 29 April 2015.

Do Article 45 of Directive 18/2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, read also in the light of the principle of reasonableness, and Article 49 and 56 TFEU preclude national legislation which, in relation to a threshold-based procurement procedure, allows a request to be made by the contracting authority on its own initiative for the certificate issued by the social security institutions ('DURC') and obliges that authority to exclude the tenderer if the certificate discloses an earlier failure to pay contributions, in particular one existing at the time of participation but not known to that operator, which took part on the strength of a positive currently valid DURC, but that infringement in any case no longer exists at the time of the award or of the verification carried out on the contracting authority's own initiative?

Case C-201/15 *(AGET Iraklis - v - Ipourgos Ergasias, Kinonikis Asfalisis kai Kinonikis Allilengiis)* **("AGET Iraklis")** reference lodged by the Greek Simvoulio tis Epikratias on 29 April 2015.

Is a national provision, such as Article 5(3) of Law No 1387/1983, which lays down as a condition in order for collective redundancies to be effected in a specific undertaking that the administrative authorities must authorise the redundancies in question on the basis of criteria as to (a) the conditions in the labour market, (b) the situation of the undertaking and (c) the interests of the national economy compatible with Directive 98/59/EC in particular and, more generally, Articles 49 TFEU and 63 TFEU?

If the answer to the first question is in the negative, is a national provision with the aforementioned content compatible Directive 98/59/EC in particular and, more generally, Articles 49 TFEU and 63 TFEU if

there are serious social reasons, such as an acute economic crisis and very high unemployment?

Case C-209/15 *(Korpschef van Politie - v - W.F. de Munk)* **("De Munk")** reference lodged by the Dutch Centrale Raad van Beroep on 6 May 2015.

Must Article 7 of Directive 2003/88 concerning certain aspects of the organisation of working time be interpreted as meaning that it cannot be reconciled with a national provision, under which a public servant who has been wrongly dismissed does not accumulate any leave hours during the period between the date of dismissal and the date of reinstatement of the employment relationship, or the date on which the employment relationship is finally validly terminated?

If it follows from question 1 that leave hours were indeed accumulated during the period at issue, must Article 7 of Directive 2003/88/EC then be interpreted as meaning that it cannot be reconciled with Article 23 of the domestic law in question, which provide that at the end of the reference year only a limited number of leave hours may be carried over to the following year and the remaining unused leave hours expire?

Case C-216/15 *(Betriebsrat der Ruhrlandklinik gGmbH - v - Ruhrlandklinik gGmbH)* **("Ruhrlandklinik")** reference lodged by the German Bundesarbeitsgericht on 12 May 2015.

Does Article 1(1) and (2) of Directive 2008/104 apply to the assignment of a member of an association to another undertaking for the performance of work under that undertaking's functional and organisational instructions if, upon joining the association, the member undertook to make his full working capacity available also to third parties, for which he receives a monthly remuneration from the association, the calculation of which is determined by the usual criteria for the particular activity, and the association receives, in return for the assignment, compensation for the personnel costs of the association member and a flat-rate administrative charge?

Case C-238/15 *(Bragança Linares Verruga and Others - v - Ministre de l' Enseignement supérieur et de la recherché)* **("Verruga")** lodged by the French Tribunal Administratif on 22 May 2015.

Is the condition imposed on students not residing in Luxembourg that they must be the children of workers who have been employed or have carried out their activity in Luxembourg for a continuous period for at least five years at the time the application for financial aid is made, justified by the considerations relating to education policy put forward by the Luxembourg State, and appropriate in each case in relation to the objective pursued, namely of bringing about an increase in the proportion of persons with a higher education degree while seeking to ensure that those persons, having benefited from the possibility offered by the system of aid concerned in order to finance their studies – possibly undertaken abroad - will return to Luxembourg in order to apply their knowledge for the benefit of the economic development of that Member State?

