Case Law

2022/1

EELC's review of the year 2021

CONTRIBUTORS Niklas Bruun, Filip Dorssemont, Zef Even, Ruben Houweling, Marianne Hrdlicka, Anthony Kerr, Attila Kun, Jean-Philippe Lhernould, Daiva Petrylaitė, Luca Ratti and Jan-Pieter Vos

Introduction

Ruben Houweling[1]

It's WAR! February 2022 started with good news, at least in the Netherlands. After another Christmas in 'lockdown', the measures taken to combat Covid-19 were decreased and by the end of February almost all restrictions ended. But little time did we have to celebrate this historic moment, due to the fact that Russia attacked Ukraine on 24 February. All of Europe, so it seemed, returned to the Cold War. While trying to oversee the consequences and dealing with academic peers and students stuck in a war zone, the ICPP delivered its 'Climate Change 2022: Impacts, Adaptation and Vulnerability' report on 28 February. So at the start of 2022, we're fighting a virus, we're fighting an enemy and we're fighting against climate change. We've seen the impact on labour markets and labour law itself during the Covid-19 pandemic. We're about to see the impact on labour markets and labour law caused by the Russia-Ukraine war: taking in refugees, putting refugees to work, working under economic sanctions and dealing with this conflict while recovering from Covid-19. We must foresee the impact of climate change on the labour market and labour law. The element 'labour' is crucial in meeting the Green Deal goals of the EU. Without well-allocated and skilled workers, our green transition plans and Fit for 55 goals will be tough to meet. This does not only call upon more (and stricter) legislation, but even more on international cooperation. Cooperation between Member States, enterprises, trade unions, and also us lawyers and academia. By sharing information and best practices, we share knowledge to help improve the judicial framework of the labour market. EELC is one of the media to contribute in that way.

This review shows that both on an EU and national level 2021 was an interesting year. From the *WABE and Muller* case (equal treatment) to *Team Power Europe* (posting of workers), from *Radiotelevizija Slovenija* (working time) to *Uber* (employment status), and many more cases are summarized and reflected on by the EELC Academic Board. A great oversight of cases in which European employment lawyers argued, judges ruled and academics reflected upon: EELC Law Review 2021!

Collective agreements and unions

Filip Dorssemont[2]

Collective agreements both at a European and a national level featured in EELC. In 2021 the Court of Justice ruled on the appeal launched by the European trade union European Federation of Public Service Unions (EPSU) against the decision of the General Court of 24 October 2019 (T-310/18).

EPSU

In its judgment, the General Court had to rule on a request to annul a decision of the European Commission refusing a request of the signatory parties to a European collective agreement. On 21 December 2015, EUPAE and TUNED concluded a framework agreement on the information and consultation of civil servants and employees of central government administrations. On 1 February 2016, they filed a joint request to implement the agreement, which was addressed to the European Commission. It took the European Commission more than two years to respond to this request. On 5 March 2018, the European Commission formally refused the request, indicating it would not submit a

1. Ruben Houweling is a professor at Erasmus School of Law, the Netherlands, and Chairman of the Academic Board of EELC.

2. Filip Dorssemont is professor of Labour Law at the Faculty of Law of the Université catholique de Louvain.

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proposal to the Council to implement the agreement by means of a directive.

The claimants at the time challenged the decision on two distinct grounds. First, they argued that Article 155(2) TFEU does not provide a right for the European Commission to refuse to submit a proposal following the joint request.[3] In other words, the claimants argued that the European Commission was under an obligation to grant a joint request to submit a proposal of a directive implementing the agreement, except in case of insufficient representativeness of the social partners or if the clauses of the agreement were contrary to EU law. The second line of argument related to a less fundamental critique on the motivation of the decision, considered to rely on insufficient reasons.[4]

In assessing the scope of Article 155(2), the General Court tried to sort the arguments raised by the applicants into three kinds of categories. It distinguished arguments relevant for the literal interpretation, for the contextual interpretation, and the teleological interpretation from so-called 'other arguments'. The applicants had strong reasons to argue that Article 155(2) generated an obligation for the Commission to submit a proposal at their joint request. Thus, this provision states "that the agreements concluded at Union level *shall be* implemented either in accordance with the procedures and practices specific to management and labour and the Member States or, in matters covered by Article 153, at the joint request of the signatory parties, by a Council decision on a proposal from the Commission".

According to the General Court the word 'shall' had to be interpreted as 'may' in a literal interpretation. The General Court stated that the mandatory use of the word 'shall' could be explained by the fact that the drafting States would have liked to indicate that there were *only* two ways to implement the agreement. In my view, this is a questionable interpretation. In fact, it is hard to see why it would be necessary in a legal provision to state that an agreement can solely be implemented following either an heteronomous OR following either an autonomous avenue. What on earth would have been a third way which needed to be excluded? In fact, the added value of Article 155(2) can only relate to a potential role of the European institutions. In fact, social partners can always ensure an autonomous avenue of implementation. They do not need any authorization from the EU to implement European agreements according to the practices of social partners and the Member States at that local level. Hence, the added value of Article 155(2) TFEU can only reside in the fact that the will of the people can be expressed by the representatives to whom these rules apply, *id est* management and labour instead of elected representatives of the European Parliament and that there is a genuine obligation of the European Commission to promote the European Social Dialogue by submitting a proposal.

In support of their interpretation, the General Court stated that the interpretation of the applicants would even amount to an obligation for the Council to adopt a directive, despite the fact that this issue was not at the heart of the annulment procedure, and despite the fact that the General Court recognized that it was common ground for all parties that they at least agreed on the non-existence of this obligation.[5]

The Court also submitted Article 155(2) to what it called a contextual interpretation.[6] In my view, the extremely selective way this has been operated by the General Court is unfortunate. In fact, the Court had deliberately chosen to analyse solely those parts of the treaties which were helpful to corroborate its decision and all the other provisions invoked by the applicants in favour of their contextual interpretation were reshuffled in the part dealing with the teleological interpretation and the part dedicated to 'other arguments'. Thus, the only provision deemed to be worthy to appear in the contextual analysis is not even derived from the TFEU. Hence, it cannot be physically part of the context of the relevant text. Neither is there a hierarchy between both treaties.

The provision concerned, Article 17 TEU, does not at all deal with the legitimate interests of the citizens of Europe, neither with its values, nor with a vision on democracy. It solely deals with the institutional power of the European Commission. Hence, the General Court organized a confrontation between an institutional actor and civil society around the issue of *legislative powers* and around the idea of the independence of the Commission, which should be prevented from taking instructions from any government institution, body, office, or entity.

Article 17 TEU highlights the central role of the European Commission in *pushing* the process of European integration in an exclusive way. The rationale of this central role is indicated in Article 17(1) TEU. The European Commission has the role of *promoting* the general interest of the Union by taking appropriate *initiatives* to that end.

Prima facie, Article 17(2) does not constitute an obstacle at all for the thesis that a provision in an entirely different treaty would oblige the Commission to submit a proposal for a directive implementing an agreement. Indeed, this provision does provide that the principle that Union legislative acts may only be adopted on the basis of a Commission proposal, *except where the treaties provide otherwise*. According to the same provision, "Other acts shall be adopted on the basis of a Commission proposal where the Treaties so provide". In the latter scenario, no exceptions seem to be allowed.

In order to overcome the absence of this obstacle, the General Court had simply disqualified directives implementing agreements as legislative instruments.[7] This *obiter dictum* is probably a more major blow than the *dic-*

3. General Court, 24 October 2019, T-310/18, para. 45.
4. General Court, 24 October 2019, T-310/18, paras. 120-141.
5. General Court, 24 October 2019, T-310/18, para. 62.
6. General Court, 24 October 2019, T-310/18, paras. 64-82.
7. General Court, 24 October 2019, T-310/18, para. 69.

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tum finale of the judgment. In order to do so, the General Court referred to the definition of Article 289 TFEU of a legislative procedure. This provision had been introduced by the Lisbon Treaty. The disqualification of directives implementing agreements as legislative acts can only be explained by the fact that the European Parliament does not participate in the process. In sum, the General Court interpreted Article 155(2) TFEU dating back to Maastricht in the light of an 'original' provision of the European Community Treaty, now enshrined in an entirely different treaty (Article 17 TEU), which it (re)interpreted in the light of a provision which is as recent as the Lisbon Treaty.

The General Court underlined that the Commission has a margin of appreciation which is not limited at all to issues of legality, but also involves the appreciation of the appropriateness of the implementation, by having regard to all political, economic and social considerations.[8] It further highlighted that management and labour are not capable of promoting the general interest of the Union, since they would only represent a part of the multiple interests that must be taken into account. The General Court furthermore observed that the interpretation given by the applicants would alter the institutional balance.[9]

Under the heading teleological interpretation, the General Court focused on two key provisions in the Social Policy Title which tend to indicate an objective to be promoted.[10] Whereas Article 151 indicates that the dialogue between management and labour is one of the objectives to be promoted, Article 152 states that the Union (hence all European institutions, including the General Court) need to promote the role of the actors of that dialogue. The General Court reduced the obligations stemming from these objectives to obligations to respect, refraining from influencing the social partners, whereas an obligation to promote should logically entail an obligation to ensure and to intervene. Although these provisions constitute what could be called the conceptual framework of the Social Policy Title, including Article 155(2) TFEU, the Court did not consider them relevant for the sake of a contextual interpretation.

Other provisions relate to the principle of democracy, horizontal subsidiarity, and the right to negotiate and conclude collective agreements, as well as the notion of a social market economy, aiming at full employment and social progress and adequate social protection which are at the core of two very teleological provisions (Article 3 TEU and Article 9 TFEU). The General Court not only refused to take these provisions into account within the context of a contextual and teleological interpretation, it also provided proof of a very narrow approach of these crucial concepts. Thus, democracy has been reduced to parliamentary democracy. Further, the General Court was unable to recognize that the principle of subsidiarity has any horizontal dimension at all and, last but not least, the General Court also considered that neither Article 28 of the CFREU, nor Article 3 TEU and Article 9 TFEU read in isolation meant that management and labour could compel the institutions to implement an agreement.

The General Court also refused to take into account that the policy of the European Commission was unprecedented and at odds with numerous communications on the European Social Dialogue.[11] Despite the fact that the refusal of the Commission was incompatible with this long standing tradition of communications stemming from the Commission, the General Court squashed the argument on the basis of the argument that communications were not legally binding.

The CJEU in its judgment of 2 September 2021 fully endorsed this line of reasoning by rejecting the appeal. There might be only one minor consolation to be drawn from both the Attorney-General's opinion and the CJEU's judgment. Both the Attorney-General and the CJEU have argued that the issue whether the directives implementing the agreements are legislative acts within the meaning of Article 289 TFEU is immaterial.[12] Hence, the question of the hierarchy between directives in the field of social policy implementing agreements and those which are not implementing agreements remains open.

