

# Law Review

2020/1

## EELC's review of the year 2019

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### Introduction

2 *Prof Ruben Houweling*<sup>1</sup>

#### Europe in extreme times...

Of course when reflecting on 2019 one might think that with the subtitle 'Europe in extreme times', we're referring to the dominant Brexit debate (also in EELC). One might even think we're referring to the growing gap between the 'haves and have nots', the strong rise of populists in politics, the new flow of refugees and the closing of (internal) borders, the growing number of working poor and new forms of work with lower social protection.

And yes, you're right, all that is stated above is a challenge for Europe ... but it becomes extreme when member states have to 'lockdown' their countries due to COVID-19 (Coronavirus), which hit Europe hard at the start of 2020. With the economy already heading into recession in some member states, the highly contagious virus puts local and global economic and social policy makers to the test. Short-time working, financial aid, wage compensation ... all member states are trying their best to cope with the economic consequences of this pandemic.

In these extreme times in Europe, we're looking back at what EELC 2019 had in store.

There were quite a lot of social insurance cases to be dealt with by the ECJ and lower courts (**Free movement and social insurance – Jean-Philippe Lher-**

**nould**). The ECJ also continued its 'horizontal direct effect' of the European Charter of Fundamental Rights (e.g. *Cresco Investigation*, C-193/17, horizontal direct effect of article 21 of the Charter – **Age, religious & sexual orientation discrimination – Daiva Petrylaitė**). EELC's contributions on annual paid leave shows that this matter remains of relevance. The landmark case *Max Planck* of 2018 had effect in national jurisdictions and article 7 of the Working Time Directive remains technical and multi-interpretable (**Right to annual leave – Jan-Pieter Vos and Luca Ratti**).

The ECJ ruled that the employer is obliged to set up a system for recording the time worked each day by its staff in order to make it possible to verify compliance with the restrictions on working time. The claim made by several member states that such an obligation would involve high costs for employers was rejected, because the protection of the health and safety of workers should not be subordinated to purely economic considerations (**Working time – Anthony Kerr**).

Other topics dealt with in EELC 2019 were transfer of undertaking (**Niklas Bruun**), dismissal (**Attila Kun**), disability and gender discrimination (**Peter Schöffmann**), fixed-term contracts (**Fixed-term contracts – Francesca Maffei**). And some cases could be classified in the category 'Miscellaneous' (**Petr Hůrka and Michal Vrajík**).

In 2019 the EU legislator adopted the directive on transparent and predictable working conditions in the European Union (Directive (EU) 2019/1152). This directive guarantees minimum protection to especially vulnerable workers and may be regarded as a (first) serious result of the European Pillar of Social Rights. The new EU Commission was installed later that year and announced an active social agenda for the future. A European minimum wage is one of its considerations.

Meanwhile, the European Union and the United Kingdom are still negotiating on their future partnership. In times like these, collaboration within and between member states is crucial. EELC will contribute by sharing insights and knowledge. We are convinced that EELC's review of 2020 will show that Europe dealt with the extreme times perfectly and came out even stronger. Only time will tell...

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## Age, religious & sexual orientation discrimination

*Prof. Daiva Petrylaitė<sup>2</sup>*

The prohibition of discrimination on grounds of religion or belief, disability, age or sexual orientation, as well as the rules and principles for combating this discrimination, are set out in the Framework Directive 2000/78/EC. Non-discrimination case reports on *inter alia* age, religious and sexual orientation discrimination make up a significant part of all EELC reports.

### Age

In *Österreichischer Gewerkschaftsbund* (C-24/17) and *Leitner* (C-396/17) the ECJ stated that the Austrian system of remuneration and advancement of State officials and contractual public servants is contrary to the prohibition of discrimination on grounds of age. The Court found that the Austrian legislature failed to take measures to re-establish equal treatment with regard to taking into consideration professional experience acquired before the age of 18, persons treated unfavourably by the old system are entitled to obtain the same advantages as their colleagues who are treated favourably by that system and in particular with regard to the payment of compensation. It should also be noted that according to Directive 2000/78/EC, in particular Article 6(1), Member States may provide that differences of treatment on grounds of age shall not constitute discrimination if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary. In *Österreichischer Gewerkschaftsbund* the Court noted that a difference in treatment on grounds of age **not for a transitional period but definitively cannot be justified by the legitimate objective of respecting acquired rights and protecting legitimate expectations and also cannot be justified by budgetary or administrative considerations.**

In *Horgan and Keegan* (C-154/18) the Court did not find indirect age discrimination when the national Irish legislation established a different and less favourable remuneration system for teachers based on different recruiting dates. The Court found that the only relevant criterion for the purposes of applying the new rules on the salary scale and classification on that scale is whether the person concerned is a ‘new entrant to the public service as of 1 January 2011’, regardless of the age of the public servant at the date at which he or she was recruited. Accordingly, that criterion, which renders the application of the new rules dependent exclusively on **the date of recruitment as an objective and neutral factor**, is manifestly unconnected to any taking into account of the age of the persons recruited.

As regards the precedents of the national courts, the decision of the Labour Tribunal of Leuven (**EELC 2019/40**) needs to be highlighted. The Labour Tribunal decided that the calculation of monthly salary based on taking into account professional experience (possibly via length of service) when determining wage in principle constitutes an indirect difference of treatment as younger workers have by definition and, in most cases, less experience than older ones. Such situation **gives a strong advantage to older employees without objective justification** and can be considered as indirect discrimination.

The Danish Supreme Court (**EELC 2019/25**) has established that it does not constitute unlawful discrimination based on age when a disabled employee had a publicly funded reduced-hours job and was dismissed after reaching the statutory retirement age for which reason the public funding lapsed (it was the reason for the dismissal). Such legal regulation by the Court was found as **objectively justified because it creates employment opportunities for a certain socially sensitive group** and given that these social-employment measures are funded by public funds.

### Religion

Austrian national legislation was again evaluated in *Cresco Investigation* (C-193/17) where the ECJ stated that Articles 1 and 2(2) of Directive 2000/78/EC must be interpreted as meaning that national legislation under which, first, Good Friday is a public holiday only for employees who are members of certain Christian churches and, secondly, only those employees are entitled, if required to work on that public holiday, to a payment in addition to their regular salary for work done on that day, constitutes **direct discrimination on grounds of religion**. Moreover, the measures provided for by that national legislation cannot be regarded either as measures necessary for the protection of the rights and freedoms of others, within the meaning of Article 2(5), or as specific measures intended to compensate for disadvantages linked to religion, within the meaning of Article 7(1) of the Directive.

The ECJ emphasized that employees, who are working on Good Friday, are generally comparable with respect only to financial benefits. The Court held that there were no special legal obligations for the members of mentioned churches to celebrate that religious festival or at least to have any feeling of any such kind obligation. Therefore, the Court concluded that this employee situation is no different from that of other employees who worked on Good Friday without receiving such a benefit. Accordingly, an employee is entitled to such public holiday pay even if they worked on Good Friday without feeling any obligation or need to celebrate that religious festival.

The Court noted that the prohibition of all discrimination on grounds of religion or belief is mandatory as a general principle of EU law. That prohibition, which is laid down in Article 21(1) of the Charter, is sufficient in itself to confer on individuals a right which

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they may rely on as such in disputes between them in a field covered by EU law. In the light of this, according to the Court, Article 21 of the Charter must be interpreted as meaning that, until the Member State concerned has amended its legislation granting the right to a public holiday on Good Friday only to employees who are members of certain Christian churches, in order to restore equal treatment, a private employer who is subject to such legislation is obliged also to grant his other employees a public holiday on Good Friday, provided that the latter have sought prior permission from that employer to be absent from work on that day, and, consequently, to recognise that those employees are entitled to public holiday pay where the employer has refused to approve such a request.

In response to the ECJ's preliminary ruling, the Austrian legislature introduced the new legal concept of a so-called 'personal holiday' as a quick fix only several weeks before Easter in 2019. The 'personal holiday' entitles employees to unilaterally take a holiday from their statutory vacation entitlement on one day per year, which they (contrary to the general Austrian rules for vacation use) may choose freely and without the consent of the employer. However, the one thing that is clear at present is that the cultural motives underlying the designation of public holidays will require greater scrutiny in order to achieve harmonisation with the jurisprudence of discrimination (see more in EELC 2019/27).

From the point of national court decisions, the Versailles Court of Appeal's decision must be highlighted (EELC 2019/28). The French Court on 18 April 2019 ended the widely debated *Boungaoui* case (C-188/15). The national court concluded that the prohibition by the employer of the wearing of religious signs was not contained within the employer's workplace regulations, whilst also pointing out that such restrictions by the employer were limited to religious signs only leaving philosophical and political signs unrestricted. Finally, it was stated that the prohibition established a direct discrimination and the willingness of an employer to take account of the wishes of a customer no longer to have the services of that employer provided by a worker wearing an Islamic headscarf could not be considered a genuine and determining occupational requirement. As a result, the Versailles Court of Appeal considered that **the dismissal was based on the applicant's right to manifest her religion and, thus, discriminatory.**

### Sexual orientation

The ECJ in case *E.B.* (C-258/17) on the validity of continuing disciplinary action under Austrian law after the expiry of the time limit for transposing Directive 2000/78/EC, namely from 3 December 2003, stated that the legal consequences of such a disciplinary penalty must be assessed in the light of the requirements of the Directive. In this case the ECJ noted that homosexual relations are no longer criminalised after the entry into force of the Directive, therefore the consequences of a disciplinary penalty after its entry into force must

be reviewed in order to prevent discrimination on grounds of sexual orientation.

## Disability and gender discrimination

*Peter Schöffmann*<sup>3</sup>

The field of anti-discrimination law saw a wide range of decisions by the ECJ as well as national courts.

In case C-192/18, the ECJ dealt with the retirement reform affecting the Polish Supreme Court. The retirement age for female justices was lowered to 60 and for males to 65 years. Aimed at a severe limitation of the independence of the judiciary, it also posed a gender discrimination. The Commission initiated an infringement proceeding. Subsequently, the ECJ held that the reform posed a gender discrimination.

Gender discrimination was also the topic of the ECJ case *Safeway* (C-171/18), which dealt with a firm-level pension fund. Initially it provided for a retirement age of 65 for men and 60 for women. In the wake of the *Barber* case the trust deed was altered. In 1996 the new retirement age was set at 65 for both genders. This new rule took effect retroactively from 1991 onwards. However, the ECJ held that such an implementation has to be sufficiently precise, clear and foreseeable in order to be consistent with the principle of legal certainty as financial consequences derive from such amendments. Article 157 TFEU (then Article 119 EC Treaty) therefore precludes such a retroactive implementation.