Case 258/15 *(Gorka Salaberria Sorondo - v - Academia Vasca de Policía y Emergencias)* **("Salaberria Sorondo")** reference lodged by the Spanish Tribunal Superior de Justicia del País Vasco on 1 June 2015.

Is the setting of a maximum age of 35 years as a condition for participation in the selection process for recruitment to the post of officer of the police force of the Autonomous Community of the Basque Country compatible with the interpretation of Article 2(2), Article 4(1) and Article 6(1)(c) of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation?

Case 269/15 (Rijksdienst voor Pensioenen - v - Willem Hoogstad) **("Hoogstad")** reference lodged by the Belgian Hof van Cassatie on 8 June 2015.

Must Article 13(1) of Council Regulation (EEC) No 1408/71 be interpreted as precluding the levying of a contribution on benefits derived from Belgian supplementary pension schemes which are not legislation within the meaning of the first subparagraph of Article 1(j) of that regulation, in cases where those benefits are owed to an entitled recipient who does not reside in Belgium and who, in accordance with Article 13(2)(f) of that regulation, is subject to the social security legislation of the Member State in which he resides?

Case 284/15 *(Office national de l'emploi (ONEm), Caisse Auxiliaire de Paiement des Allocations de Chômage (CAPAC))* **("ONEm")**, reference lodged by the Belgian *Cour du travail de Bruxelles* on 10 June 2015.

Is Article 67(3) of Council Regulation (EC) No 1408/71 to be interpreted as precluding a Member State from refusing to aggregate periods of employment necessary to qualify for unemployment benefit to supplement income from part-time employment where that employment was not preceded by any period of insurance or employment in that Member State?

If the first question is to be answered in the negative, is Article 67(3) of Regulation No 1408/71 compatible with, in particular:

- Article 48 TFEU, insofar as the condition to which Article 67(3) makes the aggregation of periods of employment subject is likely to restrict the freedom of movement of workers and their access to certain part-time employment;
- Article 45 TFEU, which entails "the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment" and provides for the right for workers "to accept offers of employment actually made" (including part-time employment) in other Member States, "to move freely within the territory of Member States for this purpose" and to stay there "for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action",
- Article 15(2) of the Charter of Fundamental Rights of the European Union, which states that "every citizen of the Union has the freedom to seek employment, to work, [...] in any Member State"?

Case C-335/15 *(Maria Cristina Elisabetta Ornano - v - Ministero della Giustizia, Direzione Generale dei Magistrati del Ministero)* **("Ornano")** reference lodged by the Italian Consiglio di Stato on 3 July 2015.

Do Article 11, first paragraph, subparagraphs 1, 2(b) and (3), and the last and penultimate recitals in the preamble to Council Directive 92/85 and Article 157(1), (2) and (4) TFEU (formerly Article 141(1), (2) and (4) EC) preclude national legislation which does not allow payment of the allowance provided for therein for periods of compulsory maternity leave prior to 1 January 2005?

Case C-336/15 *(Unionen - v - Almega Tjänsteförbunden, ISS Facility Services AB)* **("Unionen")**, reference lodged by the Swedish Arbetsdomstolen on 6 July 2015.

Is it compatible with the Transfer of Undertakings Directive, after a year has elapsed following the transfer of an undertaking, on application of a provision in the transferee's collective agreement which means that, where a certain contiguous length of service with a single employer is a condition for an extended notice period to be granted, not to take account of the length of service with the transferor, when the employees, under an identical provision in the collective agreement which applied to the transferor, had the right to have that length of service taken into account?

Case C-341/15 (*Hans Maschek - v - Magistratsdirektion der Stadt Wien*) **("Maschek")**, reference lodged by the Austrian Verwaltungsgericht on 8 July 2015.

Is national legislation, which in principle does not allow an employee who has, at his own request, terminated the employment relationship with effect from a particular date, an entitlement to an allowance in lieu of leave compatible with Article 7 of Directive 2003/88/EC?