Other judgments

On 16 December 2020, the Supreme Court of Lithuania (**EELC 2021/3**) had to rule on case which concerned an employer-level collective agreement which provided that a seniority bonus had to be awarded solely to the members of the signatory trade unions, to the detriment not only of non-unionized workers but also to workers unionized at a different trade union. An employee affiliated to a non-signatory trade union challenged this practice on the basis of the argument that this would be contrary to the prohibition of discrimination as enshrined in Directive 2000/78. The Supreme Court was unable to identify any ground enshrined in that Directive which could be seen as relevant for the case at hand. It ruled that EU law did not sanction discrimination based upon trade union membership. This interpretation is not surprising at all. The only ground which could seem to cover 'trade union convictions', including membership, could be 'religion or belief'. The use of the word 'or' suggests that not any belief is intended, but belief of a metaphysical nature. The latter is in fact exemplified by the German language version which refers to '*Weltanschauung*'. It is remarkable that the practice was not challenged on other grounds, such as the potential argument that it would induce workers to affiliate to the signatory trade unions or possibly the idea that the employer should not show favouritism, thus violating an idea of equal treatment of represented trade unions. Whether these arguments would have made a difference is questionable. In this case, the nega-

8. General Court, 24 October 2019, T-310/18, para. 79.
9. General Court, 24 October 2019, T-310/18, para. 81.
10. General Court, 24 October 2019, T-310/18, para. 83.
11. General Court, 24 October 2019, T-310/18, para. 101.
12. CJEU, 2 September 2021, C-928/19 P, paras. 86-89. Opinion of 20 January 2021 in case C-928/19 P, nr. 72.

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tive trade union freedom was not challenged by the use of a stick, but by a mere and small carrot. Last but not least, it is of the essence of the freedom of collective bargaining that an employer is not forced to conclude a collective agreement with any specific trade union. Although authorities cannot show arbitrary favouritism, the position of an employer seems different.

Other judgments published related to the issue of strike law. The judgment of the Craiova Court of Appeal (**EELC 2021/26**) which was related to the liability of trade unions for organizing an illegal strike is puzzling by its references to the case law of the CJEU with regard to the *vis major* character of strikes affecting airline operators for the purposes of Regulation (EC) No. 261/2004. This case law by definition does not deal with trade union liability, but with corporate liability in respect of clients. Furthermore, the reference to the *Airhelp* case (C-28/20) is troublesome, since the judgment was beneficial to trade unions. The CJEU case law in fact contains a different message: the question of the *vis major* character of a strike needs to be fully dissociated from the question whether a strike is legal or illegal. The judgment of 10 June 2021 (*Norwegian Confederation of Trade Unions (LO) and Norwegian Transport Workers' Union (NTF) – v – Norway* (app. no. 45487/17)), has been welcomed in this journal as a 'well founded' decision, whereas others might perceive it as a failed opportunity for the ECtHR to denounce the Viking and Laval doctrine emulated by the EFTA Court and already severely criticised by the European Committee on Social Rights, monitoring the European Social Charter. In *Yakut Republican Trade-Union Federation – v – Russia* (app. no. 29582/09) the ECtHR had denied a genuine trade union confederation from accepting a trade union defending the interests of inmates performing prison work as members. The judgment is relevant insofar as it seems to reduce trade union freedom to workers within a very narrow meaning, whereas a Grand Chamber decision had previously ruled that people working as a counterpart of being remunerated irrespective of the existence of a contract but in a state of subordination do fall within the ambit of Article 11 of the European Convention on Human Rights (ECHR) (see *Sindicatul Păstorul cel Bun – v – Romania*, app. no. 2330/09). The use of comparative labour law material in order to downgrade rather than to upgrade the ECHR as a less living instrument is puzzling. Although the ECHR grants a margin of interpretation as to how trade union freedom of protection of occupational interests of union members may be secured, it endorses a Russian law which deprives prison inmates of any way to defend their occupational interests. Thus, the question arises whether work in these circumstances can still be considered to be the kind of work which can be required in an ordinary course of detention ("*tout travail requis normalement d'une personne soumise à la detention*"). If it ceases to be 'normal' work, it should be requalified as forced labour.

Age and religious discrimination

Daiva Petrylaitė[13]

Age discrimination

In 2021, courts had to deal with age discrimination situations relating to the consequences of containment of the 2008 economic crisis.

In its judgment of 15 April 2021 (C-511/19, *AB – v – Olympiako Athlitiko Kentro Athinon – Spyros Louis*) on whether the Greek 'labour reserve system' led to indirect discrimination, the ECJ ruled that the scheme had made it possible to maintain, rather than dismiss, public sector workers close to retirement during the economic crisis. That had also helped to avoid the dismissal of younger workers and ensure a balanced age structure within the public sector. That allowed the Court to hold that the application of the labour reserve system in the context of the Greek financial crisis had not been contrary to the EU law – the difference in treatment on grounds of age established by that scheme pursued a legitimate labour policy objective and the means of achieving that objective were appropriate and necessary.

The legislation triggered by the 2008 economic crisis has also fallen under the scrutiny of national courts. The Court of Appeal of the UK (**EELC 2021/4**) held that the financial resources situation which made it necessary to apply a progressive pay reduction system to all employees (in the case in question, probation officers) was justified and proportionate. The Court found no indirect discrimination on grounds of age in the present case and stressed that such an assessment was supported by the circumstances of the case and by the fact that the pay system at issue was applied on a fixed-term basis and to all employees.

Taken together, these two judgments suggest that the stability of public finances, the objectives sought by the introduction of social policies and labour market stability, as well as the universality of the restrictive measures in relation to the subjects (employees), are the arguments justifying certain legal restrictions which are indirectly linked to the age criterion.

The ECJ has ruled on a significant number of age limit cases in order to uphold certain positions. The Court ruled on the matter last year when it was asked to determine the legality of the maximum age requirement for candidates to notarial positions. In its judgment of 3 June 2021 (C-914/19, *Ministero della Giustizia – v – GN*), the ECJ reiterated that, within the meaning of Article 6(1) of Directive 2000/78, a difference of treatment on grounds of age does not constitute discrimination if, within the context of national law, it is 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. Considering the facts of the case, the Court had not identified any circumstances

13. Daiva Petrylaitė is a professor at Vilnius University, Lithuania.

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justifying the provisions of the Italian national law imposing an age limit on access by candidates to the notarial profession. The Court noted that there was no evidence and no circumstances to justify that limit in the context of Article 21 of the Charter of Fundamental Rights of the European Union and Article 6(1) of Directive 2000/78. The Court took the view that this legislation did not, *inter alia*, pursue the aims of ensuring the stability of the profession of notaries before retirement and of facilitating the turnover and rejuvenation of that profession. Accordingly, the Court stressed that the age limit went beyond what was necessary to achieve the legitimate aim.

A summary of the cases on non-discrimination on grounds of age should also take note of the ECtHR case (*Mile Novaković – v – Croatia* app. no. 73544/14) which decided on the issue of lawfulness of the dismissal of a teacher of Serbian nationality on the grounds of their lack of proficiency in Croatian. Although the Court did not examine the applicant's (teacher's) complaint of discrimination (Article 14 of the European Convention on Human Rights), it did, however, consider the circumstances related to the interpretation of the applicant's age in its position on the applicant's right to private life (Article 8 of the Convention). The Court ruled that the authorities had dismissed the teacher without considering any alternatives such as training. The Court also noted that neither the school nor any of the domestic courts had ever provided a detailed and convincing explanation as to why the applicant's age would have been an insurmountable impediment to them adjusting their teaching plan so that they could teach in standard Croatian. Therefore, the Court held that relying solely on the applicant's age and years of service, the authorities had applied the most severe sanction, thereby significantly interfering with their rights and that Article 8 of the Convention had been violated.

Religious discrimination

In a judgment of 15 July 2021 (Joined Cases C-804/18 and C-341/19, *IX – v – WABE eV* and *MH Müller Handels GmbH – v – MJ*) the ECJ gave a ruling concerning the legality of the instruction given by the employers to their employees not to wear, in the workplace, any conspicuous, large-sized political, philosophical or religious signs and concerning the potential discrimination of such instruction on grounds of religion. The Court set out the following evaluative arguments that can justify such instructions in the workplace: (i) the requirement to observe a neutral dress code must be applied equally to all employees, without distinction between individual employees; (ii) such a requirement may be justified by the employer's desire to pursue a policy of political, philosophical and religious neutrality with regard to its customers or consumers, in order to take account of their legitimate expectations; (iii) the employer must justify the objective necessity of its neutrality policy in each specific case, in particular on the basis of Article 16 of the Charter of Fundamental Rights of the European Union; and (iv) the employer's policy must be systematic and consistent, and the prohibitions must only be applied insofar as they are strictly necessary and proportionate to the objective pursued by the neutrality policy.

As regards the compliance of employees' dress requirements with the employer's declared policy of neutrality, the ECJ *Achbita* judgment (Case C-157/15), which has been mentioned and analysed by EELC on several occasions, has also received much attention. The so-called *Achbita* saga lasted until 2021. After the ECJ ruling, the case was referred to the Labour Court of Appeal of Ghent. On 12 October 2020, this Court ruled in favour of the employer (**EELC 2021/14**). The Court concluded that the general and undifferentiated neutrality policy of the employer did not adversely affect a protected group of persons as holders of a specific religion for which wearing a religious symbol would be important or even compulsory. According to the EELC contributor Gautier Busschaert, this finding of the Court does not contradict the *Achbita* ruling. However, as far as the employer's neutrality policy was concerned, the Belgian Court disregarded the requirement of the ECJ to 'take into account the interests involved in the case' having regard to all the material in the file, without giving any further direction in that respect. After a rather formal assessment of the situation, the national Court thus found that there was no indirect discrimination in the case at issue and, contrary to the ECJ, did not consider that the employer had an obligation to provide the employee with an alternative job position. This judgment has fuelled much debate not only in Belgium but also in other EU Member States and has demonstrated once again that religious discrimination issues and their assessment in the context of both EU and national law as well as case law remain controversial and each judgment so far has added more legal issues that are open for discussion.

Discrimination on the basis of gender or disability and general insights

Marianne Hrdlicka[14]

The year 2021 brought us worthwhile case law on the protected grounds of gender and disability. It also included some lessons on anti-discrimination law in general.

Gender

In a Spanish case (C-130/20, *YJ – v – Instituto Nacional de la Seguridad Social* (INSS)) the ECJ had to decide on the same national legislation granting a pension supplement for mothers that was at issue in a different case (C-450/18) with a different outcome. The question was whether Article 4(1) of Directive 79/7/EEC must be interpreted as precluding legislation which provides that

14. Marianne Hrdlicka is a research and teaching assistant and PhD candidate at WU (Vienna University of Economics and Business).

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mothers are entitled to a pension maternity supplement in the event of retirement at the statutory age or early retirement on certain grounds, but not if the person concerned voluntarily takes early retirement. The Court stated that 'discrimination on ground of sex' can only apply to cases of discrimination between male workers, on the one hand, and female workers, on the other. Hence, a different treatment of women who retire at the statutory age or fulfil certain grounds for early retirement in comparison to women who choose to retire early without a statutory ground cannot qualify as discrimination in the sense of Article 4(1) of Directive 79/7. In another case involving the INSS (C-843/19, *INSS – v – BT*), the ECJ found ensuring the long-term funding of retirement benefits to be a legitimate aim that can justify indirect discrimination. The provision at issue entailed a minimum pension amount for allowing early retirement – a requirement that potentially precludes more female than male workers.

Fourteen years ago a Greek woman's application to the police school was rejected because she was too short (**EELC 2021/28**). After national proceedings, an ECJ case (C-409/16) and again a session with the national court, Ms Kalliri received the answer that the principle of equal treatment between men and women precludes a national provision which makes admission of candidates into the police service subject to a minimum height requirement. A gender-neutral minimum height requirement is indirectly discriminatory and while it did pursue a legitimate aim (namely ensuring physical fitness among police officers), it was neither appropriate nor necessary for achieving the same.