In *Nobel Plastiques Ibérica* (C-397/18), an employee was diagnosed with epicondylitis, a chronic and painful condition of the elbow. The condition qualified as an 'occupational disease' and led to the employee's inability to perform her work. After the employee returned to work, she was assigned new tasks with a lower health risk. Eventually the employer terminated the employment relationship due to the employee not meeting the requirement of the tasks assigned and the high rate of absence. The ECJ held – in line with its settled case law – that it is for the national court to decide whether a certain condition can be considered a 'disability' within the meaning of Directive 2000/78, and further that the regulation put forward by the Directive does not require employers to maintain employees who are not competent or capable of performing the tasks contractually required.

The distinction between disability and sickness also concerned the case in EELC 2019/12, where an Austrian claimant argued that he suffered from health issues affecting his spine and that the Austrian Disability Employment Act covered his condition. Therefore, his dismissal should be rendered null and void as it was dis-

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criminy. The Austrian courts considered at great length the difference between sickness and disability. The notion of disability in Austrian labour law requires a hindrance for the participation in professional life. However, this does not correspond to the purpose of the protection against discrimination. The stigma arising from disabilities requires a concept that goes beyond the employees' capacity to meet their contractually owed performance. Such a concept is brought forward by the *United Nations Convention of the Rights of Persons with Disabilities*. The Austrian courts now adopt this more comprehensive approach by interpreting national law in conformity with the Convention.

A Danish case, *EELC 2019/13*, dealt with the requirement for a long-term impairment to constitute a disability. The employee was involved in a car accident. She was left both physically and mentally impaired. Although she tried to resume her work, her employer dismissed her eleven months after the accident. The High Court held that the impairment constituted a disability, but not a long-term one. The medical expert opinion noted that the symptoms experienced after such accidents are very individual. Therefore, a conclusive prognosis is not possible. The dismissed employee was not able to prove the long-term nature of her disability. For that reason the High Court dismissed her claim.

A Belgian case, *EELC 2019/14*, concerned the dismissal of an employee who made use of a time-credit scheme and reduced her weekly working time. Such employees can be dismissed, however, the employer has to prove that the termination is not linked to the reduction of working hours. In case of a retaliatory dismissal, the dismissed employee is entitled to an indemnity in lieu equalling a six months' wage. The case raised the question whether the indemnity shall be paid based on the amount of working time before or after the reduction. The court (astonishingly) ruled out an indirect discrimination based on gender and held that the reduced working time shall be taken into account.

Indirect gender discrimination was also the topic of a German decision, *EELC 2019/15*. In a (more) convincing application of the concept, the Higher Administrative Court of Münster held that a minimum body height of 163 cm for applicants can put women at a disadvantage. However, body height is a justifiable standard in order to fulfil police duties.

In *EELC 2019/16*, a female university lecturer claimed that she was paid less than a male co-worker which constituted gender discrimination. However, the Irish Workplace Relations Commission referred to the ECJ's *Cadman* ruling (C-17/05) and held that though they were performing equal work, the male co-worker was significantly more experienced. Therefore, discrimination could not be established.

A Romanian case, *EELC 2019/17*, concerned the different retirement age for women and men (63 and 65 respectively) and its repercussions for labour law. The (female) claimant, a civil servant, was dismissed after she reached the age of 63 and completion of the legal pension requirements. The Court of Appeal ruled that

the termination of her employment relationship contradicted European law. Therefore, the respective Romanian provisions providing for the possibility of termination shall be rendered inapplicable.

In *EELC 2019/42*, the UK Court of Appeal applied the well-known concept of discrimination by perception. Accordingly, protection against discrimination also covers employees when they do not actually fulfil the protected characteristic; rather it is sufficient that they are perceived as disabled. It is noteworthy that in this case the employer was aware that the employee was not disabled at the relevant time, but expected her to become disabled due to decreasing hearing ability.

The Danish Western High Court, *EELC 2019/43*, dealt with an employee's dismissal two days after her return from maternity leave. The court ruled that the proximity in time between maternity leave and dismissal does not inherently lead to a discriminatory dismissal. The employer was able to prove that the dismissal was due to (non-pregnancy/maternity-related) sickness absence and a decline in orders.

## Dismissal

*Attila Kun*<sup>4</sup>

There were some remarkable judgments concerning dismissal law that featured in *EELC 2019*. These are all national judgments, as dismissal law is a field regulated by EU law only to a very limited extent and there are massive differences between European countries' laws in this regard. However, in spite of all the national diversities, numerous similar principles can be pointed out in the majority of countries.<sup>5, 6</sup> These principles have partly already been formulated in the revised European Social Charter (ESC) and the ILO Convention No. 158. Furthermore, the fundamentally common civil/private law background of labour law also brings into being some overall similarities. Last, but not least, EU law itself also increasingly (but still mostly indirectly, lightly and in a patchy way) infiltrates national laws in this regard. Even though the Treaty on the Functioning of the European Union (TFEU) explicitly grants legislative competence to the European Union in the field of dismissal law (Article 153(1)(d) TFEU), full (or even partial) harmonisation does not seem very likely in the near future. Still, one of the basic values of the EU is the protection against unlawful dismissal (Charter of Fundamental Rights of the European Union (CFREU), Article 30). The following briefly presented national judgments uncover some marked national specialities,

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5. See for more details: van Voss, G. H., & ter Haar, B. 'Common Ground in European Dismissal Law', *European Labour Law Journal*, 3(3), 2012, pp. 215-229.
6. <https://doi.org/10.1177/201395251200300304>.



but at the same time highlight some common grounds and principles as well in dismissal law across Europe.

The increasing influence of European (and international) labour law on national dismissal laws is best exemplified by the seminal decision (EELC 2019/4) of the Italian Constitutional Court (8 November 2018) in which the Court prohibited the reform of the protection against unfair dismissal introduced by the so-called Jobs Act (Legislative Decree no. 23 of 4 March 2015), insofar as it imposed a rather inflexible requirement on the judge to quantify the compensation due for unfair dismissal based primarily on an employee's seniority (length of service). Such legislative solution could preclude any discretionary, reasonable assessment by the courts and fails to provide an adequate deterrent for the employer against unjustified dismissal. According to the Court, such a requirement violated not just national constitutional norms, but also Article 24 of the (Revised) European Social Charter of 1996. Furthermore, the Constitutional Court also referred to a relevant decision of the European Committee of Social Rights (in relation to collective complaint no. 106/2014) in which the ECSR clarified that compensation is adequate if it is capable of ensuring adequate redress for the actual harm suffered by the worker dismissed without a valid reason and of dissuading the employer from the unjustified termination of contracts. Accordingly, the Italian Court has confirmed that the decisions of the ECSR must be taken into account and are of an authoritative value (even if they are not legally binding). This approach has a very important message, as several national jurisdictions do somewhat disregard the importance of the ECSR or even of the European Social Charter. With regard to unfair dismissals the calculation method of compensation is different across European countries. However, this Italian judgment reinforces the general obligation (based on international and EU labour law principles) to guarantee adequate, proportional, deterrent specific compensation for unfair dismissal.

A Romanian judgment (EELC 2019/11) implies remarkable observations in connection with the concept of 'constructive dismissal'. Basically, constructive dismissal refers to resignation because of the conduct of the employer. In some Member States, the concept of 'constructive dismissal' exists, while others do not explicitly recognize it. A 'constructive dismissal' is usually regarded as an unfair dismissal. The Iași Court of Appeal has held that a request for resignation completed and signed after various forms of pressure (including mobbing) from the employee's superiors does not represent a termination of an individual labour agreement on the initiative of the employee, but a constructive dismissal. The Tribunal declared the resignation null and void and obliged the employer to reintegrate the employee into his original position and pay him compensation. Therefore, even if the concept of 'constructive dismissal' is not expressly regulated by the Romanian legislation currently in force, the Romanian courts successfully apply it (this is also the case in many other European

countries). This case can bring about at least three general messages. First, protection against unfair dismissal is a basic value of European labour law (see also: CFREU Article 30), and the concept of 'constructive dismissal' is typically developed within this ambit (either explicitly or implicitly). Furthermore, although 'constructive dismissal' per se is not recognized in all European national labour laws, its underlying idea is inherent within the fundamentally common civil/private law background of labour law. Even if this legal institution itself is not explicitly recognized in a country, usually similar legal consequences can be derived from various basic labour and/or civil law rules, one way or another (see for example: the civil law rules of invalidity of an agreement, principles of just and fair negotiation etc.). Last, but not least, it is notable that the EU law based concept of harassment (see Directive 2000/78/EC) is backing up the development of the concept of constructive dismissal. In other words: usually, if the employee can prove that the termination of the employment contract (by mutual agreement or by a notice) is a result of harassment and bullying by the employer, the court could find that the termination is attributable to the employer and the employer could be held liable to pay compensation for an unlawful termination.

One of the basic principles of labour law and the employment relationship is loyalty (including non-competition duties). In most labour law regimes, non-competition duties of an employee prevail during the whole employment relationship, including the notice period, even if the employee is relieved from the work obligation during the notice period (as confirmed by EELC correspondents from, among others, Finland, Germany and Greece). Nevertheless, a recent court decision from Luxembourg (EELC 2019/37) gave this obligation an original, fairly employee-friendly reading. The Luxembourg Court of Appeal (*Cour d'appel de Luxembourg*) decided that an employee dismissed with notice and exempted from performing their work during the notice period is no longer bound by the non-competition duties arising from their loyalty obligation and can therefore engage in an employment contract with even a direct competitor of their former employer during that exempted notice period. However, the Court decided that, even if the former employee is in principle entitled to use the know-how and knowledge they acquired with their former employer, the poaching of clients during the notice period must, due to the facts and circumstances and in the light of the rules applicable in the financial sector, be considered as an unfair competition act and therefore constitutes serious misconduct justifying the termination of the employment contract with immediate effect. The speciality of the decision lies in two aspects. First, according to this Court, the non-competition duties automatically cease to apply in the event of an exemption from work during the notice period. Secondly, in this situation, the employee must only refrain from apparent unfair acts of competition (based on specific rules of conduct). It is also interesting to

note that even though employee competition is an area regulated by EU law only to a very limited extent, some aspects are still touched by EU law. Firstly, specific fair competition duties might apply, for example in the financial sector, based on Directive MIFID (2004/39/EC) and MIFID II (2014/65/EU). Secondly, on a more general level, the new EU Directive 2019/1152 on Transparent and Predictable Working Conditions contains some basic rules on ‘parallel employment’ (Article 9).