If not, is a provision of national law which lays down that every employee who, at his own request, terminates an employment contract must make every effort to use up any outstanding entitlement to annual leave by the end of the employment relationship and that, in the event of termination of the employment relationship at the request of the employee, an entitlement to an allowance in lieu of leave arises only if, also in the event of request being made for annual leave beginning on the day of the application to terminate the employment relationship, the employee was unable to take a period of leave corresponding to the full extent of an entitlement to an allowance in lieu of leave compatible with Article 7 of Directive 2003/88/EC?

Is it to be assumed that there is only to be an entitlement to payment of an allowance in lieu of leave if the employee who was unable due to incapacity to work to use up his leave entitlement immediately before the termination of his employment relationship (a) without unnecessary delay (and therefore in principle before the date of termination of the employment relationship) made his employer aware of his incapacity to work (e.g. due to illness) and (b) without unnecessary delay (and therefore in principle before the date of termination of the employment relationship) provided proof (e.g. through a doctor's sick note) of his incapacity to work (e.g. due to illness)?

If not, is a provision of national law which lays down that there is only to be an entitlement to an allowance in lieu of leave if the employee who was unable due to incapacity to work to use up his leave entitlement immediately before the termination of his employment relationship (a) without unnecessary delay (and therefore in principle before the date of termination of the employment relationship) made his employer aware of his incapacity to work (e.g. due to illness) and (b) without unnecessary delay (and therefore in principle before the date of termination of the employment relationship) provided proof (e.g. through a doctor's sick note) of his incapacity to work (e.g. due to illness) compatible with Article 7 of Directive 2003/88/EC?

Does a situation in which the national legislature allows a certain class of persons an entitlement to an allowance in lieu of leave significantly above the requirements of that provision of the directive have the effect that, as a result of the direct effect of Article 7 of Directive 2003/88/EC, those persons who were, contrary to the terms of the directive, refused an entitlement to an allowance in lieu of leave by that national legislation are also entitled to an allowance in lieu of leave to the extent significantly above the requirements of that provision of the directive, and which is allowed by the national legislation to the persons favoured by that provision?

Case C-343/15 (*J. Klinkenberg - v - Minister van Infrastructuur en Milieu*) ("**Klinkenberg**") reference lodged by the Dutch Centrale Raad van Beroep on 8 July 2015.

Must Article 1 of Directive 1999/63/EC on the organisation of working time of seafarers and Clause 1(1) of the Annex to that directive, entitled 'European Agreement on the organisation of working time of seafarers', be interpreted as meaning that that directive and that agreement are applicable to a public official who works for the Netherlands National Maritime Company and who is a member of the crew of a ship engaged in carrying out fisheries inspections?

If Question 1 is answered in the negative, does the general EU law on working time apply to that public official?

Must Articles 3, 5 and 6 of Directive 93/104/EC and Articles 3, 5 and 6 of Directive 2003/88/EC be interpreted as precluding a regulation of a Member State on the basis of which the hours during which the public official referred to in Question 1 does not perform any work during the voyage but during which he is obliged to be available on call in order to remedy problems in the engine room are regarded as constituting rest periods?

Must Articles 3, 5 and 6 of Directive 93/104/EC and Articles 3, 5 and 6 of Directive 2003/88/EC be interpreted as precluding a regulation of a Member State on the basis of which the hours during which the public official referred to in Question 1 does not perform any work during the voyage but during which he is obliged, on the instructions of the master of the ship, to perform work if that is necessary for the immediate safety of the ship, of the persons on board, of the cargo or of the environment, or for the purpose of giving assistance to other ships or persons in distress, are regarded as constituting rest periods?

Case C-356/15 (*European Commission - v - Kingdom of Belgium)* ("**Commission -v- Belgium**"), application filed by the European Commission on 13 July 2015.