Regarding comparability of income, the ECJ developed the single source test, which qualifies wages to be comparable as long as the unequal pay can be attributed to the same source (C-320/00, *Lawrence and others – v – Regent Office Care Ltd*). In the more recent *Tesco* case before the ECJ (C-624/19, *K and others – v – Tesco Stores Ltd*) the Court confirmed that unequal pay can be compared even when the workers that are compared work in different establishments provided that the source setting the pay is identical. It also held that Article 157 TFEU must be interpreted as having direct effect in proceedings between individuals in the national courts. This ECJ judgment regarding a British case was delivered after Brexit. Although ECJ decisions delivered after the transition period will not be binding on UK courts, the UK-EU Withdrawal Agreement provides that European judgments are binding in cases that were referred before the end of the transition period (31 December 2020). This is the case for *Tesco*.

Before *Tesco*, the UK Supreme Court had to decide on the comparability of retail and distribution workers within the supermarket chain Asda (*Asda Stores Ltd – v – Brierley and others*) (**EELC 2021/29**). Instead of looking to Article 157 and the ECJ's single source test, the Supreme Court applied the UK's Equality Act 2010 and resolved the problem of the lack of male comparators within the same workplace (retail) by asking the hypothetical question whether the (male) comparator in distribution would enjoy the same terms if employed in the (female) claimants' role. The Court found that only a broad comparison within the same employer is necessary and that the terms would have substantially been the same. With this hurdle overcome, the claimants still have to prove that retail work has the same value as distribution, which will be an interesting point to watch out for.

Yet another British case shows that discrimination is two sides of the same coin and that even a historically privileged group can fall victim to discrimination, namely 'white, straight men' (**EELC 2021/37**). Two employees belonging to that group were dismissed shortly after their CEO announced at a conference the company's wish to "obliterate" its reputation for being full of "straight, white men" to redeem for their notably high gender pay gap. The Employment Tribunal found the reason for the claimants' dismissal to be their sex and the dismissal itself therefore directly discriminatory. It goes to show that an injustice even with the cause to compensate for another wrong is still inequitable.

Disability

In 2014, the ECJ expanded on its case law regarding what constitutes a disability. After the *Ring* and *Werge* cases the ECJ narrowed down in *FOA* (C-354/13) under which circumstances obesity can amount to a disability. While there is no general principle to prohibit discrimination on the basis of obesity, the latter can amount to a disability (and can therefore be protected under Directive 2000/78/EC) if it entails a limitation that hinders the full and effective participation in professional life in the long-term. The Danish courts had to decide whether a dismissed childminder in the case at issue met those criteria (**EELC 2021/6**). It looked at the worker's ability to perform their job for over a decade and that there was no special accommodation necessary for them to fulfil their tasks. The employee's obesity was therefore not considered a disability within the meaning of Directive 2000/78.

Four cases concerned reduced-hours employees who did not work full-time to accommodate their special needs and who had been dismissed as part of a cost-saving process (**EELC 2021/36**). As there was an overrepresentation of reduced-hours employees among those that were let go, the question that occupied the Court was whether this amounted to indirect discrimination on the ground of disability. The Danish High Court upheld the four district court decisions, which found that the statistical data showing overrepresentation in these cases can establish a presumption of discrimination. However, the employer successfully proved that the dismissal was based on operational needs and that the employees dismissed lacked the ability to carry out essential functions.

General

The following four cases contain insights on discrimination cases in general. The first lesson to be learnt is that even when a defendant is willing to pay the full compen-

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sation claimed but denies the discrimination every person must have the possibility of obtaining a court ruling that there has been a breach of his or her right to equal treatment (ECJ C-30/19, *Diskrimineringsombudsmannen – v – Braathens Regional Aviation*). The second case concerned the significance of the Hungarian Equal Treatment Authority's decisions. The highest judicial authority in Hungary, the Curia, found that while the Equal Treatment Authority making a finding of discrimination makes it probable that a claimant has been disadvantaged, the Authority's decision has no binding effect on courts (**EELC 2021/13**). Even if Directive 2000/78 was at issue, this is a principle that will apply to discrimination in general.

The question arose in another case whether direct or indirect discrimination can be found when the distinction is made within a group of people with the same protected characteristic (e.g. disability) without the employees in that group being treated less favourably than the employees who did not have the characteristic (C-16/19, *VL – v – Szpital Kliniczny im. dra J. Babińskiego Samodzielny Publiczny Zakład Opieki Zdrowotnej w Krakowie*). Surprisingly, the ECJ found direct discrimination. The case concerned an employer who chose a certain date after which its workers with disabilities had to submit disability certificates to receive a special allowance, thereby excluding the workers with disabilities who had already submitted disability certificates before that date. As this practice was inextricably linked to the protected characteristic (in this case disability), it constituted direct discrimination.

The last case on general insights regarding anti-discrimination law deals with state officials (**EELC 2021/27**). The Bulgarian Supreme Administrative Court clarified that even though the Labour Code does not cover persons appointed by state authorities, they still enjoy the protection of the equal treatment principle of Directive 2000/78. Therefore, if a civil servant falls under a category that benefits from special protection under the Labour Code, the provisions on protection against termination will apply to that state official.

Outlook

With 2021 wrapped up, it will be interesting to see what the courts develop in the current year. Covid-19 is a setback especially in gender equality as women with children are statistically more likely to lose their jobs during the pandemic. This might result in a rise of cases on gender discrimination.

Free movement and social insurance

Jean-Philippe Lhernould[15]

The **right for jobseekers to stay** in the territory of the Member State where they seek employment has been defined in the *Antonissen* case (Case C-292/89) and then codified in the 'residence directive' (Directive 2004/38/EC) which ambiguously provides that these workers "may not be expelled for as long as the Union citizens can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged" (Article 14(1)(b)). A case clarified the matter by designating three periods: for three months, jobseekers can stay without any condition; during a period of six months, they can stay if they register as a jobseeker and continue to seek employment; during an indefinite period of time, they can stay if they continue to seek employment and have a genuine chance of being engaged. Even if issues will remain, this case is a nice illustration of the denial by the Court of Justice of a strict interpretation of Article 45(3) TFEU which would jeopardise the actual chances that a national of a Member State who is seeking employment will find it in another Member State, and would, as a result, make that provision ineffective (Case C-710/19, *GMA*).

If the rules on free movement of workers must be interpreted broadly, they should not be used to receive an unfair advantage. This is why the Court held that Article 45 TFEU and Article 7 of Regulation (EU) 492/2011 do not preclude national legislation which uses, as the reference year for the **calculation of family allowances** to be allocated, the penultimate year preceding the payment period. Even if this method of calculation led in practice to the loss of family benefits, it was not the exercise of the right to free movement that led to that result, but the fact that the income received during the mobility was higher than that received in the country where the worker had returned (Case C-27/20, *QG*).

For **third-country nationals**, the right to stay and to enjoy various benefits in the Member States is more limited than that of Union citizens. The Court of Justice is however vigilant to protect their rights. In a Grand Chamber case, it ruled that Directive 2011/98/EU precludes national legislation which excludes third-country nationals holding a single permit from entitlement to a childbirth allowance and a maternity allowance provided for by that legislation (Case C-350/20, *OD*). In another case though, the Court underlined the limits set by Union law. It held that a Member State may impose legislation which requires a work permit for third-country national crew members of a vessel flying the flag of a Member State, owned by a company in another Member State. Indeed, it is apparent from Article 79(5) TFEU that Member States retain the right to determine

15. Jean-Philippe Lhernould is professor of Law at Université de Poitiers.

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volumes of admission of third-country nationals coming from third countries to their territory in order to seek work, whether employed or self-employed (Case C-71/20, *VAS shipping*).

The CJEU confirmed in two noteworthy cases dealing with social security matters its desire to strictly regulate **posting** and combat potential situations of fraud and unfair competition. It has long been admitted that **temporary employment agencies** may post workers across borders. Among the conditions for posting is the obligation for the employer to carry out its activities normally in the State where it is established. This is to avoid the proliferation of 'letterbox' companies. Should the fact that a temporary employment agency carries out in the country where it is established the activities of selection, recruitment and social security affiliation of temporary workers be considered sufficient to characterise substantial activities for the temporary workers to be considered as posted? The answer by the Court is fortunately in the negative. In order to benefit from the posting rules, a temporary work agency must carry out activities in the territory where it has established a significant part of its activities of assigning temporary agency workers for the benefit of user undertakings established and carrying out their activity in that country (Case C-784/19, *Team Power Europe*).

The **distinction between posting and other forms of cross-border work** has been discussed in another case. In 2012, the ECJ had ruled that an employee employed by a Polish construction company, posted by successive fixed-term contracts in France, then in France again, and finally in Finland could not be considered as being posted or in state of 'pluriactivity' (within the meaning of Regulation (EEC) 1408/71) (Case C-115/11, *Format I*). This case though did not make it possible to know whether, as regards any successive periods of activity exercised in the territory of more than one Member State, Article 14 of Regulation 1408/71 establishes a temporal limit preventing the application of the posting status. The answer is provided by a case where the Court held that posting rules do not apply to a person who, under a single employment contract concluded with a single employer providing for the pursuit of professional activity in several Member States, works, for several successive months, solely in the territory of each of those Member States, where the duration of the uninterrupted periods of work completed by that person in each of those Member States exceeds 12 months (Case C-879/19, *Format II*).

More surprisingly, since it goes against posted workers' interests and fair competition principles, the Court considered in a third case dealing this time with the posting directive (Directive 96/71/EC), that a daily allowance, the amount of which varied according to the duration of the worker's posting, constituted in principle an allowance specific to the posting and was thus part of the **posted worker's minimum wage**. This ruling may result in a *de facto* substantial reduction in the actual remuneration of posted employees since it will be easy for employers to hide reimbursement of expenditure actually incurred behind a flat rate bonus (Case C-428/19, *OL*).

The CJEU traditionally interprets **social security coordination rules** in favour of individuals, including for the **determination of the legislation applicable**. This was the case for a German employed person who had been hired under a contract of employment as a development aid worker by an employer established in Austria and who was covered by the Austrian compulsory social security scheme. They were assigned to Uganda not immediately after being employed but after completing a short training course in Austria. They subsequently returned there for a reintegration period before quitting their job. For the CJEU, they were to be regarded as pursuing an activity as an employed person in Austria under Regulation (EC) 883/2004. This case confirms that the *lex loci laboris* rule of conflict has an attractive function. It may apply regardless of the existence of factors to the contrary, in particular the fact that the activity is actually carried out in a third country (Case C-372/20, *QY*).

The Court of Justice has issued two rulings about access **to scheduled cross-border healthcare**. These cases, although favourable to patients, emphasise the necessity to simplify the rules applicable and to put an end to the 'double path' reimbursement system. In the first case, the Court added a new situation where an insured person can obtain reimbursement of the costs of scheduled healthcare requiring in principle a prior authorisation, even though the authorisation was not requested. It covers situations where a medical opinion from a doctor in the State of stay gives the same diagnosis as the one given in the State of residence but proposes a treatment of equivalent efficacy which is less incapacitating. This ruling shows the importance given by the Court to the state of health of the person concerned (seriousness of the condition, urgency of care) and the comparative quality of the treatments offered in the States concerned. It puts the insured person and the need to receive the best possible care at the heart of the reasoning (Case C-538/19, *TS*). In the second case, the Court held that Directive 2011/24/EU on the application of patients' rights in cross-border healthcare read in combination with Regulation (EC) 883/2004 meant that a Dutch national residing in Belgium, in receipt of a Dutch pension, who had a right under the Regulation to the benefits in kind provided by the country of residence (Belgium) at the expense of the Member State responsible for paying their pension (the Netherlands), must be regarded as an 'insured person', within the meaning of that Directive, who is able to obtain reimbursement of the costs of the planned cross-border healthcare that they have received in Germany, without being affiliated to the Dutch compulsory sickness insurance scheme and without having requested a prior authorisation. These cases illustrate the unnecessary complex interaction between the Directive and the Regulation. In sum, the Directive applies only when the Regulation does not cover the situation in question or when it brings a more beneficial result to the insured

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person or when the latter chooses to refer to it in a preferential manner (Case C-636/19, *Y*).