There is a growing consensus within labour law that whistleblowers shall qualify for protection against any form of retaliation, including dismissal. However, a case from the UK (EELC 2019/38) revealed that, from a practical perspective, difficulties may arise from the fact that no international consensus exists about the method of whistleblowing protection. The case was quite specific, concerning the potential extraterritorial application of the UK’s whistleblowing protection rules: British FCO (Foreign and Commonwealth Office) workers with a contract in England and hired there were seconded abroad to work in Kosovo for EULEX. The Court of Appeal ruled that there was no jurisdiction for the Employment Tribunal to hear the claim in relation to personal liability of the co-workers because they were outside the scope of UK employment law. According to the EELC national correspondent, the judgment potentially has implications for other types of claim brought by UK employees posted abroad where similar personal liability provisions apply, such as discrimination and harassment. Albeit such practical difficulties can certainly always arise, the growing international consensus about whistleblowing protection is best demonstrated by the recently adopted EU Directive 2019/1937 (23 October 2019) on the protection of persons who report breaches of Union law. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 17 December 2021.

## Fixed-term contracts

*Francesca Maffei*<sup>7</sup>

An analysis of the most recent ECJ judgments or national judgments concerning the consistency of national legislation with different key clauses of the Council Directive on the Framework Agreement on fixed-term contracts (Directive 1999/70) led to two important discoveries:

1. most of the judgments concern the respect of the principle of equal treatment and the dissuasive force of the penalties provided in case of abusive successive fixed-term contracts; and
2. more and more frequently the consistency between national law and the European Directive is explored

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directly by internal judges and not by the ECJ, especially in sectors or with regard to specific clauses on which the interpretative work carried out by the Court of Justice is copious.

With regard to the principle of equal treatment, Clause 4(1) of the Framework Agreement stipulates that, as regards employment conditions, employees with a fixed-term contract are not to be treated less favourably than employees on an indefinite contract, unless this is justified on objective grounds. This is a principle whose importance is testified by the number of occasions on which national legislation has been brought before the ECJ to verify its compliance with the mentioned Clause 4(1). In particular, the principal task of the ECJ is to verify the existence of ‘objective grounds’ which could justify different treatment provided for in national legislation between fixed-term and permanent workers. In recent years the interpretation of the concept of objective grounds which legitimate different treatments has extended a lot.

This was the case in *Cobra Servicios Auxiliares* (ECJ 11 April 2019, joined cases C-29/18, C-30/18 and C-44/18), in which the ECJ was required to assess the consistency with Clause 4(1) of Spanish legislation that provides for a lower level of compensation in case of termination of a fixed-term contract in comparison to the compensation given in case of termination of the permanent contracts of comparable workers under a collective redundancy. In order to fully understand the Court’s ruling, it is necessary to start with a brief summary of the facts that led to this decision. In Spain, the law concerning fixed-term contracts provides that when fixed-term contracts are concluded for the duration of a project or a service and the project or service ends (so the contract ends), the employee is then entitled to compensation of 12 days’ salary per year of service. This specific law could be considered in contrast with the European principle of equal treatment because in the same national legislation it is provided that if indefinite contracts end for a reason considered to be fair, as for collective redundancy, an employee in principle is entitled to compensation of 20 days’ salary per year of service and not just 12 days as for fixed-term contracts. In this way it seems clear that in Spanish law the treatment provided for with respect to fixed-term employees is less favourable than that for open-ended employees. Once the existence of an unequal difference is recognised, the ‘legal investigation’ that the ECJ is called upon to do, according to settled case law, is to determine whether there is an objective justification for this difference in treatment, or rather if the unequal treatment provided for in the Spanish legislation could be justified by the presence of precise and specific factors, characterising the employment condition to which it relates, in the specific context in which it occurs and, on the basis of objective and transparent criteria, in order to ensure that that unequal treatment in fact responds to a genuine need, is appropriate for the purpose of attaining the objective pursued and is necessary for that purpose. Therefore, in this case, the ECJ ruled that there existed

objective grounds that legitimates different amounts of severance compensation between fixed-term employees and open-ended employees. Indeed, according to the ECJ ruling, the compensation for indefinite term workers amounts to compensation for an unforeseen situation, while for fixed-term workers it was apparent from the beginning that it was envisaged the employment contract would end at a certain point.

As for the measures to avoid abusive successive fixed-term contracts, more and more frequently the ECJ and national courts are asked to verify the persuasive force of the penalties provided by the law to achieve this goal. For example, on 8 May 2019, the ECJ delivered an important judgment in the case C-494/17 (*Rossato and Conservatorio di Musica F.A. Bonporti*), deciding on the compliance with Clause 5(1) of the Framework Agreement of Italian legislation regarding penalties in case of successive fixed-term employment contracts for public sector teachers.

In particular, the ECJ decided that it is not contrary to Clause 5(1) that a national regulation which, as applied by the national supreme courts, precludes any entitlement to financial compensation on account of the misuse of successive fixed-term employment contracts for public sector teachers, if their employment relationship has been converted from a fixed-term relationship into one of indefinite duration, with limited retroactive effect. That is because such conversion is certain and predictable and the limited account taken of the period of service completed under those successive fixed-term employment contracts constitutes a measure that is proportionate for the purpose of punishing that misuse, which is a matter for the national court to determine.

Returning to what was already stated at the beginning of this review, the penetration of the European legal system into internal ones, both as regards the founding Euro-Community principles and with regard to specific law, such as that on fixed-term contracts, is demonstrated by the growing number of cases in which the compatibility between an internal rule and the European legislation is directly analysed by the national judges. This is above all because the interpretive material of the Directive in the matter of fixed-term contracts provided by the Court of Justice that the national courts can use is now particularly abundant and therefore their autonomy in managing the decision is certainly much more accentuated.

This is the case, for example, of the judgment of the Constitutional Court of Latvia in which the latter pronounced on the unconstitutionality of an internal rule on fixed-term contracts for professors in universities, insofar as it did not ensure protection against consecutive abuse of the conclusion of fixed-term employment contracts, as provided in the European Directive on fixed-term contracts.

Indeed, referring directly to the ECJ judgments in cases C-494/16 *Giuseppa Santoro*, C-16/15 *María Elena Pérez López* and in joined cases C-22/13, from C-61/13 to C-63/13 and C-418/13 *Raffaella Mascolo and Others*, the Constitutional Court of Latvia concluded that the

content of Clause 5(1) of the Framework Agreement is sufficiently clear and it was not obliged to submit to the ECJ a request for a preliminary ruling. According to its decision, the first sentence of Article 106 of the Latvian Constitution provides that everyone has the right to freely choose their employment and workplace according to their abilities and qualifications. The Court admitted that although in principle this right can be restricted, in this particular case such restriction cannot be regarded as proportionate, since the legislator with respect to professors has not implemented the requirements of the Framework Agreement, i.e., legal acts do not contain limits for renewals of fixed-term employment contracts and maximum limits for the periods professors can be employed on the basis of fixed-term employment contracts. The Court referred to the ECJ judgment in case C-190/13 (*Antonio Márquez Samohano*) and concluded that in principle concluding fixed-term employment contracts with professors is allowed, however, in Latvia successive fixed-term employment contracts with professors are concluded to satisfy permanent and long-term needs for the employers. Notwithstanding this, the Law on Higher Education Institutions does not contain any measures which could protect employees against the risk of successive abuses of the conclusion of fixed-term employment contracts.

Another important case in which a national court – here, the German Federal Labour Court (*Bundesarbeitsgericht*, the ‘BAG’) – could have decided directly on the basis of the interpretation established by the Court of Justice in other cases, is the case concerning a public broadcaster. In Germany, employers can enter into fixed-term contracts lasting more than two years only if one of the objective reasons stated in the German Act on part-time and temporary work (*Teilzeit- und Befristungsgesetz*) exists. Subsequently, public service broadcasters can enter into fixed-term contracts with producers due to the character of the work pursuant to Section 14(1), second sentence of this Act. In the case decided by the Court, the claimant was an employee who had been employed since 1992 for the defendant, a public broadcaster, at the beginning as a freelancer and successively as an employee based on two consecutive fixed-term employment contracts. Subsequently, the claimant filed an action, as he claimed that the last contract had converted into one for indefinite time, as the reason for entering into a fixed-term contract was invalid. The BAG found that long-term pre-employment as a freelancer actually could indicate that there was no objective reason to offer a fixed-term contract. Indeed the claimant’s duties had been very much the same for a very long time, both as an employee and as a freelancer, and for a very long time in an almost full-time capacity. This indicated that offering a fixed-term contract might have been inappropriate, as apparently the work and, particularly, the actual person in charge of this broadcast programming protected by Article 5(1), second sentence, of the German Constitution (*Grundgesetz*) had been needed for a very long time. Therefore, an indefi-

nite term contract probably would have been the way to proceed. The national Court's decision should have been based on European law. Indeed with regard to former Article 141(1) of the Treaty of Rome, which is now Article 157(1) TFEU, there is long-established case law that an employee is someone who, during a certain period of time, performs services for another person in accordance with the other person's instructions for which they receive compensation in return (for example, case C-256/01, *Allonby*). Applying this concept of employment, it would be irrelevant whether the employment relationship is set up in the form of freelancing or regular employment, because a freelancer in that sense can in fact be working full-time under their employer's instructions and must be regarded as an employee instead of self-employed following the national law. Following that notion, the claimant might have been working as an employee from the beginning.

## Free movement and social insurance

Jean-Philippe Lhernould<sup>8</sup>

Do national rules constitute **obstacles to free movement of workers**? Although the jurisprudence of the Court of Justice is quite elaborate on Article 45 TFEU, there are still court disputes which could mean either that its implementation is not settled or that it remains difficult for Member States to give up a territorial approach where the residence and/or periods of work in another Member State continue to be disregarded. In the scope of tax law, the Court rules that Article 45 TFEU precludes the Belgian legislation which provides that the tax exemption applicable to disability allowances is subject to the condition that those allowances are paid by a body of Belgium and, therefore, excludes from that exemption allowances of the same nature paid by another Member State, even where the recipient of those allowances is a resident of the Member State concerned (*BU*, C-35/19). Article 45 TFEU and Article 7(2) of Regulation (EU) 492/2011 also precludes (again) the legislation of Luxembourg which makes the grant of financial aid for higher education studies to non-resident students subject to the condition that, at the date of the application for financial aid, one of the parents of the student has been employed or carried on an activity in that Member State for a period of at least five years in the course of a reference period of seven years calculated retroactively from the date of that application for financial aid (*Aubriet*, C-410/18). It is sometimes in conjunction with social security matters that rules on free movement are interpreted. The ECJ holds indeed that Article 4(3) TEU, in conjunction with the Staff Regulations of Officials of the EU, precludes the legislation of Belgium under which, when determining the pension entitlement

of a worker who occupied a position as an employed person in that Member State before becoming an EU official and completed, after becoming an EU official, his compulsory military service in that Member State, that worker is not entitled to have his period of military service treated as equivalent to a period of actual work as an employed person (*Rohart*, C-179/18).