The Commission considers that the Kingdom of Belgium has infringed Articles 11, 12 and 76 of Regulation (EC) No 883/2004 and Article 5 of Regulation (EC) No 987/2009 and Decision Al of the Administrative Commission for the Coordination of Social Security Systems by failing to recognise the binding nature of a document issued by the Member State of origin of a posted worker attesting that he is subject to the social security legislation of that Member State.

Case C-395/15 (*Mohamed Daouidi - v - Bootes Plus S.L. and others*) ("**Daouidi**"), reference lodged by the Spanish Juzgado de lo Social No 33 de Barcelona on 22 July 2015.

Must the general prohibition of discrimination affirmed in Article 21.1 of the Charter of Fundamental Rights of the European Union be interpreted as including, within the ambit of its prohibition and protection, the decision of an employer to dismiss a worker, previously

well regarded professionally, merely because of his finding himself in a situation of temporary incapacity for work — of uncertain duration — as a result of an accident at work, when he was receiving health assistance and financial benefits from Social Security?

Must Article 30 of the Charter of Fundamental Rights of the European Union be interpreted as meaning that the protection that must be afforded a worker who has been the subject of a manifestly arbitrary and groundless dismissal must be the protection provided for in national legislation for every dismissal which infringes a fundamental right?

Would a decision of an employer to dismiss a worker previously well regarded professionally merely because he was subject to temporary incapacity — of uncertain duration — as a result of an accident at work, when he is receiving health assistance and financial benefits from Social Security, fall within the ambit and/or protection of Articles 3, 15, 31, 34(1) and 35(1) of the Charter of Fundamental Rights of the European Union (or any one or more of them)?

If the three foregoing questions (or any of them) are answered in the affirmative and the decision to dismiss the worker, previously professionally well regarded, merely because he was subject to temporary incapacity — of uncertain duration — as a result of an accident at work, when he is receiving health assistance and financial benefits from Social Security, is to be interpreted as falling within the ambit and/or protection of one or more articles of the Charter of Fundamental Rights of the European Union, may those articles be applied by the national court in order to settle a dispute between private individuals, either on the view that — depending on whether a 'right' or 'principle' is at issue — that they enjoy horizontal effect or by virtue of application of the 'principle that national law is to be interpreted in conformity with an EU directive'?

If the four foregoing questions should be answered in the negative, a fourth question is referred: would the decision of an employer to dismiss a worker, previously well regarded professionally, merely because he was subject to temporary incapacity — of uncertain duration — by reason of an accident at work, be caught by the term 'direct discrimination … on grounds of disability' as one of the grounds of discrimination envisaged in Articles 1, 2 and 3 of Directive 2000/78?

Case C-401/15 *(Noémie Depesme, Saïd Kerrou - v - Ministre de l'Enseignement supérieur et de la recherché)* **("Depesme"),** reference lodged by the French Cour administrative on 24 July 2015.

In order properly to meet the requirements of non-discrimination under Article 7(2) of Regulation (EU) No 492/2011 on freedom of movement for workers within the Union, together with Article 45(2) TFEU, when taking into account the degree of attachment of a non-resident student who has applied for financial aid for higher-education studies to the society and labour market of Luxembourg, the Member State in which a frontier worker has been employed or has carried out his activities in direct consequence of the ECJ's judgment of 20 June 2013 (Case C-20/12):

- should the requirement that the student be the 'child' of that frontier worker be taken to mean that the student must be the frontier worker's 'direct descendant in the first degree whose relationship with his parent is legally established', with the emphasis being placed on the child-parent relationship established between the student and the frontier worker, which is supposed to underlie the abovementioned attachment, or
- should the emphasis be placed on the fact that the frontier worker 'continues to provide for the student's maintenance' without necessarily being connected to the student through a legal child-parent relationship, in particular where a sufficient link of communal life can be identified, of such a kind as to establish a connection between the frontier worker and one of the parents of the student with whom the child-parent relationship is legally established?
- From the latter perspective, where the contribution — presumably, non-compulsory — of the frontier worker is not exclusive but made in parallel with that of the parent or parents connected with the student through a legal child-parent relationship, and therefore in principle under a legal duty to maintain the student, must that contribution satisfy certain criteria as regards its substance?