With regard to **unemployment benefits**, Article 65 of Regulation 883/2004 is often contested because of the unfair distribution of financial burdens between countries. While the contributions are paid in the State of employment, it is the State of residence that pays the benefits. Does Article 65 extend to a worker being off sick in the last Member State of work? Yes, if the person on sick leave receives sickness benefits paid by the country of work (Case C-285/20, *K*). The regulation currently being revised could provide that, for frontier workers, it is in principle the State of last employment that will pay unemployment benefits, with a right to export to the State of residence for at least 15 months (or six months). But who knows when and how the regulation will be revised.

The recent case law shows the importance of the protection granted to **mobile non-active persons**. Firstly, the CJEU ruled that Regulation 883/2004, read in the light of Directive 2004/38, precludes national legislation which excludes from the right to be affiliated to the public **sickness insurance** scheme of the host Member State economically inactive Union citizens who are nationals of another Member State and who fall, by virtue of Article 11(3)(e) of Regulation 883/2004, within the scope of the legislation of the host Member State and who are exercising their right of residence in the territory of that State under Article 7(1)(b) of that Directive. In essence, this cornerstone case means that the Regulation allows the condition of complete sickness insurance to be met directly for non-active persons through the country of residence public insurance scheme. The only, but important, reservation made by the Court is that access to the country of residence health insurance system can be subject to a proportionate contribution to be paid by the person concerned (Case C-535/19, *A*). Secondly, for Union citizens residing legally, *on the basis of national law*, in the territory of a Member State other than that of which they are nationals, the national authorities empowered to grant **social assistance** are required to check that a refusal to grant such benefits based on that legislation does not expose that citizen, and the children for which he or she is responsible, to an actual and current risk of violation of their fundamental rights, as enshrined in Articles 1, 7 and 24 of the Charter of Fundamental Rights of the European Union (Case C-709/20, *CG*).

Workers' mobility may be affected by various **principles and rules of the international market**. Many rulings deal with such matters. For example, the Court has held, in essence, that pursuant to Article 49 TFEU, a (host) Member State cannot make the exclusion of pension rights from a bankruptcy estate dependent on obtaining prior tax approval in that country if the scheme has already been tax approved in the home Member State unless there is an overriding reason of public interest to do so (Case C-168/20, *BJ*).In another case, the Court has held that legislation which reserves dock work to 'recognised workers' may be compatible with Articles 49 and 56 TFEU only if it is aimed at ensuring safety in port areas and preventing workplace accidents. However, the intervention of a joint administrative committee in the recognition of dockers is neither necessary nor appropriate for attaining the objective pursued. This judgment shows the vigilance of the CJEU towards labour market protection practices – aiming to avoid access to the local job market by foreigners – but also the need for a European regulation that would set the basis for the – difficult – working conditions of port workers (Case C-407/19, *Katoen Natie Bulk Terminals*).

Fixed-term work

Ruben Houweling[16]

The two most important provisions of Directive 1999/70/EC on fixed-term work are clause 4 (non-discrimination) and clause 5 (prohibition on excessive use of fixed-term contracts).

Clause 4 of Directive 1999/70 states that a fixed-term employee cannot be treated less favourably than a comparable permanent employee because of the fixed-term nature of his or her employment contract. In **EELC 2021/18** a Danish case illustrated that sometimes 'comparable' isn't as obvious as one might think. The temporary singers in that case were hired on less favourable terms than the 40 permanent singers of the Royal Danish Theatre. Even though many employees in both groups had the same educational background and they all took part in the same performances, prepared for the performances in the same manner, performed the same music, and thereby essentially performed the same work, the difference in qualifications and skills was essential in the ruling. Even though the work might be very similar, the result also may rely heavily on the employees' qualifications and skills. According to the Danish Supreme Court, this is especially the case when dealing with artistic work.

In an Irish case (**EELC 2021/38**) the Supreme Court determined that, pursuant to the definitions of 'employment contract' and 'fixed-term employee' in the Protection of Employees (Fixed-Term Work) Act 2003, a permanent employee temporarily upgrading to a more senior role on a fixed-term basis was entitled to protection under the 2003 Act as a fixed-term employee despite the fact that he had the right to revert to his substantive terms and conditions as a permanent employee. One of its reasonings was that if an employee would not be granted the protection afforded by the 2003 Act, they would lack protection of equal treatment and information (safeguarded by clause 4). If an employee temporarily fills a vacancy in an organisation, while already being a permanent worker, they could be entitled to

16. Ruben Houweling is a professor at Erasmus School of Law, the Netherlands, and Chairman of the Academic Board of EELC.

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claim rights under Directive 1999/70. It would be an interesting challenge brought before the ECJ.

Looking at the ECJ in 2021, its rulings on Directive 1999/70 mostly concerned clause 5. More specifically, the so-called 'objective reasons' as stated in clause 5(1)(a). Clause 5(1) of the framework agreement requires, with a view to preventing misuse of successive fixed-term employment contracts or relationships, the effective and binding adoption by Member States of at least one of the measures listed in that provision, where their domestic law does not already include equivalent legal measures. The measures listed in clause 5(1)(a) to (c) relate, respectively, to objective reasons justifying the renewal of such employment contracts or relationships, the maximum total duration of successive fixed-term employment contracts or relationships, and the number of renewals of such contracts or relationships.

In ECJ 24 June 2021, Case C-550/19 (*Obras*) the Court concluded that it has repeatedly held that the renewal of fixed-term employment contracts or relationships in order to cover needs which, in fact, are not temporary in nature but, on the contrary, fixed and permanent is not justified for the purposes of clause 5(1)(a) of the framework agreement, insofar as such use of fixed-term employment contracts or relationships conflicts directly with the premise on which the framework agreement is founded, namely that employment contracts of indefinite duration are the general form of employment relationship, even though fixed-term employment contracts are a feature of employment in certain sectors or in respect of certain occupations and activities (e.g. C-103/18 and C-429/18, EU:C:2020:219, *Sánchez Ruiz and Others* paragraph 76 and the case law cited). In those judgments, the problem of establishing whether the renewal of the fixed-term contracts at issue in those cases was justified by objective reasons, within the meaning of clause 5(1)(a) of the framework agreement including the need to cover genuine and temporary needs, arose solely because of the absence of measures falling within the two categories of measures referred to in clause 5(1)(b) and (c).

This is a crucial, but also a bit of a conflicting, consideration. It means that as soon as one of the measures of clause 5(1)(b) or (c) is taken, the extensive reasoning of clause 5(1)(a) is less relevant. In ECJ 3 June 2021, Case C-326/19 (*MIUR*) a teacher claimed that in fact his job was not temporary but a fixed-term position. The Court nevertheless reasoned (paragraph 67): 'it should be noted that the fact that universities have a constant need to employ university researchers, as appears from the national rules in question, does not mean that that need could not be met by having recourse to fixed-term employment contracts.' In ECJ 13 January 2022 Case C-282/19 (*YT and Others*) the Court could extensively consider the objective reasons for renewal of teachers' contracts, because measures (b) and (c) were not taken by the Member State. What is interesting about the reasoning of the Court is that if measures (b) and (c) are taken, the Court is not likely to use it's 'to cover needs which, in fact, are not temporary in nature but, on the contrary, fixed and permanent' consideration. Shouldn't this consideration always be the 'Adeneler test' of the Court? If for instance the position is permanent, but the workers are constantly hired on a temporary basis, shouldn't that practice be held to be a misuse or breach of the framework agreement (Directive 1999/70)?

In ECJ 3 June 2021, Case C-726/19 (*Instituto Madrileño de Investigación y Desarrollo Rural, Agrario y Alimentario*) the Court held that the economic crisis of 2008 cannot justify the absence of any anti-abusive measures. As to the consequences of not complying with EU law, the ECJ held that clause 5(1) of the framework agreement on fixed-term work must be interpreted as meaning that, where abuse of successive fixed-term employment contracts within the meaning of that provision has occurred, the obligation incumbent on the referring court to undertake, to the fullest extent possible, an interpretation and an application of all the relevant provisions of domestic law capable of duly penalizing that abuse and of nullifying the consequences of the breach of EU law extends to an assessment of whether the provisions of earlier national legislation, which remain in force, and which permit the conversion of a succession of fixed-term contracts to one employment contract of indefinite duration, may, where appropriate, be applied for the purposes of that interpretation in conformity with EU law, even though national constitutional provisions impose an absolute prohibition, in the public sector, on such conversion (ECJ 11 February 2021, Case C-760/18 (*M.V.*).

Looking forward to 2022, it will be interesting to see if the ECJ will further explore the concept of 'temporary' and the question whether or not fixed-term work on 'permanent positions' can by justified in the spirit of the framework agreement. In March 2022, the ECJ ruled in the *Daimler* case (ECJ 17 March 2022, Case C-232/20) in which it held that temporary agency work must be limited in time, but the permanent position in the hosting company does not lead to misuse: it is the agency who is limited in time (not the host). In ECJ 14 October 2020, Case C-681/18 an extensive and integrative reading of both Directives (temporary agency work and fixed-term work) was challenged by the complainant. Maybe 2022 can shine some brighter light on the (absence of) *gleichlauf* between the two.

Private international law

Zef Even[17]

There have been a number of interesting employment cases in the field of private international law over 2021, in particular when we juggle a little and add December 2020 to this period. Three cases concern the (Revised) Posting of Workers Directive: ECJ 8 December 2020, C-620/18 (*Hungary – v – Parliament and*

17. Zef Even is a professor at Erasmus School of Law, Rotterdam, the Netherlands, and partner at SteensmaEven, Rotterdam, the Netherlands.

Council), ECJ 8 December 2020, C-626/18 (*Republic of Poland – v – Parliament and Council*) and ECJ 8 July 2021, C-428/19 (*Rapidsped*). Under the heading 'Competency' I will discuss ECJ 25 February 2021, C-804/19 (*Markt24*) and **EELC 2021/34** 'End of the Ryanair saga: a trade union victory with a bitter taste for the employees involved' (BE). Finally, under the heading 'Applicable law', I will turn to ECJ 15 July 2021, Joined Cases C-152/50 and C-218/20 (*SC Gruber Logistics*).

Posting of employees

It is no secret that it wasn't easy to reach an agreement on the Revised Posting of Workers Directive (EU) 2018/957 ('RPWD'). The Commission's proposal on the amendment led to reasoned opinions of national parliaments arguing that the proposal was not compatible with the principle of subsidiarity. The Commission, however, rejected these opinions and continued. The RPWD was approved on 28 June 2018. Poland and Hungary voted against its adoption, while a number of other Member States abstained. Poland and Hungary initiated proceedings to annul the RPWD, arguing, among other things, that the RPWD (i) was based on a wrong legal basis, (ii) infringed the principle of subsidiarity, (iii) violated the principles of the freedom to provide services and (iv) was at odds with Regulation (EC) No. 593/2008 (Rome I).