One case underlines the difficulty of assessing the conformity of some domestic regulations. A perfect example is given by the Austrian legislation which grants an extra week of annual leave to employees who have 25 years of professional experience in the same company. Periods completed in other companies (in Austria or abroad) can be counted but for a maximum of five years. For the ECJ, this regulation does not violate Article 45 TFEU since it has not been established that that legislation gives Austrian workers an advantage over workers who are nationals of other Member States. Furthermore, in line with the *Graf* case (C-190/98), the legislation at stake is not of such a kind as to deter Austrian workers who wish to leave their current employer in order to work for an employer in another Member State, while at the same time hoping subsequently to return to their original employer (*Schallerbach GmbH*, C-437/17).

The **right to stay in a Member State** gives rise to interesting cases focusing on the 'resource test'. In the first case, Article 7(1)(b) of Directive 2004/38 means, according to the ECJ, that a Union citizen minor can be considered as having sufficient resources not to become an unreasonable burden on the social assistance system of the host Member State during his period of residence, despite his resources being derived from income obtained from the unlawful employment of his father, a third-country national without a residence card and work permit (*Bajratari*, C-93/18). Indeed, while the Union citizen must have sufficient resources, EU law does not lay down any requirement whatsoever as to their origin. A similar flexible interpretation of Article 5(1)(a) of Directive 2003/109 leads the Court of Justice to decide that the concept of 'resources' referred to in that provision does not concern solely the 'own resources' of the applicant for long-term resident status, but may also cover the resources made available to that applicant by a third party provided that, in the light of the individual circumstances of the applicant concerned, they are considered to be stable, regular and sufficient (*X*, C-302/18).

Concerning the **right to maintain the status of workers**, the ECJ ruled that a Romanian citizen who, having exercised his right to free movement in Ireland, acquired there the status of worker within the meaning of Article 7(1)(a) of Directive 2004/38 on account of the activity he pursued there for a period of only two weeks and retained the status of worker for a further period of no less than six months. Thus this migrant jobless worker is not subject to the stringent status of non-active persons and is entitled to full equality of treat-

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ment with regard to social benefits. The solution is transposable to self-employed workers. This said, a very short-term activity may lead national institutions to consider that the activity was marginal and therefore insufficient to grant the worker status (*Tarola*, C-483/17).

Several cases interpret the **social security coordination rules and conflict of laws**. For instance, in which Member State(s) are Holiday on Ice skaters, who are third country citizens, insured when they perform their show in several European countries? Using a pragmatic approach disregarding the requirement of a 'legal residence' in Europe, the Court of Justice considers that even if they only temporarily reside and work in different Member States in the service of an employer established in a Member State, these workers can rely on the coordination rules laid down by Regulation 883/2004 (*Balandin*, C-477/17). The logical follow-up question, which was unfortunately not discussed before the ECJ, is to determine in which Member State they are insured according to the Regulation conflict rules. Although the ruling clarifies the fact that EU social security provisions determining the legislation applicable are relevant for that kind of case, their concrete implementation is tricky. Indeed, if Article 13 of Regulation 883/2004 is relevant for workers who perform their activities in two or more Member States, it is not adapted to workers who reside outside the EU or whose employer is located in a third country.

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The competent legislation may provide low social security benefits, sometimes no benefits at all. Is it allowed to claim the benefits from another Member State – non-competent under conflict rules – the worker has close links with? For the ECJ a difference must be made between the right to claim and the obligation to pay: the Member State of residence is not obliged to serve a residence-based benefit to a person who works in Germany (and who is insured there) but who, because of their low wage, is entitled to no social security benefit in that country. This strict application of Regulation 883/2004 is questionable, since it leaves a migrant worker without actual coverage. The reasoning behind this is that Article 45 TFEU does not confer on a migrant worker an entitlement, in their Member State of residence, to the same social welfare coverage that they would have enjoyed in the country of social security insurance (*Van den Berg*, C-95/18 and C-96/18). What about a Romanian citizen who worked several years in Ireland before losing his job, who was granted a non-contributory unemployment benefit in that country, and who claims Irish family benefits for his family residing in Romania? Since he is insured in Ireland by virtue of conflict rules, he must receive the said benefits (*Bogatu*, C-322/17). Another case had to tackle a tricky factual situation where several solutions were conceivable: for the ECJ, Article 11(3)(e) of Regulation 883/2004 must be interpreted to the effect that a situation in which a person, whilst working as a seaman

for an employer established in a Member State on board a vessel flying the flag of a third State and travelling outside of the territory of the European Union, maintaining his residence in his Member State of origin, falls within the scope of that provision, such that the applicable national legislation is that of the Member State of residence of that person. This case implicitly insists on the complementary role of the *lex domicilii*, which is below the *lex loci laboris* in the hierarchy of the conflict rules, but still plays a major role in avoiding the absence of social security coverage for migrant workers (*SF*, C-631/17). Finally, the Court of Justice ruled that a retiree who spent his entire career working in Switzerland (where he is insured) and who resides in France cannot be subject in that country to the CSG/CRDS taxes levied in respect of income from assets received in France since these taxes fall within the scope of Regulation 883/2004. This solution applies the single applicable legislation principle (*Dreyer*, C-372/18).

Understanding the links between **social security coordination rules and Article 45 TFEU** is hard. A case illustrates the fact that the Court of Justice sometimes manage to apply the Treaty rules when the social security coordination rules lead to inappropriate solutions. In this regard, the Court of Justice refers to Article 45 TFEU in a case where, due to the difference in two national social security legislations, a migrant worker was deprived of invalidity benefits in both countries. For the Court, where such a difference in legislation exists, the principle of cooperation in good faith laid down in Article 4(3) TEU requires the competent authorities in the Member States to use all the means at their disposal to achieve the aim of Article 45 TFEU (*Vester*, C-134/18). However, Article 45 TFEU cannot solve all the gaps deriving from the coordination technique, as a case on the amount of social security contributions payable by a worker shows (*Zyla*, C-272/17). It is worth mentioning two cases providing further explanations on the functioning of overlapping rules applicable to the payment of family benefits by two competent Member States (*Moser*, C-32/18; *GP*, C-473/18).

One case applies well-established case law on **gender discrimination in the field of retirement pension**. The mere fact that the amounts of retirement pensions are adjusted *pro rata temporis*, in order to take account of the reduced time worked by a part-time worker as compared with that of a full-time worker, is not contrary to EU law. Nevertheless, a measure which has the effect of reducing a worker's retirement pension by a proportion greater than that resulting when their periods of part-time work are taken into account cannot be regarded as objectively justified on the ground that the pension is in that case consideration for less work. This is the reason why, unsurprisingly, the Spanish retirement regulation applicable to part-time workers is not compatible with Article 4(1) of Council Directive 79/7 (*Villar Láiz*, C-161/18).

## Transfers of undertakings

Niklas Bruun<sup>9</sup>

### Introduction

The Transfers of Undertakings Directive 2001/23/EC continues to raise issues for national courts as well as for the ECJ. During 2019 the ECJ issued four judgments regarding the interpretation of this Directive. The preliminary rulings were requested from Belgium, Greece, Slovenia and Portugal.

In the following I briefly refer to and discuss the four judgments given in 2019. In the final section of this presentation I analyse some specific features of the new practice from the ECJ.

#### • Case C-194/18 *Jadran Dodič*

In Case C-194/18 (*Jadran Dodič*), the ECJ had to assess a situation where Banka Koper on 23 December 2011 had taken a decision to cease providing investment services and performing investment activities, as well as its stock-exchange intermediation services. Banka Koper had thereafter entered into a transfer agreement with Alta Invest, providing that the former would transfer to the latter the financial instruments and other assets that it managed for its clients, the accounts relating to its clients' intangible debt securities, other investment services and ancillary services, as well as the records – that is, all the documentation relating to investment services and activities that the former was required to keep for its clients. In addition, it was agreed that Banka Koper would work for Alta Invest as a dependent stock-exchange intermediary.

In July 2012, Banka Koper had informed the clients to whom it had provided services as a stock-exchange intermediary that it would be ceasing to provide such services. In that context, it specifically informed its clients of the possibility of transferring to Alta Invest, and offered them special benefits if they did, for example, having their transfer costs covered. Banka Koper also informed its clients that if they failed to respond they would be deemed to have consented to being transferred to Alta Invest. 91% of Banka Koper's clients did, in fact, transfer to Alta Invest, most of them having expressly indicated their wish to be associated with the latter going forward.

Subsequently, Banka Koper was excluded from trading at the Ljubljana Stock Exchange (Slovenia) and the Bank of Slovenia adopted a decision authorising it to provide services as a dependent stock-exchange intermediary. Thereafter Banka Koper abolished its Office for Investment Services.

It was against that background that the employment contracts of all employees of Banka Koper's Office for Investment Services were terminated on operational grounds, including the permanent employment contract for the stockbroker Mr Dodič, which was terminated on 11 October 2012.

Banka Koper had, in the meantime, proposed to all of its employees of the Office for Investment Services the conclusion of new contracts of employment for the performance of other tasks.

Mr Dodič declined the offer made to him, claiming that the job he was offered was not suitable. Subsequently, he contested his dismissal before the Slovenian courts, seeking reinstatement to his position with Banka Koper or, alternatively, with Alta Invest. He claimed that Banka Koper transferred its securities trading and management activities to Alta Invest within the meaning of Article 73 of the Employment Relationship Act ('ZDR'), which transposes Article 1(1) of Directive 2001/23 into Slovenian law. Accordingly, following the transfer provided for by the transfer agreement of 27 June 2012, the activity of providing investment services continued at Alta Invest with Banka Koper's operating units and network of clients.

Banka Koper supported by Alta Invest contended before the national courts that, after deciding to cease providing stock-exchange intermediary services to its clients, it was obligated, under Slovenian law, to transfer the accounts relating to its clients' intangible debt securities to another legal person authorised to provide the same services in Slovenia. It stated that the transfer did not apply to the employees, the business premises or the work tools, and that the clients were able to choose their new provider of investment services.