Case C-406/15 *(Petya Milkova - v - Agentsia za privatizatsia i sledprivatizatsionen Kontrol)* **("Milkova"),** reference lodged by the Bulgarian Varhoven administrativen sad on 24 July 2015.

Does Article 5(2) of the United Nations Convention on the Rights of Persons with Disabilities permit the Member States to provide by law for specific advance protection against dismissal only for persons with disabilities who are employees, and not for civil servants with the same disabilities?

Do Article 4 and the further provisions of Council Directive 2000/78/EC permit a national rule providing for specific protection against dismissal for persons with disabilities who are employees, but not for civil servants with the same disabilities?

Does Article 7 of Directive 2000/78 permit persons with disabilities who are employees, but not civil servants with the same disabilities, to be afforded specific advance protection?

If the first and third questions are answered in the negative: In light of the foregoing facts and circumstances of the present case, is it necessary in order to comply with the provisions of international and Community law that the specific advance protection against dismissal for persons with disabilities who are employees provided for by the national legislator also be applied to civil servants with the same disabilities?

Case C-423/15 *(Nils-Johannes Kratzer - v - R+V Allgemeine Versicherung AG)* **("Kratzer")**, reference lodged by the German Bundesarbeitsgericht on 31 July 2015.

On a proper interpretation of Article 3(1)(a) of Council Directive 2000/78/EC and Article 14(1)(a) of Directive 2006/54, does a person who, as is clear from his application, is seeking not recruitment and employment but merely the status of applicant in order to bring claims for compensation also qualify as seeking 'access to employment, to self-employment or to occupation'? If the answer to the first question is in the affirmative: Can a situation in which the status of applicant was obtained not with a view to recruitment and employment but for the purpose of claiming compensation be considered as an abuse of rights under EU law?

Case C-430/15 *(Secretary of State for Work and Pensions - v - Tolley)* **("Tolley")**, reference lodged by the UK Supreme Court on 5 August 2015.

Is the care component of the United Kingdom's Disability Living Allowance properly classified as an invalidity rather than a cash sickness benefit for the purpose of Regulation No 1408/71?

- (i) Does a person who ceases to be entitled to UK Disability Living Allowance as a matter of UK domestic law, because she has moved to live in another member state, and who has ceased all occupational activity before such move, but remains insured against old age under the UK social security system, cease to be subject to the legislation of the UK for the purpose of article 13(2)(f) of Regulation No 1408/71?
- (ii) Does such a person in any event remain subject to the legislation of the UK in the light of Point 19(c) of the United Kingdom's annex VI to the Regulation?
- (iii) If she has ceased to be subject to the legislation of the UK within the meaning of article 13(2)(f), is the UK obliged or merely permitted by virtue of Point 20 of annex VI to apply the provisions of Chapter 1 of Title III to the Regulation to her?
- (iv) Does the broad definition of an employed person in Dodl apply for the purposes of articles 19 to 22 of the Regulation, where the person has ceased all occupational activity before moving to another member state, notwithstanding the distinction drawn in Chapter 1 of Title III between, on the one hand, employed and self-employed persons and, on the other hand, unemployed persons?
- (v) If it does apply, is such a person entitled to export the benefit by virtue of either article 9 or article 22? Does article 22(1)(b) operate to prevent a claimant's entitlement to the care component of DLA being defeated by a residence requirement imposed by national legislation on a transfer of residence to another member state?

Case 443/15 *(Davis Parris - v - Trinity College Dublin and others)* **("Parris")** reference lodged by the Irish Labour Court on 13 August 2015.