The ECJ (Grand Chamber) rejected the claims of Hungary and Poland. The RPWD was, according to the ECJ, (i) rightfully based on Articles 53(1) and 62 TFEU (freedom of services). The RPWD has as its objective that of making it easier to exercise the freedom to provide services, while also ensuring, where necessary, the protection of other fundamental interests that may be affected by that freedom, such as a level playing field for the businesses and respect for the rights of workers. This objective made the aforementioned legal bases appropriate. The alternative legal basis put forward, Article 153 TFEU (social policy) did not, according to the ECJ, constitute a more specific legal basis. Furthermore, the principle of subsidiarity was according to the ECJ (ii) not infringed: the amendments made by the RPWD to the original Posting of Workers Directive ('PWD') did not go beyond what is necessary to achieve the objectives of this Directive, namely that of ensuring the freedom to provide services on a fair basis and that of offering greater protection to posted workers. The principles of the freedom to provide services were (iii) also not violated. In a nutshell, the ECJ held that mutual recognition of the labour laws of all Member States insufficiently protects the interests of the posted workers in order to maintain the provision of services on a fair basis as between undertakings established in the host Member State and undertakings that post workers to that State (level playing field). The fact that the position of long-term posted workers (posted for over 12 or 18 months) more closely resembles that of the employment rights and obligations of workers employed by undertakings established in the host Member State is according to the ECJ necessary, appropriate and proportionate. Finally, there is (iv) no conflict with the Rome I Regulation, as the RPWD constitutes, with respect to workers who are posted, a special conflict of law rule, within the meaning of Article 23 of the Rome I Regulation. The Rome I Regulation and the RPWD are therefore aligned.

The case *Rapidsped* concerned drivers who were brought to France by their Hungarian employer in a minibus in order to work there as international truck drivers. The employment agreements provided that the drivers may also work abroad, without that work carried out abroad being permanent. The drivers were eligible to a daily allowance (*per diem*) for work carried out abroad, the amount of which was higher the longer the period during which the worker was posted abroad. The rules on these *per diems* explained that they were intended to cover the costs incurred abroad. The drivers received a statement that they were eligible to an hourly wage of EUR 10.40, the relevant French minimum wage being EUR 9.76 per hour. The drivers, however, in fact received wages amounting to EUR 3.24 per hour. The employer argued that the difference between that amount and the French minimum wage was covered by the *per diems* (and a fuel saving bonus, which I will not discuss further).

The drivers started litigation against their employer in Hungary. The referring Hungarian court wanted to ensure that the PWD also applied to international road transport, which was easily confirmed by the ECJ referring to the answer already given in that respect in the case *FNV – v – Van den Bosch* (C-815/18). The referring Hungarian court also wanted to know whether it was competent and whether it should apply French law on minimum wages. The ECJ explained that Article 6 PWD provides for alternative jurisdiction in litigation on the minimum employment conditions applicable on the basis of Article 3(1) PWD, by also allowing litigation before the courts in the Member State in whose territory they are or were posted. That Article, however, does not prevent the drivers from suing their employer before the court in a jurisdiction that is also competent, such as the court of the country in which the employer is domiciled, in this case Hungary. The Hungarian court should in such a situation apply French law to determine the minimum wage applicable to the employees during their posting.

Another question related to the *per diem* payments: do they constitute a wage which should be taken into account when determining whether the employees received sufficient pay? As follows from the second subparagraph of Article 3(7) PWD, allowances specific to the posting are considered part of the minimum wage, unless they are paid in reimbursement of expenditure actually incurred on account of the posting, such as expenditure on travel, board and lodging. In this case, even though the daily allowance was described as being intended to cover the costs incurred abroad by the posted workers, this seems not to be true: the amount of that daily allowance differed according to whether that

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posting lasted three, four or five weeks, or even more. The specific aspects of the *per diems* – the lump sum and progressive nature of that allowance – seemed to indicate that the purpose of that daily allowance was not so much to cover the costs incurred abroad by the workers, but rather to provide compensation for the disadvantages entailed by the posting, as a result of the workers being removed from their usual environment. Would that be the case, the *per diem* would be part of the minimum wage of the drivers. That would, finally, only be different if the payments corresponded to an allowance which altered the relationship between the service provided by the worker, on the one hand, and the consideration which he or she received in return, on the other (such as compensation for working at night or on public holidays).

Competency

In the *Market24* case the employee was domiciled in Austria, the employer Market24 in Germany. The employee was asked to enter into an employment agreement with Market24, which agreement the parties signed in Austria. On the basis of that agreement the employee was supposed to perform cleaning work in Germany. The employee, however, was never allocated any work nor did they receive any pay. The employee sued Market24 before the courts in Austria. These courts were competent on the basis of Austrian domestic law. The question was whether that was in compliance with EU law, more specifically Regulation (EU) No. 1215/2012 (Brussels II). The ECJ held that Section 5 of Chapter II of Brussels II, that concerns 'Jurisdiction over individual contracts of employment', also applied in this situation, in which no work was performed for a reason attributable to the employer. The ECJ continued that Section 5 precludes the application of national rules of jurisdiction in respect of an action such as that at stake, irrespective of whether those rules are more beneficial to the employee. In other words, Brussels II applies exclusively. On that basis, Market24 should be brought before the courts in Germany (where it is situated), unless Section 5 provides for jurisdiction in Austria. That could be the case should the employee have been habitually carrying out their work in Austria. That, however, was not so. It should be determined where, or from which place, the employee in fact performs the essential part of his or her duties vis-à-vis his or her employer. In the case where the contract of employment has not been performed, the intention expressed by the parties to the contract as to the place of that performance is, in principle, the only element which makes it possible to establish a habitual place of work for these purposes. This also pointed to Germany.

In another dispute regarding the competence of the court, the Labour Court of Appeal of Mons concluded the ongoing litigation between air cabin crew and their employer Crewlink. Crewlink is an Irish company based in Dublin. It recruits, trains and employs airline cabin crew for, among others, Ryanair. Ryanair is also Dublin based. The Belgian case follows up on the ruling of the ECJ in Cases C-168/16 and C-169/16 (*Nogueira and Others*). In brief, the Labour Court of Appeal held that the Belgian Court was competent and that Belgian mandatory law applied to the employment agreements of the cabin crew. This due to the fact that the cabin crew habitually worked from Belgium, based on the legal rules formulated by the ECJ. In consequence, the crew was among others things entitled to payment of flight allowances for the entire duration of the employment contract, holiday pay, pay for work performed on Belgian public holidays and salary in the event a crew member was ill and could not therefore work. The crew members, however, were not eligible to pay for the days they were on-call at the airport on top of the daily allowance of EUR 30 they already received. The Labour Court of Appeal held that neither Directive 2003/88/EU nor Belgian law provides for payment of salary of employees for on-call time.

Applicable law

In the case *SC Gruber Logistics* drivers claimed that they habitually worked in Germany and Italy, respectively. Their employment agreements were governed by Romanian law, though, as the chosen law. The ECJ explained how to apply Article 8 Rome I. Paragraph 1 provides that an individual employment contract is governed by the law chosen by the parties. Such a choice of law may not, however, deprive the employee of the protection afforded to him or her by provisions under the law that cannot be derogated from by agreement (mandatory provisions) and that would be applicable to the contract in the absence of such a choice, pursuant to paragraphs 2, 3 and 4. If those provisions offer the employee greater protection than those of the law chosen, the former provisions will override the latter, while the law chosen will continue to apply to the rest of the contractual relationship. The correct application of Article 8 Rome I therefore requires, first, that the national court identifies the law that would have applied in the absence of choice and determines, in accordance with that law, the rules that cannot be derogated from by agreement. Second, that court must compare the level of protection afforded to the employee under those rules with that provided for by the law chosen by the parties. If the level of protection provided for by those rules is greater, those same rules must be applied. With regard to the minimum wage rules of the country where the employee has habitually carried out his or her activities, these can, in principle, be classified as mandatory provisions within the meaning of Article 8(1) Rome I. With regard to the choice of law clause, the ECJ continued that such a choice should be free. That the clause derives from a pre-formulated employment contract makes, however, no difference: the regulation does not prohibit the use of standard clauses pre-formulated by the employer. Freedom of choice can be exercised by consenting to such a clause and is not called into question solely because that choice is made on the basis of a clause drafted and included by the employer in the contract.

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Final remarks

There is a constant flow of cases in the field of private international law, focussing primarily on international transport. The ECJ has given guidance on such cases. I hope that further clarity for the road transport sector will also be brought by Directive (EU) 2020/1057, laying down specific rules with respect to the posting of drivers in that sector. Let's see what the future holds in store for us.

Transfers of undertakings and temporary agency work

Niklas Bruun[18]

Introduction

During 2021 the Transfers of Undertakings Directive 2001/23/EC did not, as opposed to earlier years, give rise to many preliminary rulings from the CJEU which would need to be discussed. The only important case in this regard was Case C-550/19 *EV – v – Obras y Servicios Públicos SA, Acciona Agua SA* of 24 June 2021, which was fundamentally focussed on fixed-term contracts, but also contained an important aspect regarding the interpretation of the Transfers of Undertakings Directive. The CJEU also issued a judgment in 2021 regarding the interpretation of the Temporary Agency Work Directive 2008/104/EC following a request of the Supreme Court of Lithuania (*UAB 'Manpower Lit'*, Case C-948/19). In the following we analyse these two cases and in addition we briefly comment on a national case from the UK which raises issues regarding Directive 2001/23/EC.

EV – v – Obras y Servicios Públicos

This case dealt with successive fixed-term contracts concerning Mr EV with Obras y Servicios Públicos (Obras) and Acciona Agua. One important question related to six such contracts which had succeeded each other without interruption during 1996–2014. The last one of the contracts was still in existence when the legal procedure started.

On 3 October 2017, Acciona Agua was substituted by Obras as the employer of the applicant. This happened after Acciona Agua had been awarded a public contract known as 'Urgent renovation and repair work to the supply and reuse system of Canal de Isabel II Gestión', which had been performed until that date by Obras. In the context of that substitution, Acciona Agua took over a major part, in terms of numbers and skills, of the workers who had been employed by Obras for the performance of that public contract.

According to the referring court, a situation such as that at issue here, in which a public contract has been re-awarded to an undertaking and in the context of which that undertaking has taken over a major part of the staff, which the outgoing undertaking had assigned to the performance of that public contract, falls within the scope of Article 1(1) of Directive 2001/23.

In that regard, the national court had taken the view, in particular, that an activity, such as that at issue here, which does not require specific equipment may be regarded as an activity based essentially on manpower. Consequently, a group of workers engaged in a joint activity of renovation and repairs on a permanent basis may, in the absence of other production factors, correspond to an economic entity which retains its identity, within the meaning of Article 1(1)(b) of the Directive, provided that the transferee takes over a major part of the staff of that entity, which was the case here.

The referring court also claimed that the collective agreement at issue in this case, which excluded the application of the Spanish Workers' Statute, was applicable to the dispute in the main proceedings and stated that there were no objective grounds justifying contravention of Article 15(1), (5) of that Statute.