The national court of first instance ruled that the conditions for a transfer of an undertaking were not satisfied since there was no retention of the identity of the undertaking in either economic or functional terms. It noted, first, that the transfer agreement entered into by Banka Koper and Alta Invest provided for no property, rights or workers to be transferred and, second, that the clients had freely chosen to transfer their securities to Alta Invest 'or to any other financial brokerage firm'. In those circumstances, the transfer under that agreement could not be considered to be a 'transfer of an undertaking' or of 'part of an undertaking' within the meaning of Article 1(1) of Directive 2001/23.

The Appeal Court agreed with the first instance court and clarified that the fact that almost all clients did in fact decide to move to Alta Invest was not sufficient ground for concluding that there was a 'transfer of an undertaking' within the meaning of Directive 2001/23. Moreover, the fact that Banka Koper continued to carry out financial intermediary activities, including for Alta Invest, confirmed, according to that Court, that there was no transfer of an undertaking.

Mr Dodič brought before the referring court an appeal in cassation against that judgment, arguing, *inter alia*, that the fact that 91% of Banka Koper's clients actually transferred their securities to Alta Invest supported the conclusion that there was a transfer of an undertaking. The appeal was dismissed.

Mr Dodič then brought an appeal on constitutional grounds before the Constitutional Court, claiming that Directive 2001/23 had been interpreted in a manner that was manifestly incorrect and arbitrary and that his

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request for the case to be referred to the Court of Justice for a preliminary ruling had been refused without reasons. That Court set aside the judgment of the Slovenian Supreme Court and referred the case back to the latter. It found, in essence, that the referring court had not answered the appellant's questions relating to the matter of whether there had been a 'transfer of an undertaking' within the meaning of Directive 2001/23. The referring court against this background asked the ECJ whether, in the circumstances of the case, a 'transfer of an undertaking' can be considered to have taken place. The ECJ considered that the economic activity carried on by the entity in question does not require significant tangible assets to operate. The ECJ argued further:

*“Indeed, the intangible assets, which consist in the financial instruments and other assets of the instructing parties, in this case the clients, the keeping of their accounts, the other financial and ancillary services, as well as the maintenance of records, namely the documentation relating to the investment services provided to clients and the investment activities carried out for them, contribute to the identity of the economic entity in question”.*

The transfer of those items is necessarily subject to the express or tacit agreement of the clients since, in a context such as that at issue in the main proceedings, an undertaking that ceases its activity cannot require its clients to entrust the management of their securities to the undertaking of its own choosing.

It follows, first, that the fact, as the referring court notes, that Banka Koper's clients were not bound by the transfer agreement entered into with Alta Invest and could freely decide to transfer their securities to the latter cannot, in itself, preclude the classification of a transfer as a 'transfer of part of an undertaking' within the meaning of Article 1(1) of Directive 2001/23.

It follows, second, that, in order for the transaction at issue in the main proceedings to be classified as a 'transfer of part of an undertaking', it must be established that there was a transfer of clients.

It is, thus, for the referring court to take into account whether the clients had an express choice or not as regards the transfer of their accounts to Alta Invest, or whether there was a default transfer of the records relating to their accounts. In that context, it is for that court to establish whether Article 159(3) of the Slovenian law on the financial instruments market ('ZTFI') requires a brokerage company which decides to cease its activities to transfer the documents relating to its clients' accounts to one single person duly authorised in Slovenia to provide investment services and carry out investment activities or whether those documents may be transferred to several people.

Another factor to be taken into consideration is the provision of financial incentives such as covering transfer fees in the case of transfer to Alta Invest.

In addition, while the fact that 91% of Banka Koper's clients agreed to entrust the management of their securi-

ties to Alta Invest appears to confirm the efficacy of such incentives, a transaction cannot be classified as a 'transfer' within the meaning of Article 1(1) of Directive 2001/23 on the basis of that observation alone, particularly since such an observation is made after the conclusion of the transfer agreement by the two undertakings.

The Conclusion of all this was that Article 1(1) of Directive 2001/23/EC must be interpreted as meaning that the transfer, to a second undertaking, of financial instruments and other assets of the clients of a first undertaking, following the cessation of the first undertaking's activity, under a contract the conclusion of which is required by national legislation, even though the first undertaking's clients remain free not to entrust the management of their stock market securities to the second undertaking, may constitute a transfer of an undertaking or of part of an undertaking if it is established that there was a transfer of clients, that being a matter for the referring court to determine (emphasis added). In that context, the number of clients actually transferred, even if very high, is not, in itself, decisive as regards classification as a 'transfer' and the fact that the first undertaking cooperates with the second undertaking as a dependent stock-exchange intermediary, is, in principle, irrelevant.

- *Case C-509/17 Plessers*

Ms Plessers had worked at Echo NV in Houthalen-Helchteren (Belgium) from 17 August 1992 as head of management accounting.

On 23 April 2012, on the application of Echo, a Belgian Commercial Court had initiated judicial restructuring proceedings with a view to a consent procedure. That company was granted a stay of proceedings until 23 October 2012 inclusive. The stay of proceedings was subsequently extended up to and including 22 April 2013.

On 19 February 2013, before that period had expired, the Commercial Court had granted Echo's application to change the transfer by consent to a transfer under judicial supervision under the Belgian Law on Continuity of Undertakings ('LCU').

On 22 April 2013, the Commercial Court had authorised judicial officers to proceed with the transfer of movable and immovable property to Prefaco, one of the two companies bidding to take over Echo. In its bid, Prefaco had offered to keep on 164 employees, around two thirds of Echo's total staff. The transfer agreement was signed on 22 April 2013. A list of the employees to be taken over was appended as Annex 9 to that agreement. Ms Plessers' name was not on that list.

That agreement also provided that the transfer date would be 'two working days after the date of the authorisation decision' by the Commercial Court.

On 23 April 2013, Prefaco contacted the employees covered by the transfer by telephone, asking them to attend the following day to perform their duties. Prefaco confirmed that transfer in writing on 24 April 2013. Similarly, the employees who were not taken over were contacted by telephone and informed by the court officers,



by letter of 24 April 2013, that they had not been taken over by Prefaco. That letter read as follows:

*“This letter serves as official notification under Article 64(2) of the LCU. Echo’s activities ceased from 22 April 2013. Since you have not been taken over by the transferees referred to above, you must regard this letter as a termination of contract by your employer, [Echo]. As a potential creditor [of Echo], you are advised to file a claim with the undersigned court officers ...”*

The court officers also issued Ms Plessers with a form, indicating 23 April 2013 as the date of termination of her contract.

In a letter of 7 May 2013, Ms Plessers put Prefaco on formal notice that it had to employ her.

Prefaco responded by a letter of 16 May 2013, referring to application of Article 61(4) of the LCU, which entitles the transferee to choose which employees it wishes to keep on and which employees it does not, provided, first, that such a choice is determined by technical, economic or organisational reasons and, secondly, that there is no prohibited differentiation. Prefaco also referred, *inter alia*, to the fact that it had no obligation to re-employ Ms Plessers after her employment contract with Echo was terminated.

No agreement having been reached, by application of 11 April 2014 Ms Plessers instituted proceedings before the Labour Court in Antwerp.

By a judgment of 23 May 2016, the Labour Court declared all Ms Plessers’ claims to be unfounded and ordered her to pay the costs in full. Ms Plessers appealed against that judgment. In August 2017 the Appeal Court decided to stay the proceedings and to refer the following question to the ECJ for a preliminary ruling:

*“Is the right of option for the transferee under Article 61(4) of the [LCU], in so far as that ‘judicial reorganisation by transfer under judicial supervision’ is applied with a view to maintaining all or part of the transferor or its activities, consistent with Directive 2001/23, in particular with Articles 3 and 5 of that directive?”*

The case boiled down to a question of whether the exception under Article 5(1) of Directive 2001/23 could justify the Belgium legislation. In essence this Article stipulates that the Directive does not apply to any transfer where the transferor is the subject of insolvency or similar proceedings which were initiated for the purposes of the liquidation of the transferor’s assets and which are under the control of a competent public authority.

In that regard, the Court held it necessary to ensure that such a transfer satisfies the three cumulative conditions laid down by Article 5(1). The ECJ noted that as long as the court has not given a ruling on the application for judicial restructuring, the debtor cannot be declared insolvent and, in the case of a company, it cannot be wound up by the courts.

It further noted that, although judicial restructuring proceedings such as those at issue in the main proceedings, may lead to the insolvency of the undertaking concerned, such an outcome is neither automatic nor certain.

Furthermore regarding the requirement that proceedings must have been instituted for the purposes of the liquidation of the transferor’s assets, it is apparent from the case law of the Court that it is not met in the case of proceedings aimed at ensuring the continuation of the activity of the undertaking concerned.

The ECJ concluded that proceedings for judicial restructuring by transfer under judicial supervision, such as those at issue in the case in hand, do not meet the requirements laid down in Article 5(1) of Directive 2001/23 and that, consequently, transfers carried out in such circumstances are not covered by the exception provided for in that provision. Thus, Articles 3 and 4 of Directive 2001/23 remain applicable to a case such as that at issue in the main proceedings.

The next question to answer for the ECJ was therefore whether Articles 3 and 4 of the Directive must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which provides the transferee with the option to choose the employees it wishes to keep on. The Court noted that Article 3(1) of Directive 2001/23 stipulates that the rights and obligations of the transferor arising from a contract of employment or from an employment relationship existing on the date of transfer of the undertaking are, by reason of such transfer, to be transferred to the transferee.

It is therefore apparent that the application of national legislation such as that at issue in the main proceedings is liable seriously to compromise observance of the principal objective of Directive 2001/23, namely the protection of employees against unjustified dismissal in the event of a transfer of an undertaking.

The legal consequences of the fact that Belgian law does not fulfil the requirements of the Directive is not – in accordance with the well-established doctrine on the lack of direct horizontal effect for provisions in Directives – that the national court has to set aside national provisions which are contrary to the provisions of the Directive. The ECJ however reminded the parties involved that the party injured as a result of the domestic legislation’s lack of compliance with the Directive may nevertheless rely on the case law stemming from the judgment *Francovich and Others* (C-6/90 and C-9/90), in order to obtain from the Member State, where appropriate, compensation for the damage suffered.

The answer to the question referred for a preliminary ruling was that Directive 2001/23, in particular Articles 3 to 5 thereof, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which, in the event of the transfer of an undertaking which has taken place in the context of proceedings for judicial restructuring by transfer under judicial supervision applied with a view to maintaining all or part of the transferor or its activity, entitles the



transferee to choose the employees which it wishes to keep on.

- *Case C-644/17 Ellinika*

Ellinika Nafpigeia was a former public sector undertaking. It had been privatised in 2002 and made subject to a prohibition on reducing its workforce before 30 September 2008.