Does it constitute discrimination on grounds of sexual orientation, contrary to Article 2 of Directive 2000/78/EC, to apply a rule in an occupational benefit scheme limiting the payment of a survivor's benefit to the surviving civil partner of a member of the scheme on their death, by a requirement that the member and his surviving civil partner entered their civil partnership prior to the member's 60th birthday in circumstances where they were not permitted by national law to enter a civil partnership until after the member's 60th birthday and where the member and his civil partner had formed a committed life partnership before that date.

If the answer to Question 1 is in the negative, does it constitute discrimination on grounds of age, contrary to Article 2, in conjunction with Article 6(2) of Directive 2000/78/EC, for a provider of benefits under an occupational benefit scheme to limit an entitlement to a survivor's pension to the surviving civil partner of a member of the scheme on the member's death, by a requirement that the member and his civil partner entered their civil partnership before the member's 60th birthday where: -

G. The stipulation as to the age at which a member must have entered into a civil partnership is not a criterion used in actuarial calculations, and

H. The member and his civil partner were not permitted by national law to enter a civil partnership until after the member's 60th birthday and where the member and his civil partner had formed a committed life partnership before that date.

If the answer to questions 2 is in the negative:

Would it constitute discrimination contrary to Article 2 in conjunction with Article 6(2) of Directive 2000/78/EC if the limitations on entitlements under an occupational benefit scheme described in either question 1 or question 2 arose from the combined effect of the age and sexual orientation of a member of the scheme?

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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).

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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).

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

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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).

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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).

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

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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 November 2015, C-219/14 *(Greenfield)*: increase of working hours does not yield retroactive increase of paid leave (EELC 2015-4).

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).

10 September 2015, C-266/14 *(Tyco)*: time spent traveling to first and from last customer is working time (EELC 2015-4).

12. Free movement, tax

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

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

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

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

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

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).

15 September 2015, C-67/14 *(Alimanovic)*: EU law allows exclusion of foreigners from social assistance (2015-4).

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).

11 November 2015, C-422/14 *(Pujante Rivera)*: fixed-termers are "normally" employed; adverse changes can qualify as redundancy (EELC 2015-4).

20. Applicable law, forum

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

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

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

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

10 September 2015, C-47/14 *(Spies von Büllesheim)*: director cannot be sued before foreign court if he is also an employee (EELC 2015-4).

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 (EELC 2015-1).