In that context, the national court had doubts as to whether the articles in the national collective agreement were in conformity with clause 4(1) of the framework agreement (Directive 1999/70/EC) and with Article 3(1) of Directive 2001/23. Therefore the Court asked if Article 3(1) must be interpreted as precluding a situation in which, under the collective agreement, the rights and obligations that are to be respected by the new employing undertaking or entity that is taking on the contracted activities are to be restricted solely to those arising under the last contract concluded by the worker with the outgoing undertaking, and as meaning that that does not constitute an objective ground that justifies the collective agreement of the construction sector contravening Spanish national legislation, under which, pursuant to Article 44 of the Workers' Statute, all rights and obligations of the previous employer are transferred, not merely those arising under the most recent contract?

Against this background, the national court decided to stay the proceedings and to refer this question to the Court for a preliminary ruling.

The CJEU stated that Directive 1999/70/EC on fixed-term work did not categorically exclude or restrict use of successive fixed-term contracts in the way they had been used in this case.

Further, the CJEU stated in accordance with its earlier case law that the lack of a contractual link between the two undertakings successively entrusted with managing the surveillance of the buildings in question had no bearing on the question as to whether or not Directive 2001/23 was applicable. Furthermore although the re-employment of the staff was imposed on Acciona Agua by a collective agreement, that circumstance had no bearing on the fact that the transfer did concern an economic entity. Finally, the CJEU stated that the decisive criterion for establishing the existence of a transfer is the fact that the economic entity in question retains its identity, as indicated by the fact that its operation is actually continued or resumed as was also stated in the

18. Niklas Bruun is an Emeritus professor at Hanken University, Finland.

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judgment of 27 February 2020 in *Grafe and Pohle* (Case C-298/18).

Regarding the impact of the period of service, the CJEU referred to the fact that it had requested the transferee to take into account rights of a financial nature, such as compensation for termination of a contract or salary increases, when calculating the benefits that must be transferred. The transferee must also take into account the entire period of service of the employees transferred, in so far as their obligation to do so derives from the employment relationship between those employees and the transferor, and in accordance with the terms agreed in that relationship as also stated in the case *Unionen* (Case C-336/15).

In the present case it was not according to the CJEU apparent from the order for reference that the period of service which was granted, under the collective agreement, was less favourable for those workers than the period of service granted to them before that transfer by the outgoing undertaking. On the contrary the application of that agreement meant that the period of service granted to them by Obras had been maintained in the context of their transfer.

The Court further noted on the other hand, that the grant to that worker, in the transfer of staff, of rights – a period of service in particular – which they did not enjoy prior to that transfer, would constitute an improvement in their working conditions, which is not provided for by Directive 2001/23.

The CJEU concluded that Article 3(1) of Directive 2001/23 must be interpreted as not precluding national legislation under which, in the event of a transfer of employees under public contracts, the rights and obligations of the transferred worker that the incoming undertaking is required to respect are limited exclusively to those arising from the last contract concluded by that worker with the outgoing undertaking. This applies provided that the application of that legislation does not have the effect of placing that worker in a less favourable position solely as a result of the transfer, which it is for the referring court to determine.

It is important to note that the Court did not exclude that national legislation on fixed-term work might change the situation, since Directive 2001/23 is a minimum Directive. If EV would have had a clear right towards Obras, the legal assessment would have changed. In particular the case *Unionen* shows that it might sometimes be difficult to draw the line between rights and obligations which exist with the transferor and has to be transferred and those which are only presumptive rights. Especially when we have rights and obligations related to seniority, which can be acquired during long periods (ten years or more), the legal assessment might be tricky.

UAB 'Manpower Lit'

The question was whether Directive 2008/104/EC applied to an agency of the EU in Vilnius, the European Institute for Gender Equality (EIGE). The most astonishing aspect of this case is that it was submitted to the CJEU for a preliminary ruling encompassing six questions. It should have been clear already from the textual reading of the Directive that it is applicable to public and private undertakings which are user undertakings engaged in economic activities whether or not they are operating for gain. Several questions were concerned with the fact that this EU institution was regulated by separate EU law which the national court thought might justify non-application of national law and the Directive. Again, it is very difficult to explain why this special regulation would include a licence to undermine EU and national law protecting temporary agency workers and the CJEU convincingly confirmed that the Directive had full application in this case, which also meant that Lithuanian law must be applied accordingly.

Comment on national case law

The CJEU case *ISS Facility Services – v – Govaerts* (Case C-344/18) has clearly raised further issues of interpretation in different Member States. Even in the non-Member State, the UK, after Brexit courts are faced with interpretative issues regarding situations where companies or units split and some of the employees might be continuously working for two different units and two employers.

This situation was at stake in the Employment Appeal Tribunal case of 25 February 2021 *McTear Contracts Ltd – v – Bennett and others*.

Here the company Amey Services Ltd (Amey) undertook a kitchen installation contract for North Lanarkshire Council within its social housing stock. In February 2017, the Council re-tendered the contract, splitting it into two lots defined by geographical location – north and south. The lots were awarded to two different companies McTear and Mitie.

Amey's view was that the UK legislation on transfers, TUPE, would apply to the transfer of the employees' contracts to either McTear or Mitie. The company presented a scheme identifying which workers would transfer to each of the companies based on the amount of time they had spent in each of the two geographical locations. Some of the employees did not accept the transfers as presented by the parties to the transfer and brought claims in the Employment Tribunal. The Tribunal accepted Amey's scheme and rejected the claims.

The employees took the case to the Employment Appeal Tribunal in Scotland, which accepted the argumentation by the employees, which was based on the *ISS Facility Services* case. They argued that there was no reason to rule out the possibility that some employees can simultaneously work for two different employers as long as the work is clearly separate and identifiable. Based on this starting point the Employment Appeal Tribunal sent the case back to the Employment Tribunal for an assessment of the facts in the case.

The case clearly raises issues that also the CJEU most probably will have to deal with in the foreseeable future. The split-up situations are quite common in the internal market and the questions on how to split salary, working

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time and other terms and conditions will necessarily come into focus.

This approach certainly is apt to revive the element of information and consultation, which has always been an integral part of the Transfers of Undertakings Directive. It seems that the best way to solve the issues of shared responsibilities and rights for the employers is to have an information and consultation procedure in place where both the transferor, the transferees and the employees (represented in some cases by trade unions) are involved. Since the transferees are not in a competitive situation when the decision on the split-up has been made, there are in my view no obstacles for such procedures.

Annual leave

Jan-Pieter Vos[19] *and Luca Ratti*[20]

Destination ECJ

The ECJ regularly delivers judgments on annual leave but in 2021 it was not until November that the first judgment appeared. However, then came two other judgments in less than three months, which also included almost a month of Christmas holidays.

Most cases which led to these judgments had featured in EELC already. For instance, the preliminary question in the *job-medium* case was discussed in **EELC 2020/52** (indeed, in 2020: obviously ECJ proceedings take time): is an employee entitled to an allowance in lieu of untaken leave if they terminate their employment contract prematurely? It seems that the ECJ answered all questions about the allowance in lieu once and for all.[21] As in earlier cases, the Court held that Article 7(2) of Directive 2003/88/EC imposes two requirements only. Firstly, that the employment relationship has ended and, secondly, that the worker has not taken all the annual leave s/he was entitled to. It is not relevant who terminates the employment relationship and why. Whereas Article 7(2) provides that the minimum period of annual leave *may not* be replaced by an allowance in lieu *except* if the employment relationship ends, the ECJ has come to interpret it as a *right* to an allowance in lieu if all annual leave is not taken. The status of annual leave as a fundamental right prevails. The Austrian legislation which denied the employee such compensation when they terminated the employment relationship prematurely without cause will need to be adapted.

Then came the Dutch *State Secretary of Finance* case, first discussed in **EELC 2020/41**. This case dealt with the question whether a civil servant's holiday pay during sickness should be based on 'regular' pay or a lower sick pay.[22] Here, the ECJ reiterated a consideration which it had used in *Schultz-Hoff*:[23] according to Directive 2003/88, workers who are on sick leave are to be treated equally as those who have worked. Back then, the consideration served to have sick workers accrue the same holiday entitlements as 'healthy' workers. In the case at issue, the same consideration stood in the way of applying a lower holiday pay to annual leave entitlements accrued during sickness. The Dutch provision at issue made the right to 'full' annual leave subject to the condition that the worker had worked full time, said the ECJ. The impact of the judgment is limited: Dutch employees with a 'regular' employment contract already enjoyed full holiday pay during sickness and, as of 2021, most civil servants have become regular employees.

As this Academic Board Review was prepared in February 2022, we could include a case from January 2022, which we had already pointed out in our review (EELC 2021/1) last year. In *Koch Personaldienstleistungen GmbH*, the ECJ held that annual leave taken counts as working time when determining whether the worker is eligible to additional overtime premiums.[24] In a particular month, the employee had worked many hours (including overtime) before they took annual leave. If they had worked even only normal hours instead of taking leave, they would have easily exceeded the threshold and thus become eligible for these premiums. The ECJ found that, by not counting the annual leave as working hours, the worker could be deterred from taking leave, which is in breach of the Directive. This couldn't come as a surprise, as this has been longstanding case law; in particular, the case bears much resemblance to the ECJ's judgment in *Lock*.[25]

National case law

National case law is typically influenced by ECJ case law and the cases which featured in EELC in 2021 were no exception. Of course, the way of application can sometimes be debated, but it is laudable that judges take note of relevant ECJ case law.

EELC 2021/39 featured a case before a Dutch Court of Appeal, after the judgment in first instance had already been discussed in **EELC 2020/26**. Initially, the discussion had centred around the *Maschek* case, as the Subdistrict Court essentially held that the leave entitlements of an employee who had been put on garden leave had lapsed, although the case report discussed how difficult it had been to arrive at that conclusion. The ruling in appeal was different: rather than discussing *Maschek*, the Court of Appeal held that the entitlements to annual leave had simply lapsed. The employee was not saved by *Schultz-Hoff*-based arguments that they were on sick leave most of the time, as it followed from preparatory works of the Dutch legislation on annual leave that a 're-integrating' worker can take leave. It is questionable whether this interpretation would be accepted by the

19. Jan-Pieter Vos is a lecturer and PhD candidate at the Erasmus School of Law, Rotterdam, the Netherlands.
20. Luca Ratti is an associate professor at the University of Luxembourg
21. ECJ 25 November 2021, C-233/20, ECLI:EU:C:2021:960 (*job-medium*).
22. ECJ 9 December 2021, C-217/20, ECLI:EU:C:2021:987 (*Staatssecretaris van Financiën (Rémunération pendant le congé annuel payé)*).
23. ECJ 20 January 2009, C-350/06 and C-520/06, ECLI:EU:C:2009:18 (*Schultz-Hoff*), para. 41.
24. ECJ 13 January 2022, C-514/20, ECLI:EU:C:2022:19 (*Koch Personaldienstleistungen GmbH*).
25. ECJ 22 May 2014, C-539/12, ECLI:EU:C:2014:351 (*Lock*).

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ECJ. In his opinion in Case C-217/20 (*State Secretary of Finance*), discussed above, Advocate-General Hogan considered that leave cannot lapse unless an employee has fully recovered (which is not the case with 're-integration').[26] The ECJ remained silent on the issue – the case did not require the ECJ to consider the matter – but considering how it defends the rights to annual leave of employees who are on sick leave, the odds are that it will agree with the Advocate-General.[27] It should be noted that this is very much a Dutch problem, as in many EU Member States employees cannot take annual leave during sickness at all. However, it is very relevant in the Netherlands, not least because Dutch employees cannot be dismissed in the first two years of sickness, so that they accrue a lot of annual leave.