It had four lines of business, namely military and commercial shipbuilding, ship repairs, submarine shipbuilding and repairs, and railway vehicle production and repairs. Those lines of business were allocated to four 'directorates', respectively the surface vessels directorate, the repairs directorate, the submarine directorate and the rolling stock directorate.

Shortly after it was privatised, Ellinika Nafpigeia created a subsidiary in the rolling stock sector, namely Etaireia Trochaiou Ylikou Ellados AE ('ETYE'), in order to transfer to it the programme agreements under way relating to the construction and supply of various types of rolling stock. According to the order for reference, on 28 September 2006 Ellinika Nafpigeia and ETYE concluded a number of contracts in order to enable Ellinika Nafpigeia's 'rolling stock directorate' to operate, from 1 October 2006, within the framework of an autonomous company, under ETYE's name.

Those contracts concerned, in particular, the leasing for business purposes of a plot of land owned by Ellinika Nafpigeia, the sale and delivery by Ellinika Nafpigeia to ETYE of movable property, the provision by Ellinika Nafpigeia to ETYE of administrative services and the assignment by Ellinika Nafpigeia to ETYE of outstanding works to be carried out under three programme agreements.

In 2007 Ellinika Nafpigeia and ETYE concluded some further contracts, concerning, in particular, the secondment of ETYE staff to Ellinika Nafpigeia, the assignment by Ellinika Nafpigeia to ETYE of outstanding works to be carried out under a programme agreement and the provision of services by ETYE to Ellinika Nafpigeia.

On 28 September 2007 Ellinika Nafpigeia and ETYE concluded a framework agreement providing for ETYE's liquidation on 30 September 2008. In addition, it was agreed that Ellinika Nafpigeia would bear the liquidation costs equivalent to the estimated cost of making the 160 ETYE employees redundant. The date envisaged for that liquidation was, however, put back by an amendment made to the framework agreement on 10 September 2008.

On 1 October 2007 INTEI (IGWA), a group of German limited liability companies, became the owners of all the shares in ETYE.

By announcement of 8 October 2007, the employees concerned were informed that ETYE had been transferred to that group of companies. A company-level collective agreement concerning the pay and working conditions of all ETYE employees was concluded on 13 May 2008.

In 2010 the Court of First Instance, Athens declared ETYE insolvent.

On 1 June 2009 the employees concerned brought an action before the Court for a declaration that they continued to be bound to Ellinika Nafpigeia by contracts of employment of indefinite duration, that Ellinika Nafpigeia was required to pay them the lawful wages in particular throughout the period that their contracts of employment continued and that, in the event of termination of the contracts of employment, Ellinika Nafpigeia would be required to make the statutory redundancy payments to each of the employees.

After that Court upheld the action, Ellinika Nafpigeia brought an appeal before the Court of Appeal, which confirmed the judgment delivered at first instance, holding, in particular, that ETYE had never been an autonomous organisational entity. It found, first, that ETYE was not an autonomous production unit, on the ground that the contribution of Ellinika Nafpigeia's four production divisions was necessary for the manufacture and repair of the rolling stock and that, if Ellinika Nafpigeia ceased all activities, it would be impossible for ETYE to manufacture and repair rolling stock. Second, ETYE did not have its own administrative support as this was provided by Ellinika Nafpigeia and, third, it did not have financial autonomy, its financial management having to be carried out by Ellinika Nafpigeia. The Court of Appeal, Athens inferred from this that there was no transfer of an undertaking, business or parts of a business and that, therefore, Ellinika Nafpigeia continued to be the employer of the employees concerned.

The national court making the request for a preliminary ruling seemed to have in mind that the responsibility of Ellinika Nafpigeia to pay wages to the employees might be based on three grounds. First, there had been no change of employer during the years 2002–2010 since Ellinika Nafpigeia continued to be the 'real' employer, while ETYE was only some kind of internal administrative unity and not a real 'economic entity'. Second, although a transfer had taken place in 2008 the purpose of the transfer was to end the whole economic activity, which happened in 2010. Third, at the time of the transfer, the objective pursued by the transferor and the transferee was not to continue the activity transferred but to circumvent the employee protection obligations under national law meaning that the transfer cannot fall within the scope of Article 1(1)(a) and (b) of Directive 2001/23. As the Advocate General pointed out in this case, the protection of employees seems to justify the application of national provisions penalising any harmful consequences of such dishonest conduct.

The ECJ concluded that Directive 2001/23/EC, in particular Article 1(1)(a) and (b) thereof, must be interpreted as applying to the transfer of a production unit where, first, the transferor, the transferee, or both those persons jointly, act with a view to the transferee pursuing the economic activity engaged in by the transferor, but also with a view to the transferee itself subsequently ceasing to exist, in the context of a liquidation, and second, the unit at issue, lacking the ability to attain its eco-

conomic object without having recourse to factors of production from third parties, is not totally autonomous, provided that – matters which are for the referring court to establish – first, the general principle of EU law requiring the transferor and transferee not to seek to obtain fraudulently or wrongfully the advantages that they might derive from Directive 2001/23 is observed and, second, the production unit concerned has sufficient safeguards ensuring its access to the factors of production of a third party so as not to be dependent upon the economic choices unilaterally made by the latter.

- *Case C-317/18 Moreira*

Ms Correia Moreira had a working history dating back to 2005. In 2008 she and Portimão Urbis EM SA, a municipal company, had entered into a contract for a position of trust to perform the duties of head of the administrative management and human resources unit. That contract lasted until 30 June 2010.

On 1 July 2010, Ms Moreira entered into a new contract for a position of trust with Portimão Urbis to perform the same duties. The parties had terminated that contract on 1 July 2013. On the same date, she had entered into a new contract for a position of trust with Portimão Urbis to perform the same duties but with a reduction in her gross pay.

On 15 October 2014, the Municipality of Portimão approved the winding up and liquidation of Portimão Urbis as part of a plan to insource some of the activities of that undertaking to the municipality and to outsource other activities to another municipal undertaking EMARP.

The Municipality of Portimão and EMARP maintained in force all rights under the employment contracts concluded by Portimão Urbis.

Ms Moreira was included on the list of ‘insourced’ employees of the Municipality of Portimão, who entered into a public-interest transfer agreement with Portimão Urbis, and she was assigned to administrative and human resources management services. Between 1 January 2015 and 20 April 2017, she performed the duties of a senior member of staff in human resources operations within the Municipality of Portimão.

In July 2015, the employees who came under the insourcing plan, which included Ms Moreira, were informed by the Municipality of Portimão that their applications to a proposed competition would, assuming they were successful, result in their recruitment to the first rung of the civil service, where they would be required to remain for at least 10 years. The employees who were ‘outsourced’ to EMARP were not subject to such a competitive selection procedure.

A competition was initiated to which Ms Moreira applied. At the conclusion of the competition, and even though she had been ranked in first place on the list, she was informed that her remuneration would be lower than what she received at Portimão Urbis, which she did not accept.

On 26 April 2017, Portimão Urbis gave Ms Moreira notice of the termination of her contract of employment due to the closure of the undertaking.

On 2 January 2018, the conclusion of the liquidation procedure for Portimão Urbis was registered in the commercial registry.

Ms Moreira applied to the District Court, Faro, Portugal for a declaration that her contract of employment with Portimão Urbis was transferred to the Municipality of Portimão from 1 January 2015, as a result of the transfer of the establishment where she worked. In view of the transfer of Portimão Urbis, she asked the referring court to declare that the subsequent termination of the contract of employment was unlawful and that she must be brought into the workforce of the Municipality of Portimão under the same conditions as those applied to her by Portimão Urbis since 1 January 2015.

In addition, she sought an order that the Municipality of Portimão pay her the differences in salary between the salary which the municipality was required to pay her after that transfer and the salary which was actually paid to her. Finally, she sought an order that the Municipality of Portimão pay her compensation for non-material harm.

The Municipality of Portimão disputed the claims of Ms Moreira arguing, first, that there was no transfer of an establishment, since the municipal undertaking was wound up in accordance with the law and the municipality merely took back the responsibilities with which it was originally entrusted, secondly, that Ms Moreira performed her duties in connection with a position of trust and therefore she was not an employee of Portimão Urbis and, thirdly, that the Municipality of Portimão merely complied with the legal rules arising from Article 62 of Law No 50/2012 in the version applicable to the main proceedings, according to which all municipal officials are recruited following specific rules and are subject to the principle of equal treatment with regard to access to the civil service laid down in Article 47(2) of the Constitution.

The ECJ was asked whether Directive 2001/23/EC must be applied to an employee who has entered into a contract for a position of trust and whether the recruitment procedures under the 2012 law were in compliance with the Directive.

The ECJ answered that the Directive must be interpreted as meaning that a person who has entered into a contract for a position of trust within the meaning of the national legislation with the transferor may be regarded as an ‘employee’ and thus benefit from the protection which that Directive affords, provided, however, that that person is protected as an employee by that legislation and has a contract of employment at the date of transfer, which is a matter for the referring court to determine.

Furthermore the ECJ stated that Directive 2001/23, read in conjunction with Article 4(2) TEU, must be interpreted as meaning that it precludes national legislation which provides that, in the event of a transfer within the meaning of that Directive and where the

transferee is a municipality, the employees concerned must, first, undergo a public competitive selection procedure and, secondly, have a new relationship with the transferee.

### Comments

The key concepts of Directive 2001/23 on Transfers of Undertakings still continue to cause disputes, although the ECJ in a large amount of case law has outlined the basic parameters for its interpretation. It seems, however, that the creative imagination of lawyers developing new legal and factual constructions for the transformation of business activities also gives rise to new interpretative difficulties. The relationship between different forms of transfers on the one hand and insolvency or liquidation procedures on the other especially seem to cause disputes. In fact all four of the ECJ cases on transfers of undertakings issued in 2019 involved either liquidation or insolvency of companies or at least that some activities stopped or ceased (see *Dodič* C-194/18). In the two cases *Plessers* C-509/17 and *Ellinika* C-644/17 the liquidation of companies was at stake and also in C-317/18 *Moreira* a liquidation was in the background of the events although the legal issues at stake did not include any direct assessment of the liquidation.

The general impression based on the ECJ judgments from 2019 is that the Court is inclined to leave the final assessment of the interpretation of basic national concepts such as ‘employee’ and EU concepts like ‘transfer of undertaking’ to the national courts giving them a rather broad discretion. Although it always has been the task of national courts to assess the facts of the case it is a striking feature that the ECJ now in some of its new case law on transfers points out the borderlines of the margin of appreciation for the national court, but avoids giving them even indirect final guidance on how to decide on the final outcome of the case. This approach is clearly visible in the case *Dodič* and also in the case *Ellinika*.