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Poland	Stowarzyszenie Prawa Pracy	www.spponline.pl
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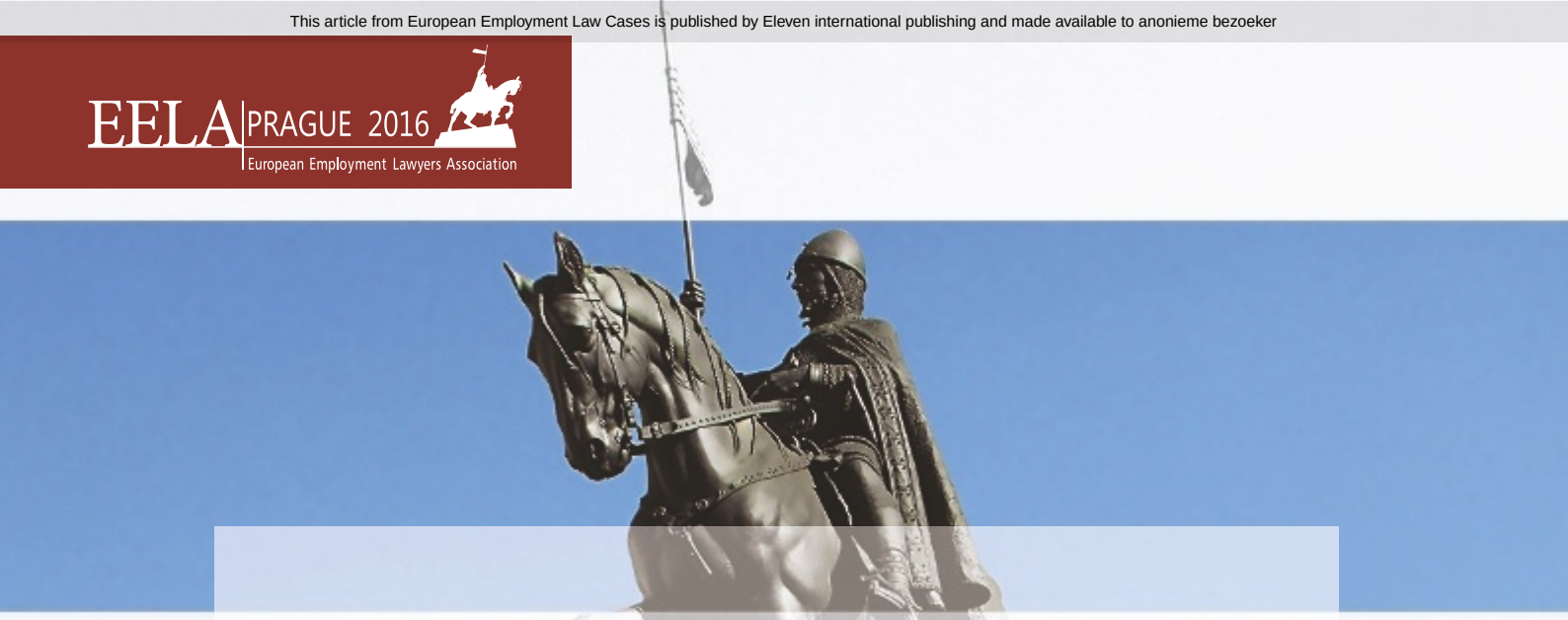

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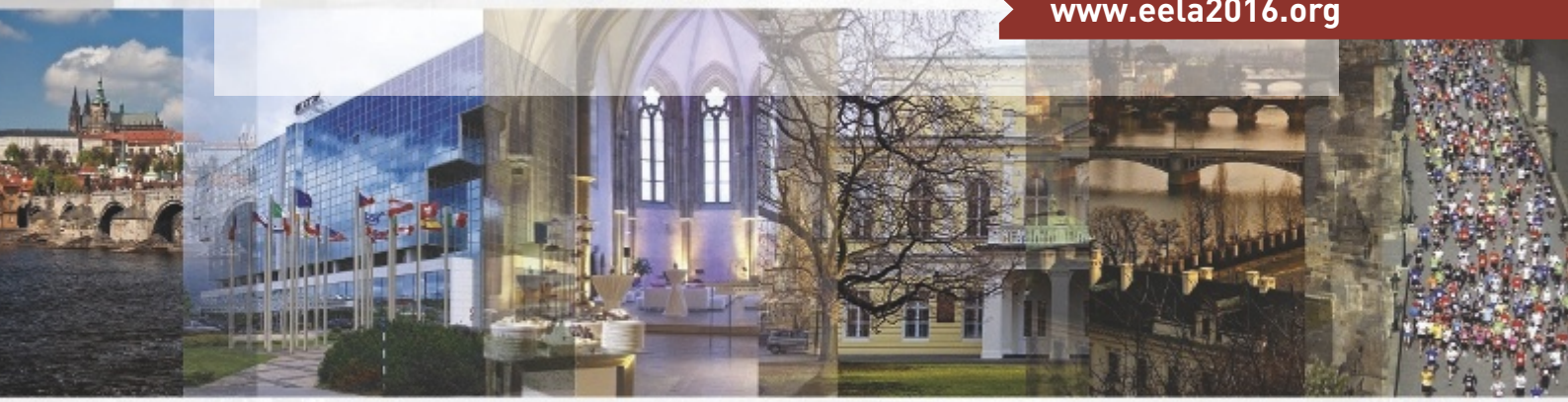

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