This was not the only issue that the Dutch Court of Appeal had faced in this case, as it also had to deal with the requirement to notify employees about taking their leave and informing them of the consequences if they don't, as follows from the ECJ judgments in *Kreuziger* and *Max-Planck-Gesellschaft*.[28] This line of defence didn't save the employee either: as they were part of the management team, notifying team members to take their holiday was one of the employee's very own duties, which they also should have applied to themself. Interestingly, the same Issue of EELC featured a Romanian case (**EELC 2021/40**) where the Dolj Tribunal held something similar in the situation of a school director.

Is this the right approach? We don't have room to deal with this issue in detail, but at least it is a practical approach. Someone must notify employees and it makes sense that the management team is responsible (although an HR department could also do the job). On the other hand, we should not forget that the right to annual leave is a fundamental right (Article 31(2) of the Charter of Fundamental Rights of the European Union), so if the employee does not bear end responsibility, shouldn't they be informed as well? Where to draw the line? Although it is not directly relevant to the right to annual leave, perhaps we could be inspired by Article 17(1)(a) of Directive 2003/88, which provides room to disapply working time regulations for "managing executives or other persons with autonomous decision-taking powers".

In **EELC 2021/12**, the Slovenian Supreme Court found against an employee who had claimed untaken annual leave upon the termination of their employment contract. According to the applicable laws, employees take their leave in the reference year, but there is a carry-over period which is (also) one year if the employee has been unable to work due to sickness. In *KHS*, the ECJ made clear that entitlements to annual leave can lapse in case of sickness after the expiry of the carry-over period, provided that this period is 'substantially longer' than the reference period, which it found to be the case with a carry-over period of fifteen months.[29] The length of the carry-over period in the Slovenian case at issue was only equal to the length of the reference period. The Slovenian Supreme Court didn't see any problems and held that the leave entitlements had lapsed fifteen months after the end of the carry-over period – it seems to single-handedly have converted the 'incorrect' carry-over period to one that met the ECJ requirements.

Still, the question is whether this is the whole story. As the German comments to the case rightly indicate: how does the above-mentioned *Max-Planck-Gesellschaft* information duty come into play? This leads us to the next paragraph.

Pending cases

The very question which concluded the last paragraph is – still – pending with the ECJ. We had already pointed out this case last year, when it was described in **EELC 2021/11**. The question has been lodged by the German Federal Labour Court (Bundesarbeitsgericht) and – in short – concerns the issue of how to reconcile *KHS* and *Max-Planck*. Is it necessary to inform a sick employee that their leave entitlements will lapse? As we write this, there have been no developments in the cases, which have been assigned numbers C-518/20 (*Fraport*) and C-727/20 (*St. Vincenz-Krankenhaus GmbH*). The Bundesarbeitsgericht also submitted another question to the ECJ in Case C-120/21 (*LB*), in which it asked whether a standard civil limitation period can cause annual leave to lapse, even if the employer has not complied with the *Max-Planck* requirements. We would be very surprised if the ECJ would accept this as it was insensitive to similar arguments before: in *Bauer*, the ECJ refused to revoke earlier case law (i.e. *Bollacke*) for 'general' civil law principles and still granted an allowance in lieu of untaken annual leave to the heir of a deceased employee.[30]

Other pending cases are only remotely associated with annual leave. The most notable one is Case C-426/20 (*Luso Temp*), where Advocate-General Pitruzzella found that the principle of equal treatment requires that a temporary agency worker is entitled to the same annual leave entitlements as regular workers. It is now for the ECJ to decide.

Conclusion

2021 wasn't a year in which we saw surprising outcomes, but it was still interesting. There is no reason to expect anything different in 2022!

26. Opinion of Advocate-General Hogan, C-217/20, ECLI:EU:C:2021:559 (*Staatssecretaris van Financiën (Rémunération pendant le congé annuel payé)*), para. 28.
27. For a more detailed reasoning (in Dutch), see: J.R. Vos, '*Vakantieloon en ziekte: meer duidelijkheid, maar niet over alles*', https://www.ar-updates.nl/commentaar/211831.
28. ECJ 6 November 2018, C-619/16, ECLI:EU:C:2018:872 (*Kreuziger*) and ECJ 6 November 2018, C-684/16, ECLI:EU:C:2018:874 (*Max-Planck-Gesellschaft zur Förderung der Wissenschaften*).
29. ECJ 22 November 2011, C-214/10, ECLI:EU:C:2011:761 (*KHS*), para. 38. See also ECJ 3 May 2012, C-337/10, ECLI:EU:C:2012:263 (*Neidel*), para. 41.
30. ECJ 6 November 2018, C-569/16, ECLI:EU:C:2018:871 (*Bauer*); ECJ 12 June 2014, C-118/13, ECLI:EU:C:2014:1755 (*Bollacke*).

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Working time

Anthony Kerr[31]

Working time issues continued to dominate the pages of EELC during 2021, with seven CJEU decisions, one from the EFTA Court and national court decisions in Belgium, Luxembourg and Romania being reported. Four of the CJEU decisions specifically concerned the status of on-call/standby time, as did the decisions from Belgium (**EELC 2021/41**) and Luxembourg (**EELC 2021/20**).

As is now well established, there is no intermediate category between 'working time' and 'rest periods' and the fact that on-call/standby time includes periods of inactivity is irrelevant. The intensity of the work done and the worker's output are not among the characteristic elements of the concept of 'working time': see Case C-303/98, *SIMAP*, Case C-151/02, *Jaeger* and Case C-14/04, *Dellas*. Accordingly, on-call/standby duty performed by a worker where he or she was required to be physically present on the employer's premises has to be regarded as 'working time' in its entirety, regardless of the work actually performed: see the decision from Luxembourg (**EELC 2021/20**). The situation is different, however, where the worker was on-call/on standby without having to be at the employer's premises because, in that situation, the worker might manage his or her time with fewer constraints and pursue his or her own interests.

The precise divide between on-call/standby time at or outside a worker's place of work was considered by the CJEU in Case C-518/15, *Matzak*. The claimant was a firefighter who was obliged, during their on-call/standby time, to be at home and to respond to callouts within eight minutes. The CJEU held that the obligation to remain physically present at a place determined by the employer coupled with the "geographical and temporal constraints" resulting from the requirement to reach their place of work within a specified time were such as to "objectively limit the opportunities which a worker […] has to devote himself to his personal and social interests". Accordingly, such on-call/standby time was to be treated as 'working time': see the decision from Belgium (**EELC 2021/41**) that home-based on-call/standby time qualified as 'working time' in view of the significant restrictions upon enjoyment of the worker's free time imposed during those periods.

What if the worker is not required to be at home but is free to engage in other employment or other activities during on-call/standby time so long as he or she could respond within a stipulated time? Here, the CJEU has adopted a more nuanced approach. The concept of 'working time' covers the entirety of periods of on-call/standby time during which the constraints imposed on the worker are such as to affect, "objectively and very significantly", the possibility for the worker "freely to manage the time during which his or her professional services are not required and to pursue his or her own interests". Conversely, where the constraints do not reach "such a level of intensity" and allow the worker to manage his or her own time, and to pursue his or her own interests "without major constraints", only the time linked to the provision of work actually carried during that period constitutes 'working time': see Case C-344/19, *Radiotelevizija Slovenija*, Case C-580/19, *Stadt Offenbach* and Case C-214/20, *Dublin City Council*.

The CJEU went on to say, in the first two of these cases, that organisational difficulties that a period of on-call/standby time might generate for a worker, which are "the consequence of natural factors or of his or her own free choice", could not be taken into account. Thus, a substantial difference between the residence freely chosen by the worker and the place that he or she must be able to reach within a certain period of time during that period was not, in itself, a relevant factor. Similarly, the limited nature of opportunities to pursue leisure activities in the area that the worker cannot, in practice, leave during a given period of on-call/standby time was also not a relevant factor.

What was relevant was the average frequency of the actual services that were normally carried out by the worker during periods of on-call/standby time. If a worker is, on average, called upon to act "on numerous occasions" during such a period, he or she has less scope freely to manage their time during those periods of inactivity, given that they are "frequently interrupted". If, however, the worker is "only rarely" called upon to act during such periods, this could not lead to those periods being regarded as "rest periods" where the impact of the time limit imposed on the worker to return to his or her professional activities "is such that it suffices to constrain, objectively and very significantly, the ability that he or she has to freely manage, during those periods, the time during which his or her services are not required". In Case C-107/19, *Dopravní podnik*, the CJEU added that the unforeseeable nature of possible interruptions was likely to have an additional restrictive effect on a worker's ability to manage his or her own time freely, because the uncertainty was liable to put that worker on "permanent alert". These, however, were all matters for the referring courts to determine.

Case C-742/19, *Republika Slovenija* is of importance for those Member States, such as Ireland, where the armed forces are excluded from the scope of the working time legislation. Here, a non-commissioned officer in the Slovenian army claimed an entitlement to a standby allowance during periods when they were on guard duty. This duty included both periods during which they were required to carry out actual surveillance activity and periods during which they were required only to remain available in the barracks.

France and Spain both intervened in the proceedings and submitted that Directive 2003/88/EC did not govern the organisation of working time of military personnel. This submission was premised on the ground that

31. Anthony Kerr is a senior counsel at the Bar of Ireland and an associate professor at the UCD Sutherland School of Law.

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working time fell within the organisational arrangements of the armed forces of the Member States which, by their very nature, were excluded from the scope of the Directive, in accordance with Article 4(2) TEU. Under this treaty provision, the EU is required to respect not just the equality of Member States but also their essential State functions.

The CJEU accepted that the principal tasks of the armed forces of the Member States, namely preserving territorial integrity and safeguarding national security, were expressly included among the essential functions of the State which the EU must respect in accordance with Article 4(2) TEU. The CJEU, however, did not accept that the respect which the EU must have for the essential functions of the State resulted in the organisation of the working time of military personnel escaping entirely the application of EU law.

In answering the questions referred, the CJEU again adopted a nuanced approach. Although Article 4(2) TEU did not have the effect of excluding the organisation of the working time of military personnel from the scope of Directive 2003/88, that provision did require that the application to military personnel of the rules of EU law relating to the organisation of working time was not to be such as to hinder the proper performance of the essential functions of a Member State. Those working time rules could not be interpreted "in such a way as to prevent the armed forces from fulfilling their tasks and, consequently, so as to affect the essential functions of the State, namely the preservation of its territorial integrity and the safeguarding of national security".

The CJEU did provide some guidance as to which activities must be excluded from the scope of the Directive. These activities included those carried out by military personnel who, "either because they are highly qualified or due to the extremely sensitive nature of the tasks assigned to them, are extremely difficult to replace with members of the armed forces by means of a rotation system which would make it possible to ensure both compliance with the maximum working periods and the rest periods provided for by [the Directive], and the proper performance of the essential tasks assigned to them".

Furthermore, the CJEU confirmed that all military personnel "called upon to assist in operations involving a military commitment by the armed forces of a Member State, whether they are deployed, permanently or on a temporary basis, within its borders or outside of those borders", carry out an activity which must be excluded in its entirety from the scope of the Directive. Compliance with the working time requirements in the course of such operations "would put at considerable risk the success of those operations, that success being predicated on the total commitment, over long periods, of the members of the armed forces involved, and would consequently also put at considerable risk the proper performance of the essential functions of safeguarding national security and preserving the territorial integrity of the Member States". The fact that "actual military operations" took place in peacetime did not undermine the conclusion that those activities must be "entirely excluded" from the scope of the Directive. In addition, all activities which form either part of the initial training of military personnel or part of the operational training which they are subsequently required to perform regularly were also excluded.