On the other hand when it comes to specific situations where national legislation in certain specific situations preclude the application of the Transfers of Undertakings Directive 2001/23 (*Plessers*) or introduce national requirements in the situation of a transfer which are not compatible with the Directive (*Moreira*) the ECJ does not hesitate to clearly proclaim that the legislation does not fulfil the requirements of the Directive and that the State party fails to comply with its obligations under EU law. These situations create some challenges for the national courts since the lack of direct horizontal effect of EU law might prevent direct application of the Directive in order to set aside EU law. The Court referred explicitly to this situation in *Plessers*. The same problem does not occur in the *Moreira* case. Here the municipal authorities are applying a legislation that is not compatible with EU law and therefore the national court can set aside the national legislation based on the *direct vertical effect* of EU law.

It is slightly surprising that we still do find legislation in the Member States that do not fulfil the requirements

under the Transfers of Undertakings Directive and that such legislation has been adopted in Portugal as late as in 2012 and in Belgium in 2009.

## Right to annual leave

*Jan-Pieter Vos and Prof. Luca Ratti*<sup>10</sup>

### Introduction

Last year, our review featured a number of very significant judgments of the ECJ. In particular, the judgments *Bauer* (C-569/16) and *Max-Planck* (C-684/16) were so important to be considered amongst the most innovative of the last decade in the jurisprudence of the Court. Also, *Dicu* (C-12/17) and *Hein* (C-385/17) were judgments that gained some attention. EELC’s case reports in 2019 saw these judgments in action.

### Follow-up of Max-Planck and Kreuziger

In these judgments of 6 November 2018, the ECJ held that Article 7 of Directive 2003/88 and Article 31(2) of the Charter preclude that untaken leave lapses, without the employer having requested the employee to take it, formally if necessary. The employer must also inform the employee, clearly and timely, that the untaken leave may lapse if the employee does not take their leave. Even more importantly, the ECJ awarded horizontal direct effect to Article 31(2) of the Charter, meaning that it can directly apply in disputes between private individuals.

EELC featured a Latvian case report in which the Supreme Court applied the *Max-Planck* and *Kreuziger* judgments (EELC 2019/22). The case concerned an employment contract which was terminated by mutual agreement. Despite a statutory obligation to pay for all untaken leave, it appears that the Latvian Supreme Court nevertheless considered it possible that untaken leave waives, provided that the employer meets the requirements set out in *Max-Planck* and *Kreuziger*.

These ECJ judgments also forced the German Federal Labour Court to change its case law on the lapse of the entitlements to paid annual leave. In EELC 2019/49, the various technicalities involved were discussed. The Court held that it was possible to interpret the applicable BUrlG (*Bundesurlaubsgesetz*) in conformity with Directive 2003/88, so that horizontal application of the Charter would not be necessary. Moreover, the Federal Labour Court stressed that the ECJ’s decision had an *extunc* effect, implying that the employer could not be granted protection of its legitimate expectations.

The comments from other jurisdictions to these cases suggest that the discussion on the right to paid annual leave is highly topical at this moment. Indeed, while preparing this review, a Dutch judgment was delivered (ECLI:NL:GHDHA:2019:3444) in which The Hague

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Court of Appeal interpreted the Dutch legislation in conformity with the Directive as well.

### Concurrent Directives

Directive 2003/88 is usually interpreted very broadly. Many situations come within its scope, and the right to paid leave seems virtually carved in stone. However, some situations are an exception to this rule.

**EELC 2019/34** concerned a German case – again – discussing whether the employer had rightly reduced the employee’s rights of annual leave as she had enjoyed parental leave for a long time. The Higher Labour Court of Berlin-Brandenburg held the *pro rata* reduction as lawful. Interestingly, the ECJ delivered the *Dicu* judgment shortly after, but the Higher Labour Court had been able to use the Advocate General’s Opinion as well as the *Heiman* and *Toltschin* judgments (C-229/11 and C-230/11) which allowed application of the *pro rata temporis* principle. While the approach of the Higher Labour Court appears logical, many comments from other jurisdictions suggested that other countries have delivered a different approach.

Sometimes an appeal gives a whole new angle to a case and completely overturns it. This certainly can be said about the Romanian case, which featured in **EELC 2019/36**. What seemed to be a case in which the Tribunal had held that a group of professional foster parents were entitled to payment in lieu for untaken leave (such in line with *Kreuziger* and *Max-Planck*), turned into a disaster for those claimants. The Court of Appeal of Craiova denied that the Romanian implementation legislation of Directive 2003/88 applied to the situation of professional foster parents. It referred to the ECJ’s judgment in *Sindicatul Familia Constanța and Others* (C-147/17), in which the Court held that work performed by a foster parent under an employment contract with a public authority, which consists in taking in a child, integrating that child into his or her household and ensuring, on a continuous basis, the harmonious upbringing and education of that child, does not come within the scope of Directive 2003/88.

Interestingly, the foster parents would work for consecutive fixed-term contracts and tried to obtain a payment in lieu for the contracts that had expired. Even if this were possible under Romanian law, we are not sure whether the ECJ would agree. Although Article 7(2) of the Directive makes it possible that annual leave is exchanged for a payment in lieu after the end of an employment relationship, it remains to be seen whether the ECJ would accept that the employment relation be terminated each year. It wouldn’t be strange at all if the ECJ would see all consecutive contracts as one employment relationship. After all, the ECJ has held that the significance of annual leave for a worker’s health and safety remains if a rest period is taken later (*FNV*, C-124/05, paragraph 30).

In a way, the Slovenian case featured in **EELC 2019/23** seems similar. Ultimately, the Supreme Court held that an employee was entitled to compensation for untaken leave following a dismissal, which had later been consid-

ered as unjustified. While the High Court had held that the employment contract had never ceased – implying that the leave couldn’t be bought off in between – according to the Supreme Court this *had* been the case. Again, we wouldn’t be sure whether the ECJ would accept that.

From those described cases alone, it turns out that the ECJ’s broad interpretation of Article 7 of Directive 2003/88 can lead to many problems in various Member States. While they are usually successful in being able to escape with interpretation in conformity with the Directive, this often means that the burden is on private parties. Given the financial interests that can be at stake, it is not always easy to figure out a practicable solution. For example, **EELC 2019/35** discussed two Dutch cases between an employer bound by a collective agreement and two employees. A previous version of the collective agreement had unjustifiably excluded unsocial hours allowances from holiday pay. The parties to the collective agreement had hoped to have this compensated by a later agreement, which provided for an additional salary increase. Nevertheless, claims were still made, one was granted and the other was denied. Repairing a past mistake thus turned out to be difficult.

### Limits of the Directive

In terms of ECJ case law, the *AKT* and *TSN* judgments (C-609/17 and C-610/17) have some significant value. In the first place, the ECJ confirmed that both Article 7 of Directive 2003/88 and Article 31(2) of the Charter only apply to the four weeks of annual leave which are granted. Member States are free to determine whether or not to grant additional rights of leave. In the wording of the case, the fact of granting workers days of paid annual leave which exceed the minimum period is not, as such,

*“capable of affecting or limiting the minimum protection thus guaranteed to those workers under that provision (...); nor is it capable of infringing other provisions of that directive, or adversely affecting its coherence or the objectives pursued thereby”.*

Although the outcome isn’t surprising in view of the ECJ’s earlier judgments in *Neidel* (C-337/10), *Dominiguez* (C-282/10) and *Hein* (C-385/17), it is important to have this confirmed once and for all.

Furthermore, the ECJ held that Article 31(2) of the Charter, read in conjunction with Article 51(1) thereof, must be interpreted as meaning that it is not intended to apply where national rules or collective agreements granting more than four weeks of leave exist. While this may be understandable focusing on the right to annual leave, this judgment seems more significant for the broader issue of the effect of EU law on domestic law of its Member States.

### Conclusion

While 2019 did not feature as many cases as 2018, the relevance of the right to annual paid leave seems to nev-



er fade. The number of case reports and comments thereon alone suggests that Member States find it difficult to transpose Article 7 of the Directive into legislation that stands the test of time. Consequently, we are confident that we will bring you another update next year!

## Working Time

*Anthony Kerr*<sup>11</sup>

2019 saw three more decisions of the Court of Justice concerning the working time provisions of Directive 2003/88/EC, two of which were considered sufficiently significant to warrant a Grand Chamber of the Court being convened to answer the questions posed in those cases by Romanian and Spanish courts.

The first of these decisions was Case C-147/17, *Sindicatul Familia Constanța and Others* which concerned the scope of the Directive. The applicant trade union represented persons who had an employment contract with the Directorate-General for Social Assistance and the Protection of Minors under which they were required to take into their own homes children who had been withdrawn from the custody of their parents and to provide for their upbringing and maintenance. The union brought proceedings on behalf of its members before the Constanța Regional Court seeking additional payments in respect of work performed on rest days and public holidays. The claims were dismissed as unfounded and, on appeal, the Constanța Court of Appeal referred various questions to the Court of Justice as to whether the activity of foster parenting fell within the scope of the Directive.

Advocate General Wahl was of the opinion that foster parents were not workers and therefore fell outside the scope of the Directive (ECLI:EU:C:2018:518). The Court of Justice, however, found that foster parents were workers but that the work they performed did not fall within the scope of the Directive. This was because the Directive's scope was limited to the scope of Directive 89/391/EEC, Article 2(2) of which excludes certain specific public service activities, the characteristics of which inevitably conflict with the provisions of the Directive. The Court of Justice took the view that fostering of children fell within that provision.

The German Government had raised the preliminary issue that the questions posed by the Romanian court pertained to the level of remuneration and the way that remuneration was calculated. The Court noted that, save in the special case envisaged by Article 7(1) concerning paid annual leave, the Directive was limited to regulating certain aspects of the organisation of working time and confirmed that the Directive did not deal with how workers are to be remunerated for shift work, night work, on-call time, or overtime. These were questions

for national law. That did not mean, however, that there was no need to reply to the questions referred.

The second decision was Case C-55/18, *Federación de Servicios de Comisiones Obreras – v – Deutsche Bank*. The applicant trade union had sought a declaration from the National High Court that the bank was under an obligation to set up a system for recording the time worked each day by its staff in order to make it possible to verify compliance with the restrictions on working time. Spain, the Czech Republic and the United Kingdom all submitted that, as there was no specific record-keeping provision in the Directive, no such general obligation should be imposed on employers. Both Spain and the United Kingdom also emphasised that setting up such a system would involve costs for employers.

The Court of Justice, however, stressed that the protection of the health and safety of workers should not be subordinated to purely economic considerations and held that, in the absence of such a system, it was not possible to determine objectively and reliably either the number of hours worked by the worker or when that work was done.

The third case was referred by the *Conseil d'Etat* and concerned the reference period used to calculate the average weekly working time of active officials of the French national police force: Case C-254/18, *Syndicat des cadres de la sécurité intérieure – v – Premier ministre* ECLI:EU:C:2019:318. The questions referred asked whether the Directive precluded national legislation which laid down reference periods which start and end on a fixed calendar date and not reference periods determined on a rolling basis.

The Court of Justice noted that neither Article 16 nor Article 19 of the Directive had anything to say on the question of whether the reference period should be determined on a fixed or on a rolling basis. As there was no indication from the wording and context of those Articles, the Member States were, in principle, free to determine reference periods either on a fixed or rolling basis. Both periods enabled the verification of working hours, but a fixed reference period might create a situation in which the objective of protecting the worker's health and safety might not be met.

Accordingly, the Court of Justice ruled that the Directive did not preclude national legislation which laid down fixed reference periods for the purpose of calculating the average weekly working time

*“provided that that legislation contains mechanisms which make it possible to ensure that the maximum average weekly working time of 48 hours is respected during each six-month period straddling two consecutive fixed reference periods”.*

That was a matter for the referring court to verify. The issue of 'stand-by' time continues to arise before national courts and tribunals. In the decision of the Pitești Court of Appeal in Romania (EELC 2019/51), the claimant was a hospital employee and was required to provide an on-call service which involved his being

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on stand-by at his home with a 20 minute response time. The Court, relying on Case C-518/15, *Matzak*, ruled that this stand-by time represented working time even when no medical activity was actually performed. In so deciding, the Court noted the impossibility of organising leisure activities during the employee's stand-by time coupled with his obligation to be in a physical and mental condition enabling him to provide adequate medical services in emergency situations.

## Fundamental Rights & Collective Labour Law

*Petr Hůrka and Michal Vrajík*<sup>12</sup>

Over the course of the previous year, various articles in EELC as well as case law have brought up the topics of fundamental rights and collective labour law. In this review we comment on selected cases.

### Fair trial as a fundamental right of employees

Article 19(1) TEU stipulates that Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law. In case C-192/18, *Commission – v – Poland* the ECJ expressly ruled that should the extension of the service period of a judge depend on a decision of an administrative body such as the Minister for Justice that is not made under substantive conditions and detailed procedural rulings (see also C-619/18 *Commission – v – Poland (Independence of the Supreme Court)*), it is considered a breach of the obligation under the second subparagraph of Article 19(1) TEU.

On the other hand, the ECJ has also ruled that the right whether or not to grant any extension to the period of the judicial activity is not itself capable of endangering the principle of independence and impartiality of justice (Article 47 of the Charter of Fundamental Rights of the European Union (the 'Charter')).

Such simplification may be dangerous in this regard, because in our opinion just the fact that a judge is aware that their period of office may be extended at the sole discretion of the respective body may seriously impact their decision making. Even if safeguards and substantive conditions are laid down, the respective body still has the power to decide whether the judge's professional career shall continue, especially when such decisions are upheld by government.

Since executive and judicial power should remain separated (the 'checks and balances' system whose purpose is to make sure that no segment of State power shall overpower another segment), it is, in our opinion, advisable that any proceedings affecting the duration of the period of office of judicial staff shall be subject to specif-

ic declinatory or regulatory bodies within the judicial system and not the executive system.

### Data protection privacy as a fundamental right of employees

The legislation of Member States imposes various obligations on employers (such as income tax, social security and health insurance obligations) who are then obliged to process personal data of employees to comply with legal obligations to which the controller (the employer) is subject,<sup>13</sup> and to perform an employment contract or in order to take steps prior to entering into an employment contract.<sup>14</sup> This also concerns rejected job applicants, if further data processing is necessary for the purposes of legitimate interests pursued by the employer.<sup>15</sup> Such an employer, however, must be aware that those legitimate interests shall stem from the legislation that enables potential claims (such as discrimination during the selection process), and only for the period during which such claims may arise. After its lapse the applicant's personal data must be erased.<sup>16</sup>

It should be also noted that personal data processing also concerns the fundamental rights of job applicants pursuant to the Charter.<sup>17</sup> For example, according to the Austrian Equal Treatment Act, a rejected job applicant may file a lawsuit and pursue a potential claim if the employment relationship has not been established on grounds of discrimination. The fixed period of six months since such rejection then also determines the period during which the (potential) employer holds a legitimate interest in processing their personal data for the sake of protection of their privacy pursuant to Article 6 of the Charter.

There is no European legislation, however, that would unify the period in which a job applicant may successfully bring the claim against the potential employer to court. For example, Czech law does not stipulate a special length of limitation period for such claims, thus general provisions, according to which the length of the limitation period is three years, shall apply.<sup>18</sup> According to respective offices for data protection of Member States, one additional month is given to the employer for the possible notification of a lawsuit. The seven-month period in Austria is then, from the Bavarian State Office for Data Protection's point of view, justified. Such simplification, however, may not fully respect the respective rules of the civil procedure proceedings of the particular Member State.

We therefore believe that it is not safe to assume that one additional month is enough for the notification of a lawsuit. Comments from other jurisdictions presume

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13. Article 6(1)(c) of the General Data Protection Regulation (the 'GDPR').

14. Article 6(1)(b) of the GDPR.

15. Article 6(1)(f) of the GDPR.

16. Sophie Mantler and Andreas Tinhofer, *For how long may data of a job applicant be stored? (AT)*, EELC 2019/5.

17. Article 8(2) of the Charter expressly provides that personal data concerning the subject must be processed fairly for specified purposes and on the basis of legitimate rights laid down by law, thus making personal data processing a fundamental right.

18. Section 629(1) of Act No. 89/2012 Coll., the Civil Code.

that the employer should be notified about the lawsuit during the period of one month from the delivery of the lawsuit to the respective court. However, certain civil procedure proceedings before actual delivery of the lawsuit to the employer may be required that may usually take two or three months (such as, but not limited to, payment of the court fee, that can be paid within 15 days from the delivery of notice of payment thereof according to Czech law).<sup>19</sup> It is advisable for employers to take local specifics of Member States' jurisdictions into account before actually deleting a job applicant's personal data. In case of any doubts, it is advisable to discuss this matter with the respective data protection offices. Since current European legislation is not unified in this regard, the question of deciding when the legitimate interest of the employer ceases to exist is largely left to local authorities.

EELC then also featured the case when a fundamental right of data protection privacy was breached as a consequence of misconduct of an employee who released data of 100,000 other employees online.<sup>20</sup> It should be noted that should the breach of personal data happen as an act in the course of the employment, such employer may be vicariously liable for the leak towards the affected employees. Current case law indicates that it may be difficult to assess whether the employee's action in general was during performance of work, but since such provisions seek third party protection, it should be interpreted broadly, which represents a certain level of danger for the employers as data controllers.

According to corresponding jurisdictions, the employer has the right to recover damages paid from the employee concerned who caused such personal data leak. It should, however, be noted that labour law in general may reduce the amount of compensation employees are obliged to pay, thus significantly reducing usefulness thereof. Under Czech law, for example, unless the damage was caused intentionally or if the employee was, for example, drunk or abused other addictive substances, the amount of damages may not exceed an amount equal to four-and-half times their average monthly earnings.<sup>21</sup> Considering the potential of rather high amounts of damages (including administrative fines that may be imposed on employers due to breach of the personal data protection legislation),<sup>22</sup> we are convinced that it is advisable for employers to cover such potential claims by corresponding damage liability insurance, or similar guarantee measures. In our opinion, the vast majority of similar cases happen due to the negligence of employees (*modus operandi* in the commented case establishing a very broad claim against the wrongdoer is not common in practice), thus potentially significantly reducing the potential remedy from the employee. It will be nevertheless interesting to follow future case law concerning

such damages, especially concerning cases of extremely large groups of data subjects affected by a data breach.

### Two or more trade unions operating within the employer and its impacts on collective labour law

In EELC 2019/39 (UK), the High Court (the 'HC') discussed whether the employer may seek an interim injunction to prevent strike action organised by two trade unions. Section 222 of the Trade Union and Labour Relations (Consolidation) Act 1992 sets out provisions concerning prohibited action that causes a trade union to lose its immunity against potential torts, such as breaching contracts of employment. These provisions prevent trade unions from taking industrial action that would actually force employees to become union members.<sup>23</sup>

In the commented case, however, two of the three trade unions within the employer put an industrial action in motion in which they asked for compensation in the amount of payments given to members of the third trade union as a settlement agreement associated with a previous dispute involving potential job losses. The HC ruled that such action was executed in order to seek equal treatment.

In our opinion, such exceptions from immunity should always follow the main principles of representation of employees in trade unions. Apart from the decision of each employee of their own free will whether they wish to be represented by a trade union, it should also be noted that such industrial action did not involve any intention of forcing the members of the third trade union to terminate their membership. We believe that in this particular case the HC rightly found that there were no circumstances to justify the granting of an interim injunction in any form. It is, on the other hand, unclear whether the HC took in account the interests of the employees who were not members of any trade union, because we assume that the concerned trade unions pressured the employer to pay such compensation only to their members, therefore indirectly coercing such employees to join them. The respective courts should always consider whether their actions harm any group of employees, eventually resulting in indirect discrimination of those who are not members of any trade union.

A different approach can be found in Czech law. Apart from Act No. 2/1991 Coll., on Collective Bargaining, which regulates only the conclusion of a collective bargaining agreement and disputes arising from such agreements, the right to strike is not expressly regulated by Czech law, much to the harm of all parties in our opinion. Since the employer also initiates court proceedings to secure issuance of an interim injunction which would prevent the industrial action pending a full trial on the grounds that a strike should be determined unlawful, the trade unions are commonly left in an uncertain situation as to whether the grounds are sufficient enough for a strike to be lawfully executed.

23. See also Article 11 of the European Convention on Human Rights.

19. Section 9(1) of Act No. 549/1991 Coll., on Court Fees.

20. Sean Illing, *Employer liable for wrongful disclosure of data by 'rogue' employee (UK)*, EELC 2019/19.

21. Section 257(2) of Act No. 262/2006 Coll., the Labour Code.

22. See Article 83 of the GDPR.

We are further convinced that conclusions contained within commented case law would be difficult to implement in Czech law, because it is still unclear whether reasons stipulated therein are sufficient enough to make a lawful industrial action at all under Czech law. The authors can only hope that similar regulation will be adopted in Czech labour law in the future, for the sake of clarity for all parties involved.