In the event, the CJEU ruled that it was for the Slovenian courts to determine whether the security activity performed by the claimant was covered by one of the above situations, in particular whether the activity constituted an "actual military operation" or was an activity which was so particular that it was not suitable for a staff rotation system or a system for planning working time. If it was not, then that activity would have to be deemed to fall within the scope of the Directive. Even if it did, the CJEU observed that Article 17(3) permitted derogations, such as in the case of security and/or surveillance activities, requiring a permanent presence in order to protect property and/or persons, and activities involving the need for continuity of service.

As the CJEU has consistently observed, and the case from Belgium demonstrates, just because on-call/stand-by time is 'working time' it does not follow, at least from the Directive, that the worker is entitled to be paid for the entirety of that time.

Finally, the issue of 'travelling time' should be briefly considered. Ordinarily, travel to and from a worker's home and their place of work does not qualify as 'working time'. The position of workers who do not have a fixed place of work was addressed by the CJEU in Case C-266/14, *Tyco* and, in Case E-19/16, *Thue*, the EFTA Court ruled that the reasoning in *Tyco* was not limited to cases where the worker did not have a fixed place of work. This was followed by the EFTA Court in Case E-11/20, *Sverrisson* where it was held that the necessary time spent travelling, outside of normal working hours, by workers to a location other than their fixed or habitual place of work in order to carry out their duties in that location constituted 'working time'.

Employment status

Attila Kun[32]

Most of the digital labour platforms categorise people working through them as self-employed or 'independent contractors'. It is of course not a problem at all when those people are genuinely autonomous in their work. However, many such platform 'workers' face employment-like subordination and control within these hybrid contractual structures. The risk of employment status misclassification is very high in the gig economy. In recent years, court cases all over the world have demon-

32. Attila Kun is a professor of Labour Law, Budapest, Hungary, KRE ÁJK & NKE ÁNTK. Supported by the János Bolyai Research Scholarship of the Hungarian Academy of Sciences and the ÚNKP-21-5-KRE-2 New National Excellence Program of the Ministry for Innovation and Technology from the source of the National Research, Development and Innovation Fund.

strated the widespread existence of this malpractice of misclassification. Even though the related case law is relatively rich by now, it is far from being stable, universally conclusive, and fully predictable. The case law is fluctuating over time within national jurisdictions. Furthermore, the case-by-case approach is never able to offer structural solutions, and it is also possible for platforms to continuously and rapidly adjust their business models in line with local, given trends in case law. Given this fluidity of the issue, lively academic[33] and policy debates are also revolving around the topic of employment qualification of gig economy workers.

Even though discrepancies and controversies are inherent in the gig economy case law, recently some clearer trends have been formulated: courts seem to reclassify allegedly self-employed persons as employees/workers employed by the platforms more often and relatively more consistently, or they extend various labour law protections to a wider pool of working relationships. EELC has also featured some cases in 2021 that could be seen as part of this trend, as described briefly below. However, it must be noted that such reclassification cases are always very fact-specific/multi-factorial on the one hand, and involve complex economic backgrounds on the other hand. Therefore, broad and abstract generalisations or universal conclusions should be avoided; the appropriate classification of the employment status is always very difficult (and the findings of the court in one case are basically limited only to the parties of the given case). In order to determine whether a contract of employment exists an overall assessment of all circumstances must always be made.

Two long-awaited, internationally influential gig economy court decisions that featured in EELC in 2021 originate from two big economies of Europe, and despite the different underlying legal traditions, these decisions point in the same direction and attracted and deserve considerable attention.

First, in Germany (**EELC 2021/23**), the German Federal Labour Court ruled that the user of an online platform ('crowdworker') who takes on so-called 'microjobs' on the basis of a framework agreement concluded with the platform operator ('crowdsourcer') can be an employee of the crowdsourcer. This applies in a case where the framework agreement is aimed at a repeated, almost continuous acceptance of such microjobs. An interesting, core point of the decision is that the crowdworker was not contractually obligated to accept offers from the defendant. Still, the Court found that the organisational structure of the platform was designed in such a way that the crowdworker would continuously accept bundles of simple, step-by-step contractually specified small orders in order to complete them personally. In other words, the level system would encourage the personal execution of the individual order. According to EELC commentators, against the background of the Federal Labour Court's decision in the case at hand, many employers must put their contractual relationships with freelancers to the test.

Second, in the UK (**EELC 2021/24**), the Supreme Court unanimously decided in the 'high-flying' *Uber BV – v – Aslam and others* case that drivers engaged by Uber are workers rather than independent contractors. It also decided that drivers are working when they are signed in to the Uber app and ready to work. Probably the most remarkable and far-reaching consideration of the decision is the Supreme Court's emphasis on the need for 'statutory interpretation, not contractual interpretation' in employment status cases. This is explained by the fact that individuals are claiming the protection of statutory employment rights, created by legislation in such cases. This means that the main task for the courts is not to ascertain the contractual terms and conditions, but to determine whether individuals fall within the proper legal category as defined by the law, in order to satisfy the protective purposes of labour laws. This case also reveals that the so-called 'multi-apping' (i.e., when platform workers are making themselves available to more than one platform app at the same time) may become a further, relatively new challenge in future employment status cases, rendering it even more difficult to determine platform workers' status and working time.

2021 has seen some similar decisions from other countries as well fitting into this trend.[34] For instance, the Amsterdam Court of Appeal confirmed that Deliveroo riders are employees.[35] In sum, most of the judgments resulting in reclassifying platform workers as employees seem to rely on complex tests of direction/control/organisational integration (while the economic dependency argument is less prevalent).

Besides genuine reclassification, another notable trend in case law is to extend various labour law protections to a wider pool of working relationships. One recent case from 2021 illustrating this trend has been brought to the surface by the Covid-19 situation in the UK (**EELC 2021/8**). The High Court ruled that protection from detriment on health and safety grounds should be exten-

33. See for example: Miriam A. Cherry and Antonio Aloisi, 'Dependent contractors in the gig economy: A comparative approach', *Am. UL Rev.*, 2016; Miriam A. Cherry and Antonio Aloisi, 'A Critical Examination of a Third Employment Category for On-Demand Work (In Comparative Perspective) (1 January 2018), forthcoming, *Cambridge Handbook on the Law of the Sharing Economy* (Nestor M. Davidson, Michele Finck & John J. Infranca (Eds.), Saint Louis U. Legal Studies Research Paper, available at SSRN: Orly Lobel, 'The Gig Economy & the Future of Employment and Labor Law', 51 *U.S.F.L. Rev*. 51 (2017); Guy Davidov, 'The Status of Uber Drivers: A Purposive Approach' (29 November 2016), *Spanish Labour Law and Employment Relations Journal* (2017), forthcoming, Hebrew University of Jerusalem Legal Research Paper No. 17-7, available at SSRN: Valerio De Stefano, 'The rise of the "just-in-time workforce": On-demand work, crowdwork and labour protection in the "gig-economy"', International Labour Office, Inclusive Labour Markets, Labour Relations and Working Conditions Branch – Geneva: ILO, 2016 Conditions of Work and Employment Series, No. 71.

34. See also Christina Hießl, 'The Classification of Platform Workers in Case Law: A Cross-European Comparative Analysis' (10 December 2021), *Comparative Labor Law & Policy Journal*, Volume 42.2, 2022, forthcoming, available at SSRN: https://ssrn.com/abstract=3982738.

35. ECLI:NL:GHAMS:2021:392, Amsterdam Court of Appeal, case no. 200.261.051/01.

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ded to the broader category of 'workers' (not just to 'employees'). This ruling potentially increases employers' liability.

Employment status cases are of course not limited to the realm of the gig economy. Bogus, grey employment practices exist in various sectors of the economy. From a legal point of view, gig economy-related and other ordinary cases of reclassification inform each other, and – in an ideal world – should point in the same direction, namely: greater clarity of employment statuses on the basis of the primacy of facts (rather than being rigidly stuck to what the contract declares). For instance, in the UK, the Court of Appeal (**EELC 2021/42**) ruled that football referees are employees, not self-employed for tax purposes, as there was sufficient mutuality of obligation and control for football referees to be treated as employees. The Court of Appeal accepted that persons engaged to do work personally on an ad hoc, casual basis could have an overarching contract and/or a contract that exists for each individual assignment (in this case, a football match). The dilemma of whether there was a contract of employment was distinct to each contract. This meant that there could be an employment contract at the individual, per-assignment level, even if the overarching contractual arrangement was not one of employment (because the sports association was not required to offer any work and the referees were not required to accept any work offered). According to EELC commentators, this decision can create uncertainties and difficulties when someone would like to engage individuals on a casual or ad hoc basis because, in line with the logic of this decision, such casual arrangements can be more easily reclassified as an 'employment' relationship in the future. Naturally, just like the gig economy cases in the gig industry, this case can generate hurdles in the sports industry, as the engagement of referees is not at all a 'black or white' scenario from a labour law perspective, and various practices exist all over the world (for instance, as EELC commentators noted, German courts would be rather likely to consider the referees to be self-employed).

As it was already mentioned above, gig economy case law is far from being fully consistent. Despite the trend presented above where employee/worker status has been the most frequent finding, 2021 has also seen some cases in which the employment/worker status has been denied for certain platform workers (again, under the specific facts of the given case). For example, in a Deliveroo-related case in the UK,[36] the Court of Appeal found that riders were not in an employment relationship and so did not fall within the scope of the trade union freedom right under Article 11 of the European Convention on Human Rights. Central to the decision was the fact that these riders were not expected to provide the services personally since they had a virtually unlimited right of substitution.

36. *R (on the application of the IWGB) – v – CAC and Roofoods Ltd t/a Deliveroo* [2021] WLR(D) 357, [2021] EWCA Civ 952, [2022] ICR 84.

The European Union has also recognised the risks of legal uncertainty and has looked for more structural ways to bring about greater clarity in the field. On 9 December 2021, the European Commission proposed a policy and regulatory package to improve working conditions for platform work: a draft Directive, a communication and draft guidelines (on the application of EU competition law to the collective agreements concluded between self-employed individuals – platform workers included – regarding their working conditions).[37] The draft Directive[38] includes clear measures to correctly determine the employment status of people working through digital labour platforms and new rights for both workers and self-employed people regarding algorithmic management. The draft provides a list of control criteria to determine whether the platform is an 'employer'. If the platform meets at least two of the five listed criteria, it is legally presumed to be an employer. The people working through them would therefore enjoy the labour and social rights that come with the status of 'worker'. Platforms will have the right to contest or 'rebut' this legal presumption of the existence of an employment relationship, with the burden of proving that there is no employment relationship resting on them.

In sum, it cannot be anticipated at this stage how the evolving case law, the national transposition of the Directive (if adopted) and the rapidly changing business models of the platform economy might shape the debate in the coming years. The ultimate goal is to guarantee decent working conditions for platform workers, and it seems to be increasingly doubtful to what extent the piecemeal case law is the most suitable method to substantially provide this guarantee (while randomly 'shooting' at a fast-moving target).

37. See for further details: [PLEASE COMPLETE FOOTNOTE]
38. Proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work, 9 December 2021 COM(2021) 762 final.